“DEMOCRATIZING” COURTS IN AN AUTHORITARIAN POLITY? USING AN INTEREST-BASED BARGAINING THEORY TO EXPLAIN CHINA’S PILOT REFORM ON ITS PEOPLE’S ASSESSOR SYSTEM

MICHELLE MIAO*

ABSTRACT

Can a jury-like institution be empowered to fully represent ordinary citizens under an authoritarian regime? This article evaluates the process and significance of China’s 2015-2018 pilot project to reform its people’s assessor regime. The reform, at least nominally, sought to empower citizenry in two main ways – to ensure that laypersons are randomly selected to represent the society in general as well as to safeguard their meaningful role during trials and deliberation. My findings demonstrate that this recent experimentation has failed to empower lay participation. This failure has its roots in the twin difficulties within China’s political-judicial bureaucracy: power-sharing and political control. I support these theoretical arguments with empirical evidence obtained through surveys with people’s assessors and interview responses of Chinese judges. Overall, I claim that the institution of people’s assessors provides a double dividend of efficiency and legitimacy to the state. The path of the reform has been decisively shaped by interest-based bargaining processes among stakeholders.

Keywords: *Authoritarianism, lay assessor, courts, jury, China*

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* Associate Professor, Faculty of Law, The Chinese University Hong Kong, Email: michellemiao@cuhk.edu.hk. I conducted this research while enjoying the generous support of the Direct Grant scheme from the Faculty of Law, the Chinese University Hong Kong. I wish to thank Dean Gane and all members of the Scholarship and Grant Committee for their support and guidance. The author would like to thank Professor Bjoern Ahl, Professor Hiroshi Fukurai, Professor Jeremy Gans, Professor Colin Hawes, Professor Xin He, Professor Colin Howes, and Professor John Pratt for their very useful comments. The author would like to thank Mr Ronald Lau for his research assistance.

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I. INTRODUCTION

While the use of juries in the U.S. has been in decline,[1] Asia seems to have become the new frontier of lay participation in judicial decision-making.[2] Consistent with this regional rise of jury-like institutions is China's reform of its people's assessor ("PA") regime. As of April 2015, the national legislature authorized fifty courts nationwide to conduct a two-year pilot program.[3] Informed by these early-stage reform experiences, China's Law on People's Assessors was enacted in April 2018.[4] Rather than establishing a new institution, this experimentation sought to reconfigure and strengthen the existing role of lay participation in judicial decision-making in at least two ways.[5] First, the pilot reform set out to enrich trials with the diverse life experiences and common perspectives of laymen. The reform widened the community representativeness of PAs by relaxing qualification criteria and introducing random selection methods.[6] Second, the reform sought to empower laymen as fact-finders by increasing their proportion in mixed grand collegial panels[7] alongside professional judges.

Of the dozens of institutional rearrangements that altered the inner

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1 William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. (2006); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. (2004); SUJA A. THOMAS, THE MISSING AMERICAN JURY (Cambridge University Press 2016); Sam Sparks & George Butts, *Disappearing Juries and Jury Verdicts*, 39 TEX. TECH L. REV. 289 (2007).

2 The past decade witnessed the rising popularity of jury-like institutions in Asian jurisdictions. These includes but is not limited to the People's Republic of China, Japan, Hong Kong SAR, South Korea and Taiwan. *See* Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?*, 24 WIS. INT'L L.J. 835 (2007); Sangjoon Kim, Jaihyun Park & Jin-Sup Eom, *Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System*, 10 J. EMPIRICAL LEGAL STUD. 35 (2013); Jae-Hyup Lee, *Koren Jury Trial: Has the New System Brought About Changes*, 12 ASIAN-PAC. L. POL'Y J. 58 (2010); Kuo-Chang Huang & Chang-Ching Lin, *Mock Jury Trials in Taiwan—Paving the Ground for Introducing Lay Participation*, 38 L. & HUM. BEHAV. 367 (2014); Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and the Law Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315 (2007).

3 See 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 (adopted at the 14th session of the Standing Comm. Nat'l People's Cong., Apr. 24, 2015).

4 Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa [Law on People's Assessors in China] (adopted by Standing Comm. Nat'l People's Cong., Apr. 27, 2018) (China) [hereinafter Law on People's Assessors in China].

5 *Supra* note 3. Greater fairness in the administration of justice is proclaimed to be one of the main motivations of the reform.

6 Guidelines on the Pilot Reform of the System of People's Assessors, art. 2(1), Sup. People's Ct. Doc. No. 100 (adopted at the 11th session of the Cent. Leading Grp. for Comprehensively Deepening Reforms, Apr. 24, 2015) [hereinafter Guidelines on the Pilot Reform].

7 This term refers to a collegial panel that is composed of a mixture of three judges and four people's accessors. *See* The Law on People's Assessors in China, *supra* note 4, art. 14.

workings of China's judicial apparatus in the past five years,[8] the PA reform stands out as a unique undertaking.[9] Instead of refurbishing courts from within, it pledged to engage *external* actors and envisaged a limited shift of authority from professionals to laypersons. Hypothetically, the reform may reconfigure the existing delicate balance of power within courtrooms between those representing the authoritarian state and society. If the reform is successfully enforced, courts may become lively arenas of contention where the citizenry can mount challenges to the exercise of state power. The primary difficulty for effective implementation of the reform plans, however, lies in its wider socio-political context, which is hostile to popular democratic control and judicial independence.

From a comparative perspective and as a staple of the much-admired Anglophone legal tradition, trial by jury has been widely regarded as a bulwark against judicial tyranny and elite domination. In addition to offering laypersons the opportunity to directly influence judicial decision-making, processes, and outcomes, jury trials represent common-sense values, enhance public confidence in the administration of justice, and educate the citizenry.[10] While lay participation in trials operates in non-democratic settings, it is important to note that many of the benefits of jury trials are firmly anchored in democratic political ideals, the rule of law, and judicial independence. Power-sharing and participative decision-making, which have long nurtured jury trials, may be weak or even absent from the political fabric and legal culture of jurisdictions where lay participation in adjudication has been recently promoted.

So, what is the fate of such a judicial reform in contemporary China? Most importantly, can ordinary citizens be empowered to impose checks on

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8 According to Zhou Qiang, the head of the Supreme People's Court (hereinafter the SPC), from 2014 to September 2017, 31 core judicial reform initiatives were approved and implemented by the highest political-legal authorities in China. *See* Zhou Qiang, Zuigao Renmin Fayuan Guanyu Renmin Fayuan Quanmian Shenhua Sifa Gaige Qingkuang de Baogao [最高人民法院**关于人民法院全面深化司法改革情况的**报告—2017年11月1日在第十二届全国人民代表大会常务委员会第三十次会议上], http://www.court.gov.cn/zixun-xiangqing-66802.html.

9 These reform initiatives include, notably and amongst others, setting up circuit courts to address the perennial conundrum of local protectionism, streamlining case filing to facilitate access to justice, and implementing judge quota schemes so that only the best legal talents are recruited to serve as judges in China. The PA reform is just one of the many reforms which the authorities recently endorsed. *See* XINHUA, *Highlights of China's Judicial Reform Progress in 2018*, XINHUA NET (Jan. 15, 2019), http://www.xinhuanet.com/english/2019-01/15/c_137745598.htm; Yueduan Wang, *Overcoming Embeddedness: How China's Judicial Accountability Reforms Make its Judges More Autonomous*, 43 FORDHAM INT'L L.J. 737 (2020). Therefore, many of the unique constraints which shape this particular pilot reform are transferable to other reform processes.

10 John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 L. & SOC. INQUIRY 195 (1981); JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (Basic Books 1994).

authoritarian state power through a judicial experiment? This article addresses these questions by presenting data from surveys given to lay assessors and interviews with judges from three local Chinese courts.[11] All three courts were on the Supreme People’s Court’s (“SPC”) list of designated pilot reform sites but represent varying degrees of socio-economic development throughout China. Court A is a basic court at the grassroots level of a rural county. Court B is an intermediate court in a city with a medium rate of economic growth. Court C is in a district within an industrialized city with relatively rich resources. In total, the data collected was based on questionnaires from ninety-eight PAs and interview responses of forty judges. The data centers around two main issues relating to the reform – the selection of the PAs and their role in judicial decision-making process.[12]

Judicial institutions in authoritarian states have become an emergent and vital field of academic research within comparative law. The empirical and theoretical contribution of this research is three-fold. First, this study furnishes the most up-to-date empirical material concerning the process and impact of China’s PA reform. Among others, scholars who studied the PA institution in its pre-reform days called for further research to evaluate whether the most recent reform has been implemented to address problems which plagued the regime for decades.[13] Second, this research presents data that sheds light on the extent to which the pilot reform has led to genuine advances toward layperson empowerment. As Alexis-de-Tocqueville observed, the jury serves as a judicial instrument and political institution. Similarly, China’s quasi-jury systems and its reform provides clues for understanding judicial politics in authoritarian states.[14]

Last, rather than claiming that the reform is politically embedded, this research analyzes both the bureaucratic behaviors of courts as an institution and individual behaviors of judges. It develops an interest-based explanation which treats relevant individuals and institutions as rational, calculating actors who compete to maximize their power, influence, and legitimacy from the reform process. It reveals that the tension between

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11 These county or district-level courts are called basic level courts or grassroots level courts (jiceng fayuan), which have jurisdiction over first trial cases. *See* Renmin Fayuan Zuzhi Fa [Organization Law of People’s Courts] (revised and adopted at the 6th session of the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Jan. 1, 2019), arts. 24–26 CLI.1.324530(EN) (China) [hereinafter Organization Law of People’s Courts].

12 Xin He, *Double Whammy: Lay Assessors as Lackeys in Chinese Courts*, 50 L. & SOC’Y REV. 733, 762 (2016).

13 *Id*.

14 1 & 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 521 (Floating Press 2009).

professional and lay assessors *within* courtrooms is structured by (1) an *external* power control dilemma inherent to China's authoritarian polity and (2) an *internal* tension formed between proponents of the reform at the *national* level and *frontline* judges who resist the reform at lower levels. The reform is an outcome of dynamic equilibrium formed on both dimensions.

First, on the national level, China's authoritarian regime seeks to benefit from the utilities of lay participation in courts but takes great caution to minimize associated political risk.[15] The incentives for the state to encourage civic engagement spring from the symbolic appeal of the PA institution as a legitimacy-enhancer and its practical utility as an absorber of popular discontent. While these functions lend considerable support to authoritarian governance, the PA system also poses the potential danger of destabilizing authoritarian rule if too much power is entrusted in the hands of ordinary citizens. This dilemma facing the state is also found in the tension between courts, which make reform policies and largely serve as agents of authoritarian governance, and PAs who represent civil society. Trapped between empowering and domesticating lay assessors, the national judiciary developed a strategy combining formal empowerment with substantial constraint on the role of lay assessors as shown in the reform program.[16] This explains why national authorities appear to be enthusiastic proponents of the reform.

Second, and most importantly, frontline judges' subdued resistance is a vital force which decisively shaped *how* the pilot reform was implemented. A contradiction inherent in centralized governance infrastructure—policymaking power is concentrated at the top echelon of the hierarchy but can only make an impact if successfully enforced at the grassroots—entails vertical fragmentation of power within the judicial bureaucracy. This makes an analysis of the attitudes and behaviors of individual judges at lower levels crucial so that the reform's nuanced dynamics can be captured. Indeed, Chinese courts are not monolithic, unified policy implementers. While the national level judiciary is primarily concerned with its compliance with regime expectations, lower courts make interest-based calculations. They consider the potential negative impact that the pilot reform may have on

15 This state-citizenry conflict is reflected as a state-court tension as envisioned by Moustafa and Ginsburg in their seminal work on courts in authoritarian settings. *See* TOM GINSBURG & TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 7 (2008); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014).

16 *See, e.g.*, *infra* pages 20–21 (reform initiatives regarding the random selection of people's assessors), and pages 28–29 (reform initiatives concerning empowering people's assessors to exercise judicial decision-making).

their remuneration, workloads, and career developments. These practical concerns are borne out by empirical evidence demonstrating widespread distrust, skepticism, and control of newly-hired lay assessors by judges at lower levels.[17] These findings demonstrate, interestingly, that judges and courts in authoritarian regimes may choose to support illiberal policies due to rational, self-interested considerations.[18]

In short, this study explains that the PA reform can be studied by reference to two sets of tensions—the state-citizenry dilemma *external* to judicial institutions and the *internal* conflicts between national and lower-level courts. In such a context, it is unlikely that the reform's causes, process, and significance are products of fixed preferences of the state or national courts. Rather, the ultimate reform reached at the end of the pilot reform depends on the interactions and bargaining among stakeholders involved in the process, including those ignored by existing literature, such as the grassroots judges who are normally assumed to be mechanical implementers of policies. This study thus develops a theory of interest-based bargaining to shed light on the specific ways in which courts are transformed into sites of conflicts and resistance in the era of judicial reform.

II. AN OVERVIEW OF CHINA'S PEOPLE'S ASSESSOR SYSTEM

China's PA regime is one of the few avenues for direct participation of ordinary citizens in state and judicial affairs. In an authoritarian polity, the public indirectly exerts pressure on courts through assertive mechanisms,[19] such as the letters and visits system,[20] mass media,[21] and popular protests.[22]

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17 See, in particular, *infra* Section 3: "'Controllable Randomness' in the Selection of People's Assessors."

18 Although informal rules and performance indicators were set up by higher authorities to cultivate frontline judges' cooperation and encourage them to serve the interests of the regime, they are not purposively tailored to annihilate lay participation.

19 Lianjiang Li, Mingxing Liu & Kevin J. O'Brien, *Petitioning Beijing: The High Tide of 2003–2006*, 210 CHINA Q. 313 (2012); Lianjiang Li, *Political Trust and Petitioning in the Chinese Countryside*, 40 COMPAR. POL. 209 (2008).

20 Letters and visits system (or xinfang) refers to an extralegal regime for hearing complaints and grievances from individuals in China. Carl Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 180 (2006).

21 Benjamin L. Liebman, *Watchdog Or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005); Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMPAR. L. 935 (2011); Susan L. Shirk, *Changing Media, Changing China*, *in* CHANGING MEDIA, CHANGING CHINA (Susan L. Shirk ed., 2011).

22 XIAOYAN CHEN, SOCIAL PROTEST AND CONTENTIOUS AUTHORITARIANISM IN CHINA (Cambridge Univ. Press 2011); KEVIN J. O'BRIEN, POPULAR PROTEST IN CHINA (Harvard Univ. Press 2008); Ethan Michelson, *Justice from Above or Below? Popular Strategies for Resolving Grievances in*

None of these channels of influence, however, permit the citizenry a role in the determination of the fate of their peers in a legitimate, open, and institutionalized manner. The PA regime, despite its many limits, offers such an opportunity.

China's PA system emerged from the practices of Communist revolutionary base areas[23] in the 1930s.[24] A typical three-person mixed court was comprised of a single judge and two laypersons who deliberate together on all issues relevant to the finding of criminal culpability.[25] Historically, wide lay participation in trials corresponds with a low level of legal professionalization and rough judicial procedures[26] in response to a young regime's urgent political need to gain public support.[27] Many features of this early Chinese PA regime have been inherited by the contemporary institution.

The last quarter of the twentieth century (China's post-Mao era) saw state authorities engaging in "the most concerted program of legal construction in world history."[28] Paradoxically, during this period of accelerated legal reform, the PA system gradually lost its popular appeal.[29] Its decline may be partly attributed to several factors: the regime's relative political stability (hence, there was less need to boost public approval via lay participation), the prevalence of speedy and summary trials during periodic Strike Hard Campaigns[30] (hence, lengthy trials with lay participation became unrealistic), and China's choice to prioritize building legal bureaucracy as part of a modernization agenda.[31] Due to the growing

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Rural China, 193 CHINA Q. 43 (2008).

23 "Revolutionary base areas" (geming genjudi) refer to regional strongholds established and controlled by Communist-party-led revolutionary armies in China before 1949. These regions are normally in remote rural areas. *See, e.g.*, DAVID S.G. GOODMAN, SOCIAL AND POLITICAL CHANGE IN REVOLUTIONARY CHINA: THE TAIHANG BASE AREA IN THE WAR OF RESISTANCE TO JAPAN, 1937–1945 (Lanham: Rowman & Littlefield 2000).

24 HONGMING [吕洪民] LÜ, THE PLIGHT AND REBIRTH OF THE CHINESE JURY SYSTEM [中国陪审制度的困境与重生] 96 (Jilin Univ. 2011).

25 *See* SHIGUI [谭世贵] TAN, RESEARCH ON CHINESE JUDICIAL REFORM [中国司法改革研究] 141–42 (Law Press China [法律出版社] 2000).

26 Michael Palmer, *Ma Xiwu*, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David S. Clark ed., Sage Publications 2007).

27 Miao Yu & Xiabing Hu, *Woguo Renmin Peishen Zhidu de Qiyuan [我国人民陪审员制度的起源]*, RENMIN FAYUAN BAO [人民法院报] (Feb. 13, 2015).

28 *See Human Rights in China in the Context of the Rule of Law: Hearing Before the Cong.-Exec. Comm'n on China*, 105th Cong. 63 (2002) (statement of Professor William P. Alford).

29 Minyuan Wang, *Zhongguo Peishen Zhidu Jiqi Wanshan [中国陪审制度及其完善]*, FAXUE YANJIU [法学研究] 25, 30 (1999).

30 *See, e.g.*, HAROLD M. TANNER, STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979–1985 (1999).

31 Lü, *supra* note 24, at 98–100. Indeed, China's rapid transition to market economy was accompanied by an intensified process of statutory codification, institutional building, and

gap between professional and lay adjudicators’ level of legal skills and the declining influence of the latter over court proceedings, the 1982 Constitution removed the provisions for mandatory lay participation in trials.[32]

It was not until the turn of the century that the PA system was revived to deal with the looming legitimacy crisis of Chinese courts.[33] After decades of market transition, Chinese courts were the confronted with social restratification, ideological decay, and resource redistribution. The reputation of the courts as impartial arbiters was undermined by widespread judicial corruption, limited access to justice, and growing popular discontent.[34] The very idea of a *people’s* judiciary in tune with grassroots realities was also put on trial. A vacuum emerged where the increasingly elitist orientation of courts could no longer satisfactorily address the concerns of the populace, particularly those less educated and socially marginalized. The PA reform thus signifies a reversal of these trends—a return of judicial ideology to informal and popular justice[35] through which *the people* may regain their authority, at least nominally. The Party-state’s renewed interest in the PA regime, therefore, reflects a fundamental shift in the landscape of judicial politics.

While China’s PA system remains a symbolic barometer of popular justice,[36] its biased representativeness and the marginalized role played by laypersons were the major concerns of its critics and opponents. In 2004, a legislative interpretation spoke to these defects of the system.[37] Yet, since then, flaws have continued to plague the system for which there seems to be no easy solution. A widely criticized aspect of the existing regime is that PAs come from a narrow segment of the population thus failing to truly represent society at large.[38] Another key issue identified by scholars and

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professionalization of legal personnel.

32 Wang, *supra* note 29, at 25 n.24.

33 An Jiang, *Lun Woguo de Peishen Zhidu yu Sifa Gaige [论我国的陪审制度与司法改革]*, 98 L. REV. [FAXUE PINGLUN] 78 (1999). Lü, *supra* note 24, at 101.

34 *See generally* Minzner, *supra* note 21; Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43 (2013).

35 JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949–1963 : AN INTRODUCTION (Harvard Univ. Press 1968).

36 Bing He, *Sifa Zhiye Hua Yu Minzhu Hua [司法职业化与民主化]*, FAXUE YANJIU [LEGAL RSCH.] 105 (2005).

37 The Decision of the Standing Committee of the National People’s Congress on Improving the System of People’s Assessors (August 28, 2004) [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 (2004) 年8月28日第十届全国人民代表大会常务委员会第十一次会议通过)].

38 Yong’an Liao, *Shehui Zhuanxing Beijing Xia Renmin Peishenyuan Zhidu Gaige Lujing [The Approach to Reform on the People’s Assessor Regime in the Context of Social Transition]*, 3 ZHONGGUO FAXUE [CHINA LEGAL SCI.] 148 (2012); Wang, *supra* note 29, at 143.

activists is the "decorative" role of PAs in judicial decision-making.[39] They tend to be overpowered by professional judges and fail to act as a substantial citizenry check on a trial's process and outcome. The recent rise of judicial populism in China indicates that the current institution of lay assessors has failed to enlist effective public input.[40] The recent pilot reform, nonetheless, promises to restore the function of the PA regime as an absorber of popular discontent over judicial elitism and injustice.

It is in this context that we focus on the particularities of the PA regime to scrutinize whether, and how, the pilot reform has induced meaningful changes. The pre-2018 statutory framework[41] governing trial by PAs covers four aspects of its operation: selection,[42] remuneration,[43] the scope of authority,[44] and the mixed court's composition.[45] Considering the pilot reform's focuses, the remainder of this article will concentrate on the selection of PAs and the PAs' role in deliberation.

In several respects, China's PA regime in the recent past resembles mixed courts in civil law jurisdictions: judges and laypersons, by majority vote, collectively deliberate on issues relating to the determination of both conviction and sentencing (with no separation of functions between professional and lay members); the decision whether to involve PAs in a particular trial is made by courts rather than based on the preference of parties or the prosecutor;[46] and the trials' outcomes are subject to *de novo* appeals and thus lack finality.[47] These features of China's PA regime stand in significant contrast to common law practices. Whilst jury trials are primarily used in serious criminal cases in the United States,[48] PAs in China

39 *Id.*

40 Minzner, *supra* note 21; Michelle Miao, *Capital Punishment in China: A Populist Instrument of Social Governance*, 17 THEORETICAL CRIMINOLOGY 233 (2013).

41 Constitutional provisions on jury trials are absent in China.

42 Organic Law of the People's Courts (amended by Standing Comm. Nat'l People's Cong., Sept. 2, 1983), art. 37(1) (China) [hereinafter Organic Law of the People's Courts].

43 *Id.* art. 38.

44 *Id.* art. 37(2).

45 Organic Law of the People's Courts, *supra* note 42, art. 9; Criminal Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 183 (China); Civil Procedure Law (promulgated by the President of the People's Republic of China, Apr. 9, 1991), art. 39 (China); Administrative Procedure Law (promulgated by the President of the People's Republic of China, Apr. 4, 1989), art. 68 (China).

46 This contrasts with the practice in the United States, where the defendants enjoy the right to waive a jury trial although such a right is not absolute. *See* Singer v. United States, 380 U.S. 24 (1965).

47 Langbein, *supra* note 10; Yigong Liu & Yongjun Li, *On the Root Causes of the Difficulty of Enforcing Lay Assessor System*, J. GANSU INST. POL. SCI. & L. (1998).

48 According to the Sixth Amendment to the United States Constitution, trial by juries are mandatory in criminal cases whilst the Seventh Amendment merely preserves the right of a jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." *See, e.g.*, Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 730 (1991); Xavier Rodriguez, *The Decline of Civil Jury Trials: A*

are involved in all types of trials, including criminal, civil, and administrative cases. In criminal trials, lay participation is only available in the form of a petit jury rather than grand juries deciding on the probable cause.[49]

It is also notable that Chinese practices significantly differ from American practices, where the majority of cases are disposed of by alternatives to jury trials like plea bargains and bench trials.[50] In China, a substantial percentage of all cases are heard by mixed collegiate panels. In 2016, PAs attended 73.2% of the cases heard by the 50 pilot courts,[51] and nationwide, approximately 220,000 PAs heard 3.063 million cases which account for 77.2% of all first-instance trial cases processed through ordinary procedures.[52] This suggests that the formality of broad civic engagement is highly valued, even though constrained resources for lay participation often means compromised quality.

III. "CONTROLLABLE RANDOMNESS" IN THE SELECTION OF PEOPLE'S ASSESSORS

To ensure an effective, democratic check on the judicial process, most common law countries randomly select jurors from electoral rolls.[53] Until the recent pilot reform, Chinese courts relied on self-nomination and recommendation by state organizations.[54] Moreover, a 2004 legislative interpretation stipulated that only those who hold a university diploma or

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Positive Development, Myth, or the End of Justice as We Now Know It?, 45 ST. MARY'S L.J. 333 (2014); D. Brock Hornby, *The Decline in Federal Civil Trials (an Imagined Conversation)*, 100 JUDICATURE 37, 46 (2016).

49 Article 29–30 of the Organization Law of People's Courts, *supra* note 11, set out that cases may be heard by a sole judge or collegial panels made up of a minimum number of three persons (judges or people's assessors). In practice, most of collegial panels are small-sized, not composed of more than three persons. See *infra* page 29.

50 Langbein, *supra* note 10; Nancy J. King, David A. Soule, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 968 (2005); Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131 (2005).

51 Zhou Qiang, *The Mid-Term Report on the Pilot Reform on People's Assessors by the Supreme People's Court* [最高人民法院**关于人民陪**审员制度改革试点情况的中期报告]—2016年6月30日在第十二届全国人民代表大会常务委员会第二十一次会议上], http://www.npc.gov.cn/npc/xinwen/2016-07/01/content_1992685.htm.

52 *Supra* note 8.

53 *See, e.g.*, *infra* note 81.

54 *See* Supreme People's Court's Report on the Reform Pilots of the System of People's Assessors (adopted at the second session of the Standing Comm. Nat'l People's Cong., Apr. 25, 2018) [最高人民法院**关于人民陪**审员制度改革试点情况的报告], § 1(1) (China)

higher degrees may qualify as PAs.[55] Restrictions imposed on the occupational and educational selection criteria excluded most Chinese citizens from participation and resulted in skewed representation.[56] In fact, a mere 8.93% of the population qualified as of 2010.[57] This resulted in an overrepresentation of pensioners[58] and civil servants[59] in the lay assessor pool, standing in stark contrast with the significant underrepresentation of most of the population, particularly peasants.

Furthermore, among those that ended up on the official PA roster, only the readily available and most cooperative were frequently called upon by the courts to serve. Seminal empirical research conducted by He Xin demonstrates that of the 42 registered PAs from a court in Western China , three of them participated in more than 100 cases in 2011.[60] Similarly, of the 54 PAs in the Wuhou district court in Sichuan province from 2004 to 2006, eight PAs attended 775 cases (60.64% of total cases) while five PAs participated in none.[61] This results in what Wang described as only a minority of the general public being qualified as PAs while an even smaller minority actually participated in trials.[62] The PA regime was characteristically an elite institution,[63] which produced large numbers of "professional PAs," "employed PAs" and "figurehead PAs."[64]

To address these concerns, the pilot reform guidelines proposed a series of measures to randomly select PAs from local communities.[65] The educational criterion was lowered from university diploma to high school

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55 *Id*.

56 Shuguang Zhang, *Renmin Peishen: Kunjing Zhong de Chulu: Henan Fayuan Renmin Peishen Zhidu de Gongxian yu Qifa [People's Assessors: The Solution to a Dillemma]*, 3 POL. & L. RSCH. (ZHENG FA YAN JIU) 35, 36 (2011); Danhong Wu, *Zhongguo Shi Peishen Zhidu de Shengcha [中国式陪审制度的省察-以《关于完善人民陪审员制度的决定》为研究对象]*, FASHANG YANJIU [STUD. L. & BUS.] 134 (2007).

57 Liao, *supra* note 38, at 148.

58 Xiaolong Peng, *Renmin Peishenyuan Zhidu de Fusu yu Shijian: 1998–2010*, 1 FAXUE YANJIU [LEGAL RSCH.] 16–17 (2011).

59 Zhuoyu Wang & Hiroshi Fukurai, *China's Lay Participation in the Justice System: Surveys and Interviews of Contemporary Lay Judges in Chinese Courts*, *in* EAST ASIA'S RENEWED RESPECT FOR THE RULE OF LAW IN THE 21ST CENTURY 111, 123 (Setsuo Miyazawa, Weidong Ji, Hiroshi Fukurai, Kay-Wah Chan & Matthias Vanhullebusch eds., 2015).

60 Xin He, *Double Whammy: Lay Assessors as Lackeys in Chinese Courts*, 50 L. & SOC'Y REV. 733, 743–44 (2016).

61 *The Project Team of Research on China's Lay Assessor System*, *Zhongguo Peishen Zhidu Yanjiu – Yi Chengdu Wuhou qu Renmin Fayuan Peishen Gongzuo Wei Duixiang [中国陪审制度研究 - 以成都市武侯区人民法院陪审工作为对象]*, FALU KEXUE [LEGAL SCI.] 133 (2008).

62 Wang, *supra* note 29, at 33.

63 Wu, *supra* note 56, at 131.

64 Peng, *supra* note 58, at 17; He, *supra* note 60, at 743; Wengui Zhu, Guanyu Lanzhou Shi Jiceng Renmin Fayuan Shishi Renmin Peishenyuan Zhidu de Diaoyan Baogao [关于兰州市基层人民法院实施人民陪审员制度的调查报告] 5 (Lanzhou Univ. 2007).

65 *Supra* note 3.

diploma. The Vice President of the SPC explained that reducing the educational level threshold was intended to highlight the importance of moral character in the selection of PAs but stopped short of explaining why a minimum standard is necessary in the first place.[66] According to the results of the sixth national census, only 24.5% of the population has the necessary education to serve as a PA.[67] Meanwhile, the minimum age threshold increased from 23 to 28 to ensure that those having real-life experiences and practical knowledge are selected to represent public opinion.[68] The proposal also stipulated that exceptions could be made for people of noble character and high respect in rural, impoverished, and distant regions.[69] Notwithstanding the limited relaxation of the selection standards, most of the disadvantaged and poorly-educated remain excluded from participation in the PA regime.

Regarding the demographic characteristics of PAs in pilot courts, the full rosters of registered PAs, which I obtained from the three pilot courts' administrators, indicate that the overrepresentation of PAs with high educational status remains a common phenomenon. In Court A, 66% of registered PAs held a college degree or higher in contrast to approximately 7% of the province's residents.[70] In Court C, 84% of registered PAs and approximately 15% of the province's residents have at least a college degree.[71] Similarly, at least 76% of the PAs in Court B held a college or higher degree.[72] This pattern holds true on the national level. An internal document indicates that, as of April 2017, of the 15,383 PAs from all 50 pilot courts, about 66.6% held college or postgraduate degrees.[73] A mixed court with such overrepresentation of well-educated citizens might mete out biased decisions that do not take into account the interests of those who are poorly educated.

Why were judges inclined to recruit PAs with higher educational

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66 *Infra* note 68.

67 The population above the age of six from all regions, distinguished by gender and the level of education. 2010 Census Report in China, STATS.GOV.CN, tbl. 4-1, http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm (last visited June 1, 2021).

68 Reporter, *Guanyu Renmin Peishenyuan Zhidu Gaige Li Shaoping Fu Yuanzhang Dajizhe Wen* [关于人民陪审员制度改革李少平副院长答记者问], XINHUA NEWS (Apr. 25, 2015), http://www.xinhuanet.com/legal/2015-04/25/c_127732045.htm.

69 *Supra* note 3. This provision, however, was eliminated from the Draft Law on People's Assessors in December 2017.

70 Estimation made on the basis of 2015 census data in Province H.

71 Estimation made on the basis of 2015 census data in Province J.

72 Data obtained by the author through gaining direct access to the internal PA database of Court B.

73 An internal SPC-issued document obtained on my field trip in July 2017.

credentials? My interview data suggests that their preferences were based on practical needs to facilitate court proceedings. Prior to the pilot reform, the representation of well-educated PAs in the pool was even higher. Many interviewees complained that PAs recruited during the pilot reform possess lower human quality (*suzhi*) in contrast to the past. Some of them were "illiterate, [had] bad manners and [were] ill-disciplined."[74] A respondent recalled that a newly-appointed PA, a peasant woman, suddenly stood up in the middle of a trial and walked away while declaring, "I need to go home now and cook lunch for my granddaughter."[75] Many judges resisted the reform because it rendered the process abrasive and cumbersome rather than facilitating trials. "We found a puzzling phenomenon," said a judge, "[D]emocratic justice undermines the quality of trials and results in declining adjudicative capacity. Loss of efficiency runs hand in hand with diminished effectiveness."[76] Another respondent observed that poorly-educated PAs struggled to understand procedural rules even after training and refused to cooperate with judges.[77] While convenience and efficiency are legitimate concerns for the administration of justice, many judges believed that these are paramount values, which should be achieved at the cost of fairness and democratic participation. This line of reasoning seems to contravene the very purpose of lay participation in trials.

Only a minority of judges are sympathetic to the reform. The PA administrator from Court B stated, "[A]lthough some newly-appointed lay assessors cannot articulate their thoughts well due to poor education, their input remains desirable to enrich trials."[78] They also lamented that a PA's poor qualifications are too frequently used as an excuse by impatient judges who prefer speedy trials. Chinese judges dislike lengthy trials during which they need to slow down to comply with procedural rules as well as explain things to and share their authority with laymen.[79] Crucially, reform supporters are concerned that excluding poorly educated citizens, who are oftentimes socially marginalized and economically disadvantaged, from court proceedings has resulted in and will continue to result in blatant bias and grave injustice.[80]

Jurors in countries like the United States can be directly drawn from the

74 An interview with a judge from Court C on August 22, 2017.

75 An interview with a judge in Court A on July 27, 2017.

76 An interview with the director of the political department in Court A on July 25, 2017.

77 An interview with a judge in Court C on August 23, 2017.

78 An interview with the director of people's assessor office in Court B on August 10, 2017.

79 *See, e.g.*, *id.* Judges who, despite the inconvenience, costs, and disruption that the reform has brought to judicial proceedings, still support the introduction of randomly selected people's assessors into courtrooms are in the extreme minority among my interviewees.

80 *Id.*

local community or electoral roll.[81] In contrast, Chinese pilot courts rely on police records of local residents. A "random selection" of PAs in the reform era is a two-step process. First, PA candidates are randomly selected from local residents to establish a relatively smaller PA pool in each individual pilot court. Second, whenever the trial of a certain case requires formation of a mixed collegial panel, the court randomly selects participant PAs from that smaller pool. In contrast with the one-step random selection of jurors to establish the pool of prospective jurors in Anglo-American countries,[82] China's two-step approach substitutes selection from the entire population with selection from its restricted sample.

This "restricted random" selection approach varies among pilot courts. Court A built a reserve bank of 200,000 residents.[83] After two rounds of random selections, screenings, and interviews, 213 PAs were finally appointed by the local People's Congress and registered by the court.[84] Court B, similarly, built a pool of 300 PAs through two rounds of selection.[85] The police authorities filtered 5.7 million residents by age and criminal records and then randomly selected 3,000 candidates using computer algorithms.[86] This cohort was further screened by Court B and the local bureau of justice, which oversees the administration of judicial affairs.[87] Court C, in contrast, did not implement the randomized selection. Instead, it doubled the size of its existing PA pool in 2014 through the traditional approach—a combination of self-nomination and employer recommendations.[88] At the time of my fieldwork, Court C was planning to implement randomized selection to recruit more PAs.[89]

Pilot courts were, at best, lukewarm in their support for random selection. A PA project administrator from a district court outside the three pilot study sites complained that the process was resource-consuming and technically challenging.[90] Two years into the reform, this PA project

81 A federal district court assembles this initial pool of prospective jurors randomly by choosing prospective jurors from registered voter lists or licensed driver lists. 28 U.S.C. § 1863(a); *see also* CAL. CIV. PROC. CODE § 197(a) (West 2021) (In California, prospective jurors are selected "at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court. Sources may include, in addition to other lists, customer mailing lists, telephone directories, or utility company lists".).

82 *Id.*

83 *Supra* note 76.

84 *Id.*

85 *Supra* note 78.

86 *Id.*

87*Id.*

88 An interview with the director of the political department in Court C on August 24, 2017.

89 *Id.*

90 A telephone interview with a judge from Court H on July 13, 2017.

administrator's court had barely finished the process of selecting PAs and none of the newly selected assessors attended any trials.[91] He explained that to randomly select PAs from 29 streets, districts, and villages was a huge project "beyond the imagination."[92] Therefore, that court relied on the support of the local bureau of justice for primary selection and screening of candidates.[93] With the bureau's help, the court built a PA roster composed of over 600 laymen.[94]

Results from surveys conducted among prospective PAs in the three pilot courts revealed a few key demographic characteristics of respondents. Consistent with research findings in the pre-pilot reform era,[95] members of the Chinese Communist Party were overrepresented among PAs. Over half (55%) of the surveyed PAs were Party members in contrast with around 6.4% of the general population.[96] Under this broad-brushed sketch, there were regional variations in a court's degree of preference of enlisting Party members. Party members account for 72% of all PAs in Court A, 73% of all PAs in Court C, and about a third of PAs in Court B.[97] Furthermore, the largest group of respondents by occupation (29.6%) was government employees while the second largest cohort was pensioners (17.3%).[98] Peasants, who account for 48.3% of China's total population,[99] were significantly underrepresented (4.1%) in this cohort of PAs.[100]

These results directly contradict the claims made by the SPC that a large group of ordinary folks were appointed and that the pilot reform had solved

91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 Wang & Fukurai, *supra* note 59, at 124; Qinghui Liu, *Dui Renmin Peishen Zhi Yunxing Guocheng de Kaocha [对人 民陪审制运行过程的考察]*, 8 BEIJING U. L. REV. 23 [北大法律评论] (2007).
96 As of 2016, the population of Chinese Communist Party of China (CPC) members were 88 million and the general population was 1382.71 million. At the end of 2016, the total population in mainland China increased by 8.09 million to 1382.71 million. *See At the End of 2016, the Total Population of Mainland China Increased by 8.09 Million to 138.271 Million* [2016年年末中国大陆总人口138271万人 增加809万人], XINHUA NEWS (Jan. 20, 2017, 11:31 AM), http://www.xinhuanet.com/politics/2017-01/20/c_129455298.htm. It is understandably difficult to govern China's Communist Party members, the population of which is higher than those of major European countries. *See Official Media: CCP Members Are More Difficult to Govern than European Countries* [官媒:中共党员比欧洲大国人口还多 治理难度可知], GLOB. TIMES (Oct. 25, 2016, 8:08 AM), http://news.china.com/domestic/945/20161025/23809928.html.
97 Survey data collected among prospective jurors in the three designated courts in July to August 2017.
98 *Id.*
99 The population at work nationwide divided by age, gender and occupation [全国分年龄、性别、职业中类的就业人口]. 2010 Census Report in China, STATS.GOV.CN, tbl. 4-8, http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm (last visited June 1, 2021).
100 *Supra* note 97.

the problem of elites' overrepresentation among PAs.[101] After all, the randomized selections of PAs by pilot courts are not as random as they appear to be. The process is controlled by screenings and interviews conducted by courts, often in joint action with other juridical and political organs.[102] Interview data with court administrators from the three pilot courts reveal that attention has been paid to, *inter alia*, the candidates' performance at work, their reputation in the local community, their criminal and disciplinary records, and whether they petitioned against the authorities and disturbed local social orders in the past.[103]

Despite the randomized computer algorithms used during the reform, the selection of PAs cannot be said to be entirely random or independent. This controlled randomness is intended by pilot courts that oversee the selection and the Party-state that oversees the courts to ensure the enlisted candidates be mindful of their behavior and words so the trial process is free of political risks. Indeed, it would be unrealistic to expect genuine randomness where judicial independence itself is absent. Purposive screening and filtering produce a group of PAs who are willing to, and are able to, cooperate with state authorities. Understandably, the state's control over who is selected to represent the populace raises concerns about the penetration of state power in courtrooms and whether individual rights might be put in jeopardy.

IV. "RUBBER STAMPS" IN JUDICIAL DECISION-MAKING

China's institution of lay assessors has long been criticized for being nothing more than a decoration on the judicial process,[104] a nominal figurehead,[105] supplemental manpower,[106] and a pure formality.[107] According to the observations of He Jiahong, PAs frequently refrained from raising questions and failed to communicate with presiding judges during trials.[108] He also observed instances where PAs, who were not invited to

101 *Supra* note 51.

102 *Id.*

103 *See e.g.*, *supra* notes 76, 78, 88.

104 He, *supra* note 60, at 735.

105 Lin Cai, *Renmin Peishenyuan Zhuli Juese Zhi Shizheng Kaocha [An Emperical Research on the Assistant Role of People's Assessors]*, 8 FAXUE YANJIU [LEGAL SCI.] 38 (2013).

106 Peng, *supra* note 58, at 18; Zhewei Liu, *Renmin Peishen Zhi de Xianzhuang yu Weilai [人民陪审制的现状与未来]*, 20 BEIJING U. L.J. [中外法学] 436 (2008).

107 Jiandong Zhang, *Guanyu Renmin Peishen Zhidu Zhixing Qingkuang de Diaocha yu Sikao [**关于人民陪**审制度执行情况的调查与思考]*, HAINAN U. J. [海南大学学报] (1993); Yunyan Wu & Min Wang, *Renmin Peishenyuan Canshen Qingkuang de Diaocha Fenxi [人民陪审员参审情况的调查分析]*, XUEHAI [学海] 135 (2000).

108 *Zhongguo Peishen Zhidu de Gaige Fangxiang [The Future Direction of Reform of Chinese*

attend post-trial deliberations and were never informed of trial outcomes, were nevertheless asked to sign blank court decisions in the capacity of PAs as required by trial procedures.[109]

Reform mechanisms were tailored to rectify these defects. First, the number of laypersons on grand collegial panels increased. Before the pilot reform, regular mixed courts were composed of either two judges and one PA or one judge and two PAs.[110] The 2015 reform guidelines required courts to form grand collegial panels comprised of either four PAs and three judges or three PAs and two judges to hear cases of significant impact.[111] The People's Assessor Law enacted in April 2018 confirmed that 4:3 grand collegial panels will be adopted.[112] The underlying rationale is that the quality of deliberation positively correlates with the size of the mixed court's lay section.[113] In other words, it is less likely that the genuine views of laymen are suppressed by powerful judges when laymen significantly outnumber judges.

Nowadays in pilot courts, traditional and newly-adopted grand collegial panels function side by side. Regular mixed courts are still the main device for courts to deal with growing caseloads while trials conducted by the latter are in the minority. Survey results reveal that some PAs continue to hear large numbers of cases on traditional panels while others attend very few trials by grand collegial panels after their appointment.[114] A survey respondent from Court A indicates that prior to 2015 he heard 125 cases annually via three-person regular courts; now, this number dropped to below 20 as he was drawn to mainly attend grand collegial panels.[115]

Additionally, pilot courts are required to grant PAs pre-trial access to full case dossiers.[116] However, interviews and survey data indicate that most courts failed to live up to the expectation due to practical concerns. A judge explained that the SPC proposal is too idealistic to implement as PAs had little time or interest to read case files, which may be hundreds of pages

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People's Assessor Regime], 1 FAXUEJIA (JURIST) 135 (2006).

109 *See supra* note 11.

110 *See supra* note 49.

111 *Supra* note 3.

112 People's Assessor Law (promulgated by Standing Comm. Nat'l People's Cong., Apr. 4, 2018), art. 14 (China) [hereinafter People's Assessor Law].

113 *Supra* note 27.

114 Observation and survey data collected from the fieldtrip in Court A, B, and C in July–August 2017.

115 *Id.*

116 Supreme People's Court, Work Methods of the Pilot Reform on the People's Assessor System [Renmin Peishenyuan Zhidu Gaige Shidian Gongzuo Shishi Banfa [人民陪审员制度改革试点工作实施办法], Fa [2015] No. 132, art. 18 (May 20, 2015) [hereinafter Work Methods].

long.[117] Even if PAs could complete the reading, giving them pre-trial access to case dossiers would complicate the administration of trials.[118] Due to these efficiency concerns, some courts hold brief pre-trial meetings which last for a few minutes to half an hour to review a list of the cases' main disputed issues while others do not. This practice varies according to the presiding judge's individual preference. Of the surveyed PAs, 70.4% indicated that they attended such meetings and others said they did not.[119] One PA who had no access to pre-trial proceedings complained, "I was seated and the trial started right away. I knew nothing beforehand and thus could not instantly comprehend the hearing."[120]

A central reform mechanism to lessen the dominance of professional judges is the bifurcation between factual and legal issues in trials.[121] PAs are responsible for fact-finding but not legal analysis.[122] The expectation was that establishing a clear division of labor would effectively frustrate unwanted intervention in the decision-making of PAs by legal professionals. However, my survey data reveals widespread failures of pilot courts to make the distinction between factual and legal issues. Many interviewees said they found it difficult to disentangle the two types of issues, which are often intertwined in trials. In practice, the division was normally achieved at the bifurcation between trial and sentencing. Judges retained their decision-making power over the guilty phase alongside PAs but enjoyed exclusive decision-making authority during sentencing. This unsymmetrical division of labor effectively limits the role of PAs but not judges who continue to control the entire trial process.

Interview data reveals that the professional-over-laymen domination remains prevalent in pilot courts. Many surveyed PAs believed that their contribution had no significant impact on trial results (49%) or had a very limited impact (20.4%).[123] About 60% of the PAs remained silent throughout the trial phase and the subsequent deliberation.[124] About 32% of the surveyed PAs signed deliberation minutes although they never participated in deliberation or discussion at any stage.[125] When asked why

117 An interview with an assistant judge in Court B on 10 August 2017.

118 A survey response received from a lay assessor from Court B on 8 August 2017.

119 Survey data collected from Courts A, B, and C in 2017.

120 An interview with a lay assessor in Court B on August 9, 2017.

121 *Id.*

122 This contrasts with the role of the judge to play a major role in both the fact finding and the application of legal rules. *Supra* note 19.

123 Surveys conducted in July and August 2017 in the three selected fieldwork sites.

124 *Id.*

125 *Id.*

they never spoke, surveyed PAs explained that they did not understand the factual issues (39.8%), had no opportunity to ask (14.3%), or knew their input would have little impact anyway (14.3%).[126] Even if PAs can make a real impact within courtrooms, first-instance trial outcomes are subject to further approval (and disapproval) by division chiefs, court presidents, and adjudication committees as well as *de novo* appellate procedures. The lack of finality of first-instance mixed-court decisions further weakens the role played by PAs.

Some interviewees indicated that newly recruited PAs were more recalcitrant. Despite being subject to screening by state organs, not all PAs randomly recruited during the pilot reform were volunteers who had vested interests in participation as in the past.[127] Judges expressed their dismay over wasted resources and delayed proceedings because of the PAs' incompetence and lack of commitment.[128] The contrast between "professional PAs" who attended trials as a secondary job in the pre-reform era and randomly-selected PAs in the reform era is particularly signficant in courts where PA selection was the closest to being truly random. A judge in Court B described the situation:

> [N]ew assessors rarely have a sense of civic responsibility. They tend to change their schedules last minute and cause tremendous difficulty for us to find replacements . . . Some assessors won't notify us until the very morning of the scheduled trial (that they cannot make it) . . . Some assessors answer phone calls and play games on their mobiles during deliberations despite our warnings. I would say that about fewer than 10% of the assessors take their duty seriously . . . In the post-trial deliberation phase . . . only 30–40% of the assessors could even articulate their opinions. Some refused to speak no matter what . . . Others could not logically organize their thoughts. Gradually we lost our patience. Does democratic participation really enhance the quality of adjudication? Doesn't seem so.[129]

Others disagree. To them, judges are reluctant to relinquish their power to PAs due to self-interest, not in the interest of justice. These judges tend to exaggerate difficulties facing the reform in order to justify their stances as reform opponents. According to a court official:

> [J]udges are the main roadblock. Their main interests center around

126 *Id.*
127 An interview with a judge in Court B on August 21, 2017
128 *Id.*
129 *Id.*

> efficiency and responsibility. They won't give the lay assessors ample opportunity to speak and deliberate because they fear they might make mistakes and could slow down the process. They can accept lay assessors as mere accessories and assistants but no more. Lay assessors can play a bigger role if they are treated with respect. Vice versa, facing hostile judges, no matter how enthusiastically they are, they won't have any impact on the process. Other judges may tell you that lay assessors have insufficient knowledge or competence. That's not the whole truth. The truth is overtired and overworked judges don't want troublemakers.[130]

A judge tellingly remarked, "I haven't seen any assessors who disagree with me significantly so far. We are able to persuade lay assessors to change their mind (even if they do so). If an assessor repeatedly refuses to cooperate, we will not use him again."[131]

At best, the research findings above suggest that the reform's implementation in the three pilot courts has been half-hearted. Some interviewees believed the pilot experiments demonstrated that increased PA participation did not improve the fair adjudication of disputes, because the general public was poorly educated and inadequately motivated. In other words, it is the people, not the courts or state, that cause the reform's failure. It follows from this logic that maybe the compromises identified in the pilot reform programs—such as the partially random selection of PAs and the half-hearted commitment to empower PAs' decision-making—represent a good balance rather than a failure. The basic premise of this reasoning is twofold: (1) it assumes that efficiency (rather than fairness) is the ultimate goal of justice and (2) it also forecloses the possibility that laymen may gain motivation and capacity to participate in trials through their experiences serving as PAs.

Indeed, the former assumption may be deemed appropriate by some—although others may consider fairness as the primary virtue of justice over utilitarian concerns about efficiency and convenience. Relieving the caseload of trial courts may be normatively desirable, not merely for the judges themselves but for the citizens served by those courts and wider society. However, it is questionable whether efficiency should be achieved at the cost of due process, fairness, and democratic participation. It seems that opponents attack the reform on the basis of alleged inconvenience but selectively ignore the many benefits that lay participation may bring to

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130 An interview with a judge on July 13, 2017.
131 An interview with a judge on July 25, 2017.

courts—one of which is citizenry education. In fact, over 60% of the surveyed PAs were willing to participate as PAs because they would like to attain a better understanding of the legal system and considered the experience a good training opportunity.[132] When asked about their suggestions for the future improvement of the PA regime, the majority of surveyed PAs hoped that judges would spend more time explaining a case's basic facts and issues to them.

It is true that some Chinese citizens are apathetic toward participating in court proceedings, which is a difficulty confronting many other jurisdictions with lay participation in trials.[133] However, this is not a reason to limit lay participation to those who the authorities trust, are well-educated, and are most convenient to employ in trial proceedings. Otherwise, the very purpose of citizenry input in adjudication will be defeated. To allege that the Chinese people, in comparison with the citizenry in other countries with jury or quasi-jury systems, possess low human quality (*suzhi*) to be engaged in judicial proceedings rests on a similar logic as the argument that the moral and intellectual qualities of the Chinese people are insufficient to support democratic politics.[134] According to this argument, it is perhaps not really beneficial to include untrained lay people in the adjudication of legal disputes until they are properly trained and their qualities are cultivated. However, engaging ordinary people in the judical process might itself be an effective alternative to raise awareness and foster capacities. One of the survey respondents, an illiterate shepherd, stated, "I am proud to represent the commoners and I have learned a lot from my experience. I hope the government could give us more such opportunities. It is not the honorarium that I am after. I want to contribute (to the administration of justice) and promote justice. Many people from my village feel the same way but we don't get such opportunities."[135]

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132 *Supra* note 119.

133 *See, e.g.*, Susan Carol Losh, Adina W. Wasserman & Michael A. Wasserman, *Reluctant Jurors: What Summons Responses Reveal about Jury Duty Attitudes*, 83 JUDICATURE 304, 311 (2000); Paul W. Rebein, Victor E. Schwartz & Cary Silverman, *Jury Dis(service): Why People Avoid Jury Duty and What Florida Can Do about It*, 28 NOVA L. REV. 143, 156 (2003).

134 It is argued that democracy is unattainable because Chinese people are still trapped in short-sighted self-interest and irrational behaviour and unable to advance the common good. The official discourse on China's political and social development has held that the low human quality of Chinese people has been the root cause of the myriad social issues that have shaping the prospects for democratization. Susanne Brandtstädter & Gunter Schubert, *Democratic Thought and Practice in Rural China*, 12 DEMOCRATIZATION 801, 811 (2005); Haifeng Huang, *Personal Character or Social Expectation: A Formal Analysis of 'Suzhi' in China*, 25 J. CONTEMP. CHINA 908 (2016).

135 A telephone conversation with the respondent on August 7, 2017.

V. THE POLITICAL LOGIC OF CHINA'S REFORM ON PEOPLE'S ASSESSORS

How do we make sense of the pilot reform's limited achievements and substantial setbacks? In this section, I seek to provide a detailed analysis from two perspectives. First, I will unpack the uneasy relations among the judiciary, state, and society, explaining that the tension between judges and PAs represents a dilemma of authoritarian rule, which has been exposed by the recent pilot reform. The judicial-political backdrop against which the reform was embedded needs to be taken into consideration so that PA institutions and their external environment can be studied as an organic whole. Then, I will evaluate the bureaucratic structure and dynamics *within* China's court system. These two paths of analysis are ultimately linked to reveal the political logic of China's PA reform.

China's authoritarian politics cast a long shadow over its judicial reforms. The way power is held and exercised in an authoritarian polity produces twin problems: authoritarian control and power-sharing.[136] Correspondingly, I argue that this dual power struggles finds direct expression in judicial processes. In our present case study, the PA reform is decisively shaped by state-society tension on the one hand and multi-level bureaucratic dynamics within the judiciary on the other. First, behind the uneasy relation between PAs and judges is the tension between state and society. The restrained role of laymen in courts springs from the power control difficulty inherent to authoritarian governance.[137] Empirical evidence presented above lends support to this theoretical formulation. Both the "controllable randomness" in the PA selection and the limited role of PAs as "rubber stamps" in judicial decision-making are evidence that show courts' distrust of PAs, courts' attempt to control PAs' scope of authority, and courts' creative use of the reform as an opportunity to strengthen their dominance over PAs.

Furthermore, the PA reform was profoundly defined by structure and processes *internal* to Chinese courts. The reform is local policy experimentation under China's centralized bureaucracy. Coined by Deng Xiaoping as "crossing the river by feeling the stones," policy experiments are key to the success of China's market transformation in the past

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136 MILAN W. SVOLIK, THE POLITICS OF AUTHORITARIAN RULE 2 (Cambridge Univ. Press 2012).

137 This is also tied to weak judicial independence, on individual and institutional levels, in contemporary China. *See* Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82 HARV. L. REV. 967 (1969); RANDALL PEERENBOOM, JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Cambridge University Press 2010); Hikota Koguchi, *Some Observations About "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195 (1987).

decades.[138] During experiment-based reforms, national policymakers encourage local authorities to test new policy programs; local pilot experiences, in turn, provide feedback, which informs and influences national-level policy design. This flexible approach permits a "selective integration" of decentralized, local experiences and a centralized, national vision.[139] Whether this two-way process produces failures or successes in the implementation of public policies, however, largely depends on the bargaining between national and local authorities.[140]

The recent pilot reform sheds light on the mechanics of this interactive policymaking process. Not every SPC-nominated pilot court was committed to a faithful implementation of the national reform policies due to local particularities. My empirical data reveals that some pilot courts failed to conduct a truly random selection of PAs while others fell short of ensuring a substantial role for PAs in court deliberations.[141] There are also courts that failed in both respects.[142] Setbacks can best be understood by considering two paradoxical factors: goal conflicts between central (national) and local courts and judges, and the willingness of the national judiciary to bargain and compromise with local courts to cover up failures. Together they contribute to the formation of a dynamic policy-bargaining equilibrium. As Stanley Lubman insightfully remarked two decades ago, entrenched interests were amongst a plethora of factors which limit the functions and autonomy of Chinese courts.[143] Individual and institutional interests, although not insurmountable impediments to China's judicial reform, have significantly shaped the way the reform was implemented.

A. A Central-Local Equilibrium Involving Goal Conflicts

Conventional wisdom would attribute the pilot reform's policy setbacks to the failure of local courts to implement national policies due to their

138 JAE HO CHUNG, CENTRAL CONTROL AND LOCAL DISCRETION IN CHINA: LEADERSHIP AND IMPLEMENTATION DURING POST-MAO DECOLLECTIVIZATION (Oxford Univ. Press 2000); Sharun W. Mukand & Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance*, 95 AM. ECON. REV. 374 (2005).

139 Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China's Distinctive Policy Process*, 59 CHINA J. 1, 29 (2008).

140 Peiwei Liu, *Local "Adaptation": The Key Word in the Interpretation of China's Governance [地方"变通":理解中国治理过程的关键词]*, ZHEJIANG SOC. SCIS. [ZHEJIANG SHEHUI KEXUE] (2015); Yongxiang [夏永祥] Xia & Changxiong [王常雄] Wang, *The Policy Game of Central and Local Government and the Solution [中央政府与地方政府的政策博**弈及其治理**]*, 28 当代经济科学[MOD. ECON. SCI.] (2006).

141 *See supra* Sections III.–IV.

142 *Id.*

143 BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 317 (Stanford Univ. Press 1999).

incompetence, corruption, or ideological conservativism. However, this analytical approach inadequately addresses the full complexity of rational central-local interactions and may amount to little more than “a simplistic moral critique.”[144] I argue that the pilot reform process has been fundamentally shaped by interest-based goal conflicts within the judiciary. To be precise, this includes the tension between national and local courts and conflicts of interests between court leaders and ordinary judges within local courts.

Throughout the reform, it seemed that the SPC remained somewhat ambivalent. On the one hand, there was a strong steer from the top toward empowering PAs. In response to the SPC President’s call to launch “a revolution with utmost courage and determination,”[145] 50 pilot courts appointed 9,673 PAs after multiple rounds of selection, trained 10,000 PA candidates before their official appointment, and trained 12,000 PAs after their appointment—during the first year of the reform alone.[146] Many courts increased the amount of honorarium paid to PAs to compensate for their travel expenses and the time they spent attending trials. Overall, pilot courts made a substantial investment of time and resources in the reform.

On the other hand, China’s top court sends out contradictory messages. In April 2017, the SPC took the rare step of extending the pilot reform for an extra year.[147] The SPC Deputy President explained that this extension was needed for policymakers to devise solutions to a series of issues facing the implementation of reform policies, ranging from the selection of PAs to the operation of grand collegial panels.[148] Concerns raised by the national legislature’s Review Opinions on the SPC’s Mid-term Report include PAs’ marginalized role in trials, insufficient judicial resources, the difficulty in conducting the randomized selection of PAs, and the failure of 20% of China’s pilot courts to set separate budgets for expenses associated with the PA reform.[149] Obviously, none of these vexing issues have easy solutions. Surprisingly, only a few months after the national legislature’s approval of the SPC’s application for an extension, a Draft Law on the People’s

144 Liu, *supra* note 140, at 37.

145 *Id.*

146 Zhou, *supra* note 101.

147 Shen Deyong, *Explanation for Draft on Extending the Pilot Reform on People’s Assessor System* (对《关于延长人民陪审员制度改革试点期限的决定（草案）》的说明 – 2017年4月24日在第十二届全国人民代表大会常务委员会第二十七次会议上) (Apr. 24, 2017).

148 *Id.*

149 Wang Wei, *Dui Renmin Peishenyuan Zhidu Gaige Shidian Qingkuang Zhongqi Baogao de Shenyi Yijian [对人民陪审员制度改革试点情况中期报告的审议意见]*, NPC.GOV.CN (July 18, 2017), http://www.npc.gov.cn/npc/lfzt/rlyw/2016-07/18/content_2033657.htm.

Assessors was submitted to the national legislature for review.[150] The SPC President stated that the sudden acceleration was because the conditions for legislation were favorable as a nationwide consensus was formed.[151] The SPC's attitudinal change, from a willingness to confront defects of the reform to an eagerness to cover up its setbacks, is significant.

A further illustration of the SPC's half-hearted commitment to empowering PAs is the gap between its original plan and the end product. A comparison between the Law on People's Assessor (2018) ("PA Law") and the reform Work Methods (2015) reveals the extent to which the SPC has rolled back its initial reform initiatives after two years of local experimentation and central-local negotiations.[152] Compromises made by the SPC include the eligibility of candidates. According to the Work Methods, a high school diploma was not a prerequisite for serving as a PA in rural, impoverished, and distant regions.[153] Under the PA Law, however, only candidates who complete high school education and above are eligible candidates.[154]

The PA Law also stipulates that the size of the PA pool should range from three to five times the total number of judges in pilot courts.[155] The provision that a collegial panel should be composed of no fewer than two PAs was eliminated, possibly resulting in a loss of the lay majority on three-person panels.[156] Furthermore, under the PA Law, whether to form a mixed panel involving PAs is entirely at the discretion of the court rather than a right accorded to the parties.[157] Parties to cases have no say in determining whether the relevant case is heard by a bench trial or a mixed collegial panel consisting of their peers. This is particularly troubling for criminal defendants.

It is noteworthy that the SPC rarely addressed the reform's feasibility. In recent years, Chinese judges struggled to meet efficiency goals due to two general trends: growing caseloads nationwide and the declining number of

150 Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (Caoan) (中华人民共和国人民陪审员法(草案)) [Law of the People's Republic of China on People's Assessors (Draft)] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 2017, effective Dec. 29, 2017) (China) [hereinafter Draft Law].

151 The Explanation on The People's Assessor Law of the People's Republic of China [周强就《中华人民共和国人民陪审员法（草案）》作说明 -- 扩大司法民主 促进司法公开 实现司法专业判断与群众朴素认知的有机统一] (Dec. 22, 2017).

152 Work Methods, *supra* note 116.

153 *Id.* art. 1.

154 People's Assessor Law, *supra* note 112, art. 5.

155 Work Methods, *supra* note 116, art. 5; People's Assessor Law, *supra* note 112, art. 8.

156 Draft Law, *supra* note 150, art. 13; Work Methods, *supra* note 116, art. 15.

157 Work Methods, *supra* note 116, arts. 12–13; Draft Law, *supra* note 150, art. 16.

judges. The 2018 SPC Work Report revealed that, from 2013 to 2017, local-level courts closed approximately eighty-nine million cases, which represented a 58.6 percent increase from the previous five-year period.[158] Meanwhile, the number of judges dropped from 211,990 to 120,138 after the judge quota system (*yuan'e zhi*) reform.[159] The net consequence of these new developments is that judges are under unprecedented pressure to clear filed cases. Local judges are particularly susceptible to this pressure as over eighty percent of the caseload in China is dealt with by first-trial courts.[160]

Mixed collegial panels are required for ordinary criminal and civil procedures and are traditionally composed of three members.[161] With the attendance of two PAs, the panel only requires the presence of a single judge.[162] As the majority of cases in China are dealt with through ordinary trial procedures, employment of PAs can ease the critical shortage of manpower in Chinese courts. This has been well explained by one interviewee:

> The people's assessors are extra pairs of hands for us because they freed judges from laborious trials. Judges can instead analyze evidence, write case decisions, study case dossiers and engage in mediations if needed. That is why we recruit assessors who are stationed in our courts (*zhuting peishen*). No one is happy if we cannot close most of our pending cases. Who says efficiency is not important?[163]

Efficiency is a legitimate concern for adjudication, but the reform was considered to undermine efficiency. This is because restoring PAs to their proper place in trials is resource- expensive and time-consuming. Before the reform, the PA institution was criticized for its mere window-dressing function. PAs were so outpowered by judges that there was no distinction between three-person mixed panels and trials by single judges despite the formal participation of PAs in the former. The pilot reform, which promised

158 In some regions, the number of cases almost doubled. *See, e.g.*, Zhou Qiang, *Zuigao Renmin Fayuan Gongzuo Baogao Quanwen ji Fujian Fabu* [最高人民法院工作报告全文及附件发布], XINHUA NEWS AGENCY (Mar. 19, 2017), www.court.gov.cn/zixun-xiangqing-37852.html.

159 *Id.*

160 *See, e.g.*, Cai Chuangchun & Huang Jie, *Beijing Haidian Fayuan Shangbannian Xinshou an Siwan yu Jian Faguan Mang Bing Kuaile Zhe Gege Ganjing Shizu [北京海淀法院上半年新收案四万余件 法官忙并快乐着个个干劲十足]*, LEGAL DAILY (Aug. 17, 2017), http://www.xinhuanet.com/legal/2017-08/17/c_1121495427.htm (stating that, in the first half of 2017, courts at the grassroots level heard 87.94% of all filed cases nationwide).

161 *See supra* note 45.

162 *Id.*

163 An interview with a judge from Court C on August 22, 2017.

random selection and substantial empowerment of PAs, may enhance the accountability of the adjudiciary. As a tradeoff, however, it threatens to end past practices and axe the associated benefits enjoyed by trial judges. One respondent explained, "[J]udges resist the reform as it removes the practice of professional lay assessors which has been relieving the pressure on us. The reform undermines the efficiency of adjudication at grassroots levels. It is a burden for us."[164]

They criticized the reform for consuming too many resources and too much manpower. As one interviewee put it: "[N]o one has the time to put on the democracy show . . . My colleagues complained to me: 'don't trouble us anymore with the reform.' Lay assessors . . . were useful assistants to us. Any reform measures which take that away from us won't work."[165]

Another interviewee explained:

> To be honest, not many people's assessors are granted pre-trial access to case dossiers. I know the reform encourages us to do so. But it wastes too much of our time. I close more than 200 cases per year. I have no time for this. In fact, I have never seen other colleagues welcoming the reform. Most people put on a show to convene a grand panel when demanded by the court leader. Assessors won't be able to play any substantial role without the support of judges, right? They enjoy no such support.[166]

Borne out by my empirical data above are conflicts between the primary reform objective set by the SPC—namely civic engagement and accountability—and efficiency, which is the main concern of self-interested, local judges. The SPC was aware the critical shortage of manpower was suffocating local courts, but surprisingly, it made little effort to address this difficulty. As one interviewee complained:

> [W]hen I was young, our entire division dealt with 150 pending cases. Now we process 700 to 800 pending cases with fewer judges. As you know, many of our young colleagues have resigned recently for a career in private practices. It is a huge waste of our time to ask three professional judges to sit on the same collegial panel. With traditional panels, we only need to place one judge there and two people's assessors. And yet those SPC brutes ordered us to follow their stupid policies.[167]

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164 *Supra* note 127.
165 A telephone interview with a judge from a grassroot court in province Z on July 19, 2017.
166 An interview with a judge from Court A on August 1, 2017.
167 *Id.*

Central-local goal conflicts are best understood within China's changing socio-political contexts. Before the late 1970s, policy implementation in the Maoist era could be characterized as a uniform top-down fashion. Since then, the power balance between national and lower authorities has changed such that local agents enjoy greater autonomy today.[168] The creative use of PAs as efficiency enhancers is a pertinent example of "adaptive implementation"[169] or "goal displacement"[170] at local levels. These approaches allow agents to selectively adjust and develop policy goals set out by principals to meet evolving local conditions in a society under rapid transformation.

However, the soft resistance of lower level authorities may also result in an incongruence between policy objectives and their implementation to the extent that policies are distorted to suit the implementers' interests, values, and expediency at the expense of their original missions.[171] In our case, despite being an institution fostering citizenry participation, the PA regime became a handy tool for understaffed courts and overworked judges.[172] For national authorities, the main utility of China's PA system is its symbolic representation of judicial democracy. In the eyes of the local courts, the regime is reduced to a supplementary labor force with no substantial power. This results in a divorce between the formality and substance of the PA regime and leads to institutional corruption. Namely, the PA regime saved face for judicial authorities who took pride in civic engagement and created

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168 Zongzhi Huang, *Gaige Zhong de Guojia Tizhi: Jingji he Shehui Weiji de Tongyi Genyuan [改革中的国家体制： 经济奇迹和社会危机的同一根源]*, OPEN TIMES [**开放**时代] (2009).

169 Paul Berman, *Thinking About Programmed and Adaptive Implementation: Matching Strategies to Situaions*, *in* WHY POLICIES SUCCEED OR FAIL 205–230 (H. Ingram & D. Mann eds., 1980); Gary L. Cooper & Alan Pearson, *Editorial*, INT'L J. MGMT. REVS. iii (2001); Peter J. May, *Implementation Failures Revisited: Policy Regime Perspectives*, 30 PUB. POL'Y & ADMIN. 277, 279 (2015); Liu, *supra* note 140; Huang, *supra* note 168.

170 Burt Perrin, *Bringing Accountability up to Date with the Realities of Public Sector Management in the 21st Century: New View of Accountability*, 58 CANADIAN PUB. ADMIN. 183, 189 (2015); Robert K. Merton, *Bureaucratic Structure and Personality*, 18 SOC. FORCES 560, 563 (1940); Joseph Galaskiewicz & Sondra N. Barringer, *Social Enterprises and Social Categories*, *in* SOCIAL ENTERPRISES: AN ORGANIZATIONAL PERSPECTIVE 47, 59 (Benjamin Gidron & Yeheskel Hasenfeld eds., 2012); Laurence J. O'Toole & Kenneth J. Meier, *Public Management, Context, and Performance: In Quest of a More General Theory*, 25 J. PUB. ADMIN. RSCH. & THEORY 237, 250 (2015); Xueguang [周雪光] Zhou, *基层政府间的"共谋现象"– 一个政府行为的制度逻辑*, OPEN TIMES [**开放**时代] (2009).

171 Originally, the term referred to the situation where a strict adherence to the rules transforms the means into the ends. A growing body of literature on goal displacement, however, broadened its connotation to include circumstances where the original goals shift during the process of implementation. In this article, the term is used in the broader sense.

172 Liu, *supra* note 106, at 436; Peng, *supra* note 58, at 19; Wu & Wang, *supra* note 107, at 135.

a false impression that judicial decision-making involves meaningful popular input in most trials. A judge from Court C explained, "[I]t is a routine practice that courts nationwide use lay assessors to help administer cases . . . We cannot resist policies 'from the top,' which are ill-suited for our local conditions. What we can do, however, is to alter the policies for our own benefits."[173]

The SPC, as China's national administrator of judicial affairs, tolerates local courts' *pro forma* compliance with and *de facto* departure from reform policies. Internal reports released by the SPC confirm that the top court is in tune with challenging local realities.[174] Yet, as one interviewee tellingly observed, "[T]hey are satisfied with the symbolic significance and formality (*xingshi*) of people's assessor system and we are content with its actual function of assisting us clearing dockets. Everyone turns a blind eye to it [the discrepancy]. The reform changes nothing."[175] In this way, local courts exploited the regime for their own administrative expediency with acquiescence from the top. This explains why the regime has been retained despite its long-term failure to substantiate the power of PAs. Indeed, the decades-long collusion between the SPC and local courts seems to have gained renewed longevity. An official from Court A commented:

> Many of the judicial reform projects are claimed to be successful once they are launched. [I]t seems that "the top is not as zealous about the reform as they proclaim to be. I never saw any higher official asking as many questions as you do or spend sufficient time with us to do a proper investigation. (That is) perhaps they don't care. … we cater to their needs by selectively reporting what they would like to hear. They know what the reports say does not represent the reality but they pretend they don't know. This phenomenon has roots in our unique regime.[176]

It is important to note, however, that local courts are far from monolithic. In my analysis about central-local tension, it was for analytical clarity that I did not distinguish different groups of actors on the local level. Depending on their bureaucratic statuses, the attitudes of members of courts vary. Court officials seek to maximize their political capital by, *prima facie*, loyally implementing reform policies. Under China's top-down governance structure, court officials at the hierarchy's lower rungs secure their positions, remuneration, and promotions by serving as policy conduits

173 A telephone interview with a judge from a court in Province G on July 13, 2017.
174 Zhou, *supra* note 101.
175 An interview with a judge from court A on August 2, 2017.
176 An interview with a judge from Court A on July 27, 2017.

between the top courts and frontline judges.[177] They are motivated to promote reform measures designed by the SPC and endorsed by the higher echelons of the judicial-political bureaucracy.

Ordinary judges in lower courts, however, are less attentive to and enthusiastic about grand policy ideals. Given that the performance of Chinese judges is periodically measured by quantifiable appraisal indicators—one of which is the annual rate of closed cases out of all registered cases (*jie'an lü*)[178]—efficiency looms large. Judges are rewarded with honorary titles and receive financial rewards and career advancements if their rates are satisfactorily high.[179] Conversely, a failure to meet these goals indicates incompetency and will negatively affect their performance evaluation.

Consequently, a cleavage of interests between court officials and individual, local judges takes shape. In general, China's well-oiled bureaucracy brings about effective top-down control. Despite the resistance of frontline judges, court leaders have the final say over staff administration and remain capable of pressuring judges to carry out some of the reform policies. Indeed, the ultimate formula of implementation in a given court is a compromise normally reached after intensive bargaining amongst self-interested actors. Such an outcome is contingent upon a wide range of court-specific factors, such as the caseloads, resources at the court's disposal, and the career ambitions of court leaders.

In this way, dynamic policy-implementation equilibria exist not only between central and local courts but also between frontline judges and court leaders. Yet, sometimes, the control mechanism can backfire if the actors are no longer interested in playing the game. One interviewee complained:

> [O]ur political department is torturing me. I am forced to engage people's assessors in the trials. This slows down the process of clearing dockets. I am over 50 now and I am in poor health. My back aches so much from sedated sitting for hours and hours during trials. In fact, I don't have the time to talk with you. They said that they will deduct my performance points if I don't do it. Well, nothing worries

177 Jonathan J. Kinkel & William J. Hurst, *The Judicial Cadre Evaluation System in China: From Quantification to Intra-state Legibility*, 224 CHINA Q. 933, 939–41 (2015).

178 C.F. Minzner, *Riots and Cover-ups: Counterproductive Control of Local Agents in China*, 31 U. PENN. J. INT'L L. 53, 53 (2009).

179 Michelle Miao, *Performance Evaluation in the Context of Criminal Justice Reform: A Critical Analysis*, *in* CHINESE COURTS AND CRIMINAL PROCEDURE: POST-2013 REFORMS (Björn Ahl ed., Cambridge Univ. Press, forthcoming 2021).

me. I told them: "[S]uit yourself!"[180]

The institutionalized role of PAs as facilitators for court trials enjoys such widespread support among local judges to the extent that most judges I interviewed believed the old practice should be maintained. Preoccupied with the growing demands of judicial administration, few would act against their concentrated self-interests to embrace the reform. The annual caseload, which many of my interviewees need to process, ranges from 100 to 300 cases. At best, some of them endorsed a dual-track system where the majority of cases are dealt with by the traditional method and only exceptional cases are heard by grand collegial panels where the PAs play a meaningful role. Realistically speaking, meaningful lay participation in trials requires the judiciary to scale back the scope of cases heard by mixed panels with the participation of PAs. As noted by Wang Minyuan, the key to the success of a PA reform, rather than enlisting the participation of tens of thousands of lay assessors, lies in ensuring their substantial role in selected trials.[181]

B. The Political-Judicial Nexus: Tension or Collusion?

In many ways, tension within China's judicial bureaucracy has political roots which extend well beyond courtrooms and into the relations between state and society. For instance, the reform plan specifies that cases which are politically sensitive, controversial, or significant should be heard by grand collegial panels.[182] These generally include cases involving collective interests and cases attracting public attention.[183] According to my survey data, these cases of high social impact normally involve issues such as housing demolition and relocation, homicide, class suits, cases involving administrative petition, traffic accidents and medical negligence involving multiple victims, inheritance of property, and inter-province economic disputes. Clearly, incorporating laymen into trials of cases of significant social impact serves important governance functions for at least two reasons. First, laymen could act as a barometer of public sensibilities. Courts can then tailor judicial decisions to curry favor with prevailing public preferences. Second, and most importantly, the presence of lay persons in court trials can convince cynics that court judgments reflect the opinions of their peers rather than those of corrupt, arrogant elites.

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180 An interview with a judge from Court C on August 22, 2017.
181 Wang, *supra* note 29, at 46.
182 *See* Guidelines on the Pilot Reform, *supra* note 6, art. 2(3).
183 *Id.*

Courts, including the SPC, are motivated by rational calculations of institutional self-interest.[184] They profit through the reform by constructing a positive image as a popular institution where public opinion and input are valued. On the one hand, through symbolic engagement with the PAs, public mistrust and cynicism of courts are dampened in controversial cases. Hypothetically, if an all-judge collegial panel rules that the government has the power to demolish the residence of local villagers, their impartiality may be put on trial—were they bribed or coerced by local officials and government? However, the formality of trial by one's peers, particularly by peers belonging to the "grassroots class,"[185] assuages public skepticism. The PA institution, thus, acts as an instrument to deflect public dissatisfaction away from courts and the state authorities behind courts. On the other hand, the more courts cooperate with the authoritarian regime, paradoxically, they earn more autonomy and suffer from fewer interventions.[186] By promoting the reform, the SPC strengthens the legitimacy of state authorities and its own institutional legitimacy. They form a win-win strategic partnership.

An authoritarian regime suffers from a legitimacy deficit as the general public is largely excluded from the exercise of state power. Chinese authorities address this deficit by, among other strategies, constructing and reinforcing an image of popular participation in the judicial process. An interesting fact is that among a series of equally, if not more, important judicial reform initiatives in recent years, the PA reform attracted the most intense media spotlight. These are mostly self-congratulatory reports from state media outlets praising the achievements of the reform and the rising power of ordinary folks. Pilot courts used both traditional media outlets and social media such as Weibo and WeChat to promote the reform. A public interest advertisement funded by the SPC was aired at China's Central Television channel.[187] Courts in Henan launched a WeChat HTML5 (H5) campaign.[188] Courts in Heilongjiang and Chongqing funded the making of micro movies on PA reform.[189]

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184 *See* Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012).

185 Liao, *supra* note 38.

186 GINSBURG & MOUSTAFA, *supra* note 15, at 16.

187 *See Public Interest Advertisement on People's Assessors (Renmin Peishenyuan Gongyi Guanggao)*, SUP. PEOPLE'S CT. (June 29, 2016, 3:08 PM), http://www.court.gov.cn/zixun-xiangqing-22782.html.

188 Zhou, *supra* note 101.

189 See the General News Agency of the People's Court, a micro movie called *Our People's Assessors Demonstrates the Achievement of the People's Assessor Reform*, available at http://www.court.gov.cn/shenpan-xiangqing-49362.html. *See also* Baidu Baike, *Juror in Liangping*

Meanwhile, the ruling elites take considerable caution not to lose complete control over the citizenry by conferring them untrammeled power. The current configuration of the PA system can be viewed as the optimal balance struck after conflicts, negotiations, and bargaining among main players. Yet, a reform which may substantially redistribute power in favor of the lay citizenry is clearly incompatible with the operational logic of an authoritarian regime. This partially explains the ambivalent voice by which the SPC speaks to the reform's purported audiences. What it cares about most seems to be the reform's formality rather than its substance. For instance, the SPC widely claimed that all fifty pilot courts, by April 2017, had completed the random selection of PAs.[190] This report, in large part, served as the factual basis of subsequent policymaking and legistlation. In fact, Court C, one of the main sites of my empirical study, did not even start the process of random selection until as late as the summer of 2017.[191] Its PA office administrator stated this had been reported to the higher authorities.[192] Unless there was an inter-hierarchical miscommunication, the SPC's policy formulation was not entirely based on the factual feedback they gathered at the grassroots level.

In authoritarian contexts, the state holds a firm grip over courts, and this is commonly described as the absence of judicial independence.[193] Due to the domination of political decision-makers over judicial agents, policies made by courts often reflect the will of the state. In our case study, the SPC's half-hearted commitment to empowering PAs largely reflects the reserved attitudes of the Party-state to whom the reform is a double-edged sword. On the one hand, courts, subservient to the ruling Party-state, further the Party-state's interests by constructing symbolic legitimacy. Courts are reluctant to relinquish their power to the public, because they are often held accountable by the state for judicial decisions. Compared to professional judges, the authoritarian Party-state has even less direct control over and trust of laypersons. Interestingly, all judicial interpretations issued to guide the pilot reform, including the Reform Plan and the Work Method, were approved by the Leading Team for Comprehensive Deepening the Reform[194] at the

(Youxiang Peishen Yuan), https://baike.baidu.com/item/柚乡陪审员 (last visited June 2, 2021).

190 Zhou, *supra* note 101.

191 *Supra* note 88.

192 *Id.*

193 Cohen, *supra* note 137; PEERENBOOM, *supra* note 137; Koguchi, *supra* note 137.

194 This is a Party organ with the highest power to take charge of the overall design of reforms, co-ordination, implementation and supervision in China. It is affiliated to the Politburo of the Communist Party of China and launched by the current administration in November 2013.

top echelon of the Party-state.[195] Many procedural safeguards, which were originally envisioned to protect the autonomy and authority of PAs, were rolled back. These include PAs' pre-trial access to case files and their privilege to speak first during deliberations.[196] Power has been reserved exclusively for professional judges. The state's distrust of the lay segment of courts and its urge to control the courts are central to the explanation of the reform's limits.

Some interview respondents seemed guarded and tense. However, when the interview veered in a direction with which judges were comfortable, they opened up to me about their cynicisms regarding the reform's design and implementation. One judge who oversees the implementation of the PA reform in his court told me:

> [O]bviously the central leadership does not trust people's assessors. You see, they are so cautious that they require all of them to be selected by us and appointed by local people's congresses. They feel worried that the reform may spin out of their control. Have you heard that the lay assessors need to be appointed by legislatures in other jurisdictions? They are state appointees. Also, the training. All people's assessors went through trainings so that they will reshape their identity as part of the regime. My personal view is that if they want the people's assessors to really play a meaningful role, they should trust them, give them more power and don't try to tie their hands.[197]

Structural constraints sustain the continued alienation of laypersons in judicial proceedings. Today, career PAs, alongside randomly selected PAs, are still retained by many courts across China. Involving these career "laypersons" with substantial legal knowledge and bureaucratic skills in trials to represent ordinary folks defeats the very purpose of lay participation in judicial decision-making. Yet, under an authoritarian regime, they serve the needs of judicial administration (as efficiency-enhancers) and the interests of political governance (being proficient in bureaucratic skills). As career PAs closely resemble insiders to the organization, there is little need for exclusion and distrust. In the bureaucratic ecology of Chinese courts, career laymen are expected to fulfill tasks more demanding than mere representation of the local community.

195 *Supra* note 54.
196 Work Methods, *supra* note 116, arts. 18, 23.
197 An interview with a judge from Court C on August 24, 2017.

PAs' marginalized role corresponds with their minimal sense of accountability. Of all the survey respondents, 46 (46%) believed that they should not be responsible for the outcome of cases as they had very little impact on the trials in which they managed to participate.[198] Fourteen percent of PAs said that as they only made some suggestions on the facts of decisions, they should not be held liable even if cases were wrongfully decided.[199] Four percent stated that they care little about responsibilities while 15% of the respondents said that they were concerned they might be held liable even though they did not believe it was fair.[200] Only 19% believed that it was legitimate for PAs to bear responsibility but only to a limited degree.[201] Some respondents said that they were told during training that PAs only needed to attend trials and it was the judge who would make the final decisions.[202]

One respondent stated, "We were there only to offer some opinions for the reference of judges . . . We cannot reject the court's request to sign the decision documents but it was unfair for us to bear any sort of responsibility as we understand very little factual or legal issues involved."[203] Another respondent stated, "[I had] never been told that I am liable for the decisions. Judges will decide in whatever way she prefers no matter what our opinions are."[204] Courts take great care to constrain the authority of laymen as they themselves are the primary targets under authoritarian control. If they defer authority and responsibility for decision-making to PAs, it is likely that they would lose control of their own fate. This is evidenced under the fact that, following recent judicial reforms, judges assume life-long judicial responsibility for erroneous decisions.[205]

198 *Supra* note 97.
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 A survey questionnaire collected on August 10, 2017, from a PA registered in Court B.
204 A survey questionnaire collected on August 1, 2017, from a PA registered in Court A.
205 XINHUA, *Judges to Assume Lifelong Responsibility for Cases, Be Accountable for Miscarriages* (2015), http://english.cri.cn/12394/2015/04/09/2982s873577.htm.

VI. CONCLUSION

Without changing the political rules of the game, China’s resilient state bureaucracy has accommodated successful economic and social transformation so far.[206] Many observers anticipate, however, this trend will not continue indefinitely.[207] Specifically, they believe there is a connection between economic growth and democratization, and judicial reform could be a crucial catalyst for this transformation.[208] The 2015 pilot reform presents an interesting and rare opportunity for researchers to test the potential of China’s politico-judicial bureaucracy to surrender power to the citizenry. The reform, hypothetically, could be a transitional point for the Party-state to dislodge its tight grip on courts and society and become a healthy supplement to address judicial elitism in China.

These hopes have not materialized. Convincing empirical evidence suggests that the reform is symbolic at best and does not address the PA institution’s root difficulties. The experiment of growing a democratic judicial institution in the soils of non-democratic politics seems to be futile. The PA regime remains a distorted institution, deliberately retained by state authorities as a symbol of popular justice and exploited by local judges as an instrument for administrative expediency. Owing to its duality of ideological appeal and practical utility, the PA regime has been institutionally strengthened, despite limited prospects for serving as an effective check on the exercise of state power or delivering a genuine representative of civic opinions on judicial affairs. The pilot reform, imprisoned within China’s judicial and political conditions, is no more than packaging old wine in a new bottle.

My research has captured, not only the struggles made by the PA institution to reconcile itself with a hostile political environment, but also, the tension between political authorities and civil society through anatomizing the PA reform dynamics. Central to these processes are the tensions between political organs and laypersons representing the ordinary citizens as well as the uneasy cohabitation of multiple layers of bureaucratic and individual interests under the authoritarian rule. Thus, the contours of

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206 SUSAN L. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA 6 (Univ. of California Press 1993).

207 Andrew J. Nathan, *China’s Changing of the Guard: Authoritarian Resilience*, 14 J. DEMOCRACY 6, 6 (2003).

208 STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 306–08 (2000); William P. Alford, *Tasselled Loaferes for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 36 (1995).

judicial reform have been structured by a self-interested bargaining process that unfolded between the reform's main stakeholders. The reform's limited achievements and substantial setbacks (depending on the view of the reader) are the optimal positions of dynamic policy equilibria acceptable to all parties.

The reform's experience has broader implications beyond the PA institution itself. It reveals the political heart of China's judicial reform. Lurking behind the tensions between judges and laymen is the state's control over its citizens and, equally worrisome, the lack of awareness and experience the citizenry has in engaging with public institutions. Caught up in this mutual disappointment is the very plight of Chinese courts. The administration of justice remains key to the exercise of state power. Courts are expected to fulfill the political tasks of effectively structuring social order by efficiently processing caseloads, bolstering political legitimacy by presenting lay participation as a veneer of popular engagement, and refraining from challenging the authoritarian governance of the Party-state by disallowing citizenry to overpower and challenge judicial authorities. That Chinese courts are frequently caught in the crossfire between state and society is deeply relevant for our understanding of the limits, as well as the potential, of past and future judicial reforms.