

# ARTICLES

## A TALE OF TWO JURIES: LAY PARTICIPATION COMES TO JAPANESE AND CHINESE COURTS†

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### I. INTRODUCTION

In 2009, Japan will take a long contemplated step by authorizing the use of mixed tribunals of professional and lay adjudicators in serious criminal cases – the so-called *saiban-in* system.<sup>1</sup> In a far less widely-noted step, China has, over the past two years, dramatically increased the use of a similar lay assessor system, not only in serious criminal cases, but in major civil and administrative proceedings as well. China's shift has been so rapid that there is exceedingly little discussion of the matter to be found in English-language materials, and there is not even a definitive translation of China's mixed tribunal Directive.<sup>2</sup>

It is remarkable that Japan and China have, at almost precisely the same moment, turned to the mixed tribunal jury mech-

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1. For a description and translation of the *saiban-in* law. See Kent Anderson & Emma Saint, *Japan's Quasi-jury (SAIBAN-IN) Law: An Annotated Translation of the ACT CONCERNING PARTICIPATION OF LAY ASSESSORS IN CRIMINAL TRIALS*, 6 *Asian-Pacific Law & Policy J.* 233 (2005).

2. We provide a translation of the Quanguo renmin daibiao dahui changwuweiyuanhui guanyu wanshan renmin peishenyuan zhidu de jue ding [DIRECTIVE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS CONCERNING IMPROVEMENT OF THE PEOPLE'S ASSESSOR SYSTEM], issued May 1, 2005, at Appendix I.

anism in their legal reform efforts. This is particularly striking because of the dramatically different histories of the two legal systems and the divergent legal frameworks into which reform is to be fitted.

For Japan, the reform effort comes after decades of nurturing one of the most capable judiciaries in the world. The effort appears to be driven by concerns about public disenchantment with an elite judicial corps viewed as out of touch with ordinary life and the judiciary's mishandling of a series of cases that have resulted in miscarriages of justice. Japan's reformers appear to be hoping that the cautious incorporation of lay decision makers at the margin of the criminal justice system will broaden the judicial outlook and help improve the reliability of the judicial branch of government. This step is being undertaken despite the failure of a similarly cautious jury trial initiative in the 1920s, as well as a set of procedural and professional barriers that will make it exceedingly difficult for laymen effectively to share courtroom responsibility with the judicial elite.

For China, the problem also appears to be decreasing public faith in the judiciary. In China's case, however, the difficulty is rooted in the failings of professional judges, who are poorly trained and tainted by widespread corruption. China's reformers have sought to address this challenge by re-energizing a system of lay assessors with origins in China's revolutionary past and a continuing presence in at least some Chinese courts. The difficulty here is that China may have neither the resources nor the political will to establish an effective and independent adjudicatory system.

This article will explore the growing desire in each nation for legal reform, the motivation for selecting the mixed tribunal procedure, and the prospects for reform success. The article will then seek to draw some lessons from these reform activities about the course of future developments in the Japanese and Chinese legal systems, as well as elsewhere.

## II. JAPAN

In Tokugawa Japan (1600-1868), little energy was devoted to the development of a formal legal system to resolve civil disputes. Emphasis was placed on conciliation, compromise, and mediation rather than adjudication.<sup>3</sup> In 1868, with the beginning of the Meiji era, Japan turned outward toward the Western world. An array of reforms was introduced, including, in 1890, a

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3. See Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339, 340-44 (1982).

court system and legal code based on that of nineteenth century Germany.<sup>4</sup> This system featured a classically inquisitorial fact-gathering mechanism that relied on inquiring judges to develop the evidence upon which cases were to be decided. The courtroom process was episodic rather than climactic, utilizing plenary and proof-taking hearings spread out over a number of months or even years. As befitted a country with little historical experience in the use of legal adjudication, the system was small in scale and staffed by a modest number of judges and lawyers. This legal machinery proved to be slow-moving and was, from its inception, plagued by delay.<sup>5</sup>

In 1926, a major effort was undertaken to speed the process, in part, by giving judges additional supervisory power in “preparatory proceedings” designed to focus and move cases. The bar, displaying the independence and resistance to change that has marked its attitude throughout the modern era, opposed these innovations and thus failed to appreciably speed or simplify litigation.<sup>6</sup> Some change came about in the aftermath of World War II, as the American occupation introduced a number of adversarial innovations into the Japanese legal machinery. Perhaps most significant among these was a shift away from reliance on the judge (or judges) to develop the facts at trial. The parties rather than the judge were assigned the leading role in examining witnesses.<sup>7</sup> Despite this shift, lawyers and judges clung to their episodic and essentially inquisitorial way of doing business. As Japan’s courts approached the end of the twentieth century, they still adhered to a slow-moving, delay-prone, fundamentally inquisitorial legal mechanism. That mechanism was still, as in Meiji times, presided over by a tiny group of judges, who heard the representations of a bar that would be considered minuscule in most other industrialized societies.

The development of the Japanese criminal process proceeded, more or less, along a parallel line. Adjudication was handled by judge-directed inquisitorial courts. Great emphasis was placed on securing the defendant’s confession – a traditional approach that dates from well before the Tokugawa era. Acquittals were exceedingly rare and the notion of an aggressive court-

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4. See Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?*, 45 AM J. COMP. L. 767, 767 (1997).

5. For a description of the inquisitorial process relied upon by Japan since 1890, see Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 KAN. L. REV. 687, 689-90 (1998).

6. *Id.* at 690-91.

7. *Id.* at 693-94.

room defense was unknown.<sup>8</sup> There was, however, a moment in Japanese legal history when this approach was questioned. It came in the 1920s during the period of the so-called Taisho Democracy. In 1923, a law was enacted to allow the use of independently deliberating twelve-member juries to decide factual questions posed by the evidence in serious criminal cases. These juries were not asked to render a verdict but rather to answer a set of interrogatories framed by the presiding judge. The goals of this innovation were to enhance confidence in the courts and boost the perceived legitimacy of their proceedings. Despite those lofty objectives, the jury mechanism was made available in only a small proportion of criminal cases. Moreover, the jury's contribution to the decision of a criminal case could be negated by the trial judge, who was authorized to strike its conclusions if he found them "unwarranted" and empanel a new jury to start over. The jury process was expensive, and defendants who used it lost the right to a round of appeals that not only reviewed questions of fact but also offered the appellate court an opportunity to reduce the defendant's sentence.<sup>9</sup>

It should come as no surprise that the jury experiment foundered. From its implementation in 1928 to 1943, when Japan's wartime government swept the jury mechanism aside, fewer and fewer defendants per year had their cases heard by a jury.<sup>10</sup> This fact notwithstanding, the acquittal rate in jury cases was 15.4 percent, an astounding figure in a country where acquittals were (and continue to be) a rarity.<sup>11</sup> The jury experiment failed for a host of reasons. It had the grandiose objective of democratizing justice. However, that goal could hardly be met by a reform so modest that it touched a mere handful of cases in any given year. Jury reform was opposed by prosecutors and never enthusiastically embraced by the Japanese bar, whose resistance to change had doomed a number of other innovations. It imposed a financial burden and deprived defendants of an important form of appeal. It challenged established expectations that acquittals would be rare. Finally, it did not fit comfortably into the judge-driven inquisitorial machinery of the Japanese criminal process.<sup>12</sup>

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8. The background and attributes of the Japanese criminal justice system described here are drawn from Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Procedure*, 80 CAL. L. REV. 317, 328-31 (1992) [hereinafter *Benevolent Paternalism*].

9. On the history of Japanese juries see Richard Lempert, *A Jury for Japan?* 40 AM. J. COMP. L. 37, 37-38 (1992); Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261, 266-70 (1999).

10. Lempert, *supra* note 9 at 37-38; Kiss, *supra* note 9, at 267.

11. Kiss, *supra* note 9, at 264, n.33.

12. See *supra* note 9; Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor*

Japan's justice system followed a predictable inquisitorial trajectory through the 1980s and early 1990s. Its reach was modest, and Japan had arguably the lowest litigation rate of any industrialized society, either east or west.<sup>13</sup> Its citizens mostly shunned the courts, and filings were flat for virtually the entirety of the twentieth century. There were only 2,250 judges and 18,000 *bengoshi* (courtroom qualified advocates) to serve a population of approximately 125 million.<sup>14</sup>

The judiciary of the early 1990s was remarkably small but highly skilled. It had a reputation for incorruptibility, hard work and consistency.<sup>15</sup> Though thousands took the bar examination each year, only two or three percent passed. Of this group, most of the best joined the ranks of the professional judiciary, committing themselves to a lifetime of judging.<sup>16</sup> A Japanese judge's life is governed by a set of rules that usually require him or her to move every three years, as a means of thwarting the creation of entangling personal or professional alliances in any locale.<sup>17</sup> Sustained effort and reliability are recognized through fast-track pay scale promotions and postings to desirable locations, particularly Tokyo. All of this is administered by the General Secretariat of the Supreme Court which uses its authority to exert significant control over judicial conduct.<sup>18</sup>

The civil legal process over which the judges presided, and in which the lawyers plied their trade, continued to be a slow-moving, delay-prone episodic affair.<sup>19</sup> The average civil case featured seven plenary hearings to address legal and procedural questions, two settlement hearings and four proof-taking sessions. The plenaries were, on average, held every 40 days or so, and the fact-gathering sessions every two-and-one-half months.<sup>20</sup> Trial decisions were generally followed by a lengthy appellate process. The legal machinery might be expected to grind on for years, clogging dockets, raising costs and delaying resolution.

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*System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 962-64 (2004).

13. See John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 121-24 (2002).

14. See Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM J. COMP. L. 561, 562-63 (2001).

15. See Haley, *supra* note 13, at 139.

16. See Ota, *supra* note 14, at 562 & n.4.

17. See J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J. LAW, ECON. & ORG. 259, 264 (1997).

18. *Id.* at 259-60, 267-68; Ota, *supra* note 14, at 562.

19. See Taniguchi, *supra* note 4, at 769; Ota, *supra* note 14 at 565; Kojima, *supra* note 5, at 689.

20. Kojima, *supra* note 5, at 689-90.

The criminal courts continued to pursue traditional Japanese law enforcement objectives in the framework of the inquisitorial process. The main goal was the securing of confessions. To this end, the police were ceded vast discretion in criminal investigations. They were authorized to detain and interrogate suspects for up to twenty-three days, a period often extended through a variety of procedural maneuvers.<sup>21</sup> Primarily, the police used this time to secure the all-important confessions from suspects. They were so successful at doing so that 90 percent of cases being sent to trial featured a full confession.<sup>22</sup> Police relied so heavily on confessions that serious factual and forensic investigation usually did not begin until a confession had been secured and was, generally, preoccupied with confirming the confession obtained.<sup>23</sup>

Prosecutors were also vested with enormous discretion.<sup>24</sup> Of the cases referred to them, 40 percent were sent to trial – the rest being disposed of by a variety of other means.<sup>25</sup> The prosecutor's job required the assembly of a written dossier presenting the grounds for conviction in the cases selected for trial. At the heart of this dossier was the confession so assiduously sought by the police.<sup>26</sup> Faced with tightly limited resources and organizational policies that were likely to lead to professional sanctions against a prosecutor who suffered an acquittal, prosecutors sought to winnow their caseloads down to "sure things." In this, they were incredibly successful, securing convictions in more than 99 percent of all cases tried.<sup>27</sup>

In contrast to the prosecutors, the defense bar was seriously constrained from zealous representation in the criminal process. Defense counsel were generally barred from access to clients being interrogated by the police.<sup>28</sup> A restriction on government-financed legal aid to the post-indictment phase of criminal proceedings meant that many defendants had no means of securing counsel until long after their interrogation and confession.<sup>29</sup> Few attorneys saw the criminal law as professionally promising. The

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21. See Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 429-31 (1991) [hereinafter *Right to Silence in Japan*].

22. See *Benevolent Paternalism*, *supra* note 8, at 336-37.

23. See *Right to Silence in Japan*, *supra* note 21, at 476.

24. See Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11, 75-77 (1992) [hereinafter *Death Row to Freedom*]; *Benevolent Paternalism*, *supra* note 8, at 346.

25. See *Benevolent Paternalism*, *supra* note 8, at 351.

26. See Kiss, *supra* note 9, at 265.

27. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 59-62 (2001) [hereinafter *Conviction Rate*].

28. See *Benevolent Paternalism*, *supra* note 8, at 338.

29. *Id.* at 374.

lawyers involved tended to be young and inexperienced.<sup>30</sup> Despite the existence of the right to cross-examine, most defense counsel followed the lead of those trying cases in civil proceedings and accepted voluminous written submissions at trial. They were generally inclined to advise clients to cooperate so as to win a more lenient sentence—perfectly sensible advice in light of the realities of the Japanese criminal process.<sup>31</sup>

The result of these procedural and professional arrangements in the criminal courts has been a process in which acquittals are virtually non-existent—usually less than 0.5 percent.<sup>32</sup> This comes as no surprise in light of the emphasis on, and inducements to, confession. The criminal process shares with the civil the episodic approach that can yield painfully slow progress toward judgment. In complex cases, like the Aum Shinrikyo poison gas attack in the Tokyo subways, years are likely to elapse before judgment is rendered.<sup>33</sup> And even when judgment is entered, there is ample room for appeal. Yet the results are entirely predictable, at least as far as guilt and innocence are concerned.

It has been argued that Japanese prosecutors succeed not simply because of their good judgment and skill, but because judges are little more than ratifiers of the prosecutors' conclusions.<sup>34</sup> The judges are provided the prosecutors' dossiers well before trial. The dossier's power to influence the judge's views is obvious and confirmed by empirical findings about the lasting impact of prejudicial materials on professional adjudicators.<sup>35</sup> Judges, like prosecutors, face professional hazards when they acquit defendants. Studies have demonstrated that acquittals, most particularly those involving the recognition of technical defenses and those concerning political outsiders, lead to a slowing of professional advancement and unattractive postings.<sup>36</sup> These factors serve as powerful disincentives to robust judicial scrutiny of the prosecution's cases. Knowledgeable observers have suggested that "prosecutors and not the courts conduct [. . .] the real trials of Japanese criminal defendants."<sup>37</sup> Takeo Ishimatsu, a former High Court judge, has said, "criminal trials . . . are conducted in

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30. *Id.* at 338.

31. *Id.* at 381.

32. See *Conviction Rate*, *supra* note 27, at 55.

33. See Carl F. Goodman, *Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism?*, 29 BROOKLYN J. INT'L L. 511, 555 (2004).

34. See *Benevolent Paternalism*, *supra* note 8, at 319; Kiss, *supra* note 9, at 265.

35. See Stephan Landsman and Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).

36. See *Conviction Rate*, *supra* note 27, at 54.

37. *Benevolent Paternalism*, *supra* note 8, at 319.

closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony.”<sup>38</sup>

In the mid 1990s, amidst strong criticism by the press and politicians, a concerted effort to reform the legal system was undertaken, led by the Justice System Reform Council. This group was headed by Professor Akira Mikazuke who employed a consensus-building strategy to bring bench and bar together for a serious and wide-ranging reform effort.<sup>39</sup> One of the most important results of this initiative was the overhaul of the Japanese Civil Code, a task completed in 1996.<sup>40</sup> The new code took a decidedly American and adversarial approach to Japan’s justice-system problems. It adopted procedures designed to reduce the scope and duration of the episodic hearing process. It embraced, at least on a limited basis, pre-trial discovery. It introduced managerial procedures like those employed at American pre-trials and committed the courts to moving the docket more rapidly.<sup>41</sup> The major thrust of reform was to overcome delay and curb costs.<sup>42</sup> While speed does not appear to have increased dramatically, Japanese judges have been taking a number of steps to reduce time-consuming activities.<sup>43</sup> Perhaps most striking in this regard is the declining use of live testimony.<sup>44</sup> Proceedings using no live testimony have steadily climbed in number and stand at more than one-third of all trials. The average number of witnesses used has dropped to less than one per case and reliance on documentary materials has grown proportionately.<sup>45</sup>

The shift in Japanese procedure toward the “common law family,” noted by the distinguished Japanese proceduralist, Takeshi Kojima,<sup>46</sup> has been accompanied by a radical change in policy about the size of the bench and bar. With limited manpower at its disposal, it would have been impossible for Japanese judges and lawyers to meet the full demand for legal services.

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38. *Id.* at 339.

39. *See* Ota, *supra* note 14, at 566-67.

40. *Id.* at 564.

41. *Id.*; Kojima, *supra* note 5 at 718.

42. *See* The Justice System Reform Council, Recommendations of the Justice System Reform Council for a Justice System to Support Japan in the 21st Century, ch. I, part 3, subsection 2, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> [hereinafter Reform Council Recommendations] (“For civil justice, the system must be reformed so as to enable the people to easily access the justice system as users and to obtain proper, prompt and effective remedies in response to diversified needs. . . First of all, with regard to litigation, the aim is to reduce the current duration of proceedings by about half . . .”); Ota, *supra* note 14 at 565, Kojima, *supra* note 5 at 687.

43. *See* Ota, *supra* note 14 at 561, 581.

44. *See* Taniguchi, *supra* note 4 at 774-75.

45. *See* Goodman, *supra* note 33 at 559-67.

46. Kojima, *supra* note 5 at 718.

This, inevitably, meant ever greater delay and expense. To alleviate the problem, the government committed itself to a radical departure from tradition. It has authorized a vast increase in the number of law schools, lawyers and judges.<sup>47</sup> The bar examination, while still extremely rigorous, is in the process of being adjusted so that two or three times as many new lawyers will be qualified at every sitting. The bar is to grow from 18,000 in 2001 to 50,000 by 2018.<sup>48</sup>

The criminal process, too, has been the target of reform. As was the case with respect to civil proceedings, there has been extensive concern about delay in criminal cases. The Diet (Japan's parliament) has moved to impose a two-year limit on the trial of most criminal as well as civil matters.<sup>49</sup> Another concern frequently voiced about the Japanese criminal justice system is that greater effort should be made "to avoid mistakes."<sup>50</sup> In the 1980s, the appellate courts had occasion to reverse a series of four capital murder convictions that had been rendered between 1948 and 1955.<sup>51</sup> In each case, a young ne'er-do-well had, after extensive police interrogation, confessed to a heinous crime. The defendants all repudiated their confessions but were, nonetheless, convicted. Although all the cases raised serious questions about the voluntary nature of the confessions obtained, the appellate courts that eventually reversed the convictions avoided focusing on the question of excessive police pressure. They chose, instead, to concentrate on the asserted unreliability of the corroborating evidence adduced in support of the confessions.

These cases triggered extensive press criticism of the courts. They were followed by a series of later cases involving similar miscarriages of justice, including the case of a taxi driver wrongfully convicted of rape on the strength of a dubious confession and the case of a young man erroneously found guilty of groping a teenage girl in the subway, again, on the strength of a questionable confession. The latter case was the subject of a documentary film entitled: "I Just Didn't Do It," by the internationally

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47. See Reform Council Recommendations, *supra* note 42 at ch. I, part 2, subsection 3 ("In order to achieve [Japan's legal goals] in the 21st century, the existence of a larger stock of legal professionals sharing the concept of the rule of law, and their wide range of activities in various fields of a society based on a spirit of mutual reliance and unity, are strongly demanded.")

48. *Id.* at ch. I, part 3, subpart 2(2); Ota, *supra* note 14, at 583.

49. See Goodman, *supra* note 33, at 517 & n.18.

50. *Benevolent Paternalism*, *supra* note 8 at 371.

51. The four cases determined, in the 1980s, to be significant miscarriages of justice are analyzed in detail in *Death Row to Freedom*, *supra* note 24. The present discussion of these cases is based on Professor Foote's analysis in that piece.

renowned director, Masayuki Suo.<sup>52</sup> In May 2007, the *New York Times* ran a front-page story about a string of false confessions procured by the police in Shibushi in connection with an alleged vote buying scheme pursued by the police after a powerful political figure suffered the embarrassing defeat of a protégé.<sup>53</sup> All the Shibushi cases featured excessive interrogation. One of the defendant-victims was awarded the equivalent of \$5,000 for the mental anguish caused by the affair.

Some have suggested that these cases are just the tip of the iceberg, a contention made more credible because of the system's extensive reliance on lengthy interrogations, unwillingness to protect defendants through the appointment of counsel, extraordinarily high conviction rate, and inclination to punish prosecutors and judges who are associated with certain sorts of acquittals.<sup>54</sup> Concern about mistakes has been linked to a broader worry that citizens' confidence in the justice system has declined. To remedy this situation, the Justice System Reform Council has proposed that: "A new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding the cases autonomously and meaningfully."<sup>55</sup> It has been claimed that bringing ordinary citizens into the justice system will increase public understanding of, and appreciation for, the system, as well as securing citizens' special insights (the sort of common sense insights elite judges are thought less likely to have because of their cloistered lives).<sup>56</sup>

To achieve these ends, the Reform Council recommended, and the government (in somewhat amended form) enacted, in 2004, a reform that established the so-called *saiban-in* system for the utilization of lay assessors in serious criminal trials. The "Act Concerning Participation of Lay Assessors in Criminal Trials" is to come into effect in 2009.<sup>57</sup> The lengthy and detailed legislation has more than 80 Articles and a set of supplementary provi-

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52. See Norimitsu Onishi, *Pressed by Police Even Innocent Confess in Japan*, *NEW YORK TIMES*, May 11, 2007, A1. Mr. Suo was the director of the international film success, *Shall We Dance*. *Id.*

53. *Id.* at A1 and A14.

54. *Benevolent Paternalism*, *supra* note 8. at 372-73.

55. Reform Council Recommendation, *supra* note 42, at ch. I, part 3, subsection 2(3).

56. *Id.* at ch. I, part 3, subsection 2(1); see also the "Legislative Reasons" set forth in the *saiban-in* law translated and reproduced in Anderson & Saint, *supra* note 1. at 283 & n.61. ("[H]aving lay assessors selected from among the people participating along with judges in the criminal litigation will contribute to raising the public's trust in and increasing their understanding of the judicial system . . .").

57. See Anderson & Saint, *supra* note 1, at 234.

sions.<sup>58</sup> As was the case with the jury trial legislation adopted in 1923, the present act applies only to major crimes warranting either the death penalty or, at least, one year in prison. (Article 2) It provides for mixed panels of professional judges (“judges”) and lay assessors (“assessors”) to decide both guilt and sentence in such cases. (Article 6) Where there are contested questions, the mixed panel is to be composed of three judges and six assessors. (Article 2) If there is “no dispute concerning the facts,” then a panel with one judge and four assessors is authorized. (*Id.*) The assessors are to be selected at random from local voter rolls to participate in one case only. (Article 13) Potential assessors are subject to background checks, must answer questionnaires, may be questioned before being qualified, and are subject to a limited number of peremptory strikes by both the prosecution and defense. (Articles 12, 30, 34 and 36) Potential assessors are to be disqualified if, among other things, they are ex-convicts, suffer from mental incapacity or work in law-related settings. (Article 14) Assessor candidates can opt out of service if, for example, they are 70 years of age or older, ill, or responsible for the care of a child. (Article 15) The court may strike candidates “who the court recognizes might not be able to act fairly in a trial.” (Article 18) Denial of a request that an assessor candidate be disqualified is subject to immediate appeal as is a judge’s decision to remove an already-seated assessor. (Articles 35 and 41)

Once the trial has begun, the prosecution and defense are required to make opening statements to the assessors. (Article 55) Assessors are specifically authorized to question witnesses, victims and defendants. (Articles 56, 57, 58 and 59) In the case of defendants, the questioning is to be mediated by the chief judge of the panel. (Article 59) The assessors and judges are jointly “entrusted to decide freely based on the strength of the evidence.” (Article 62) Their decision is to come after they have all participated in deliberations at which the assessors are free to “express an opinion.” (Article 66) The chief judge is charged with the duty of “conscientiously explaining the necessary laws or ordinances.” (Article 66) Acquittal is to be by majority vote, but conviction may only occur with the concurrence of a judge. (Article 67) Substantial barriers are erected to prevent assessors or others from making any public comment about deliberations. (Articles 70 and 79) The leaking of deliberation secrets is a crime, as is contacting an assessor or disclosing his or her identity to the public. (Articles 72, 73, 79 and 80)

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58. *Id.* at 235-83. All references to and quotations from the *saiban-in* law in the text are based upon the Anderson & Saint translation cited herein.

What are the prospects that the *saiban-in* system will succeed as a method of trying serious criminal cases and advancing the loftier goals set forth by the reformers? Both history and empirical data suggest that the lay assessor scheme will face substantial difficulties in achieving its objectives. As noted, Japan's last experiment with lay adjudicators was a failure. Jury trials were held in only a small number of cases. The procedure was resisted by prosecutors and produced negative incentives (particularly regarding appeals) that discouraged all but the hardest or most desperate of defendants. While the new system reduces user disincentives,<sup>59</sup> it has done very little to address the other problems encountered by the 1923 jury reform. The new rule applies to precisely the same set of cases as the old.<sup>60</sup> At least one estimate suggests that a maximum of 3,000 cases per year might be affected by the law,<sup>61</sup> and there are good reasons to believe that the number of mixed panel trials will be far smaller, as was the case in 1923.<sup>62</sup> With such a small number of trials, visibility and impact are likely to be very modest. Moreover, the negative professional consequences for prosecutors and judges associated with acquittals remain unaltered. These are likely to encourage both groups to resist the use of the assessor mechanism. That is particularly significant because prosecutors will be vested with the broadest discretion in choosing whether to send cases to jury trial<sup>63</sup> and "support by the prosecutor's office is crucial to [the system's] success."<sup>64</sup>

Since the 1920s, if not before, the Japanese legal profession and judiciary have faced criticism because of the slowness and costliness of courtroom proceedings. In the most recent round of reforms, a genuine effort has been made to speed the process. The Diet has imposed time limits on cases and a range of reforms has been introduced to cut costs.<sup>65</sup> It is doubtful that lay assessor trials will speed cases or reduce their expense in Japan. If a sin-

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59. According to Richard Lempert, the "most frequently mentioned" reason for the decline in use of the 1923 jury reform was that "defendants gave up their right to a first level appeal which could reverse convictions for factual as well as legal errors and had a tendency to result in mitigated sentence." Lempert, *supra* note 9, at 38. The new law addresses this problem and allows "immediate appeal . . . by either the defense or prosecution." Robert M. Bloom, *Jury Trials in Japan*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 35, 41 (2006); see also Anderson & Nolan, *supra* note 12, at 957.

60. See Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 *WASH. U. GLOBAL STUD. L. REV.* 231, 243 (2003).

61. See Bloom, *supra* note 59, at 41 n.44.

62. See Lempert, *supra* note 9, at 37-38.

63. See Anderson & Nolan, *supra* note 12, at 953. ("Whether a lay assessment panel is convened is solely at the prosecutor's discretion.")

64. *Id.* at 974.

65. See Goodman, *supra* note 33, at 516-17.

gle concentrated hearing (the sort that best fits with an assessor system) can be arranged instead of episodic proceedings, things may indeed move faster.<sup>66</sup> However, for that to happen live witnesses need to be identified, prepared, summoned and examined all together in open court.<sup>67</sup> Japan has a system which, because of time concerns, is moving steadily away from live testimony in open court. The likelihood that it will reverse that trend for lay assessor trials seems small. Even assuming that the courts are willing to embrace the time-intensive task of witness examination, there remains the matter of the *bengoshi's* reluctance to make the substantial and expensive effort necessary to prepare for such hearings.<sup>68</sup> The Supreme Court of Japan voiced this concern in opposing the use of mixed tribunals before the *saiban-in* system was adopted.<sup>69</sup> As Professor Kojima has noted, an episodic process uses less court time and pretrial preparation resources (at least in the short run) than a concentrated trial, making the expense of assessor trials a real problem in a system acutely concerned about such matters.<sup>70</sup> Of course, these concerns are diminished if assessor hearings focus exclusively on documentary material. Limiting the evidence in this way in the prosecution of major criminal charges is troubling, and would deprive the court of the assessor's common-sense assessment of witness credibility, one of the most significant contributions laymen might make to the process.

It has been frequently remarked that lay jurors are more inclined to acquit than their professional counterparts.<sup>71</sup> This was

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66. The Reform Council urgently pressed, in its report, for speedy concentrated hearings declaring: "what is most important is that, as much as possible, the trial should be conducted on consecutive days on a continuing basis." Reform Council Recommendation, *supra* note 42, at ch. 4, part 1, subsection 1(4)(a).

67. See *supra* note 45.

68. See Lempert, *supra* note 9, at 43; Kojima, *supra* note 5, at 689. The bar's resistance could be particularly significant because it led to the "failure of the past reform efforts." Taniguchi, *supra* note 4, at 771, 790.

69. See Sabrina Shizue McKenna, *Japanese Judicial Reform: Proposal for Judicial Reform in Japan: An Overview*, 2 *ASIAN-PACIFIC L. & POL'Y J.* 121, & n.105; Kodner, *supra* note 60, at 242-43 & nn.83-84.

70. See Kojima, *supra* note 5, at 689.

71. See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 157 (1966) (American juries tended to acquit in close cases when professional judges tended to convict); Lempert, *supra* note 9, at 54-55. It might be suggested that these American data tell us little about the likely behavior of Japanese lay assessors. It should be recalled, however, that the Japanese jury reform of 1923 produced substantially more acquittals than its professionally adjudicated counterpart. See note 11 *supra*. A jury-related trend toward acquittal was noted in Russia after the introduction of jury trial in certain sorts of cases in that country. See Inga Markovitz, *Exporting Law Reform - But Will It Travel?*, 37 *CORNELL INT'L L. J.* 95, 107 (2004). It should be emphasized that the American, Japanese and Russian data all focus on independently deliberating juries rather than mixed tribunals. Similar data have been reported from Poland where mixed tribunals are in use. See Stanislaw Pomorski, *Lay*

the case in the jury trials conducted in pre-war Japan. If the same thing happens in the new system, it will introduce an element of uncertainty into Japanese criminal procedure which heretofore could rely on a conviction rate in excess of 99 percent. Uncertainty raises the cost of deterrence as more defendants choose to contest their guilt (unless offered an exceedingly attractive deal).<sup>72</sup> Several commentators have highlighted the risk that the lay assessor reform will increase "the pressure to, in effect, 'plea bargain'. . . something that is at least formalistically antithetical to Japanese prosecutorial culture."<sup>73</sup> Caseload concern, in addition to the previously noted adverse professional consequences associated with acquittal, suggest that there is likely to be substantial judicial and prosecutorial resistance to lay assessor trials. Here, again, the assessor mechanism may create new costs and risks that will undermine the prospects for success.

Professional opposition is particularly important because, over the course of the last 80 years, reform proposals have repeatedly been undermined by resistance from within the judiciary and legal profession.<sup>74</sup> There is good reason to anticipate that resistance may scuttle the *saiban-in* system. Separate and distinct from general judicial concern, the Supreme Court of Japan made its opposition to lay participation abundantly clear during the debate preceding the passage of the law.<sup>75</sup> The Court said that it was worried not only about the cost of such a system but about a number of other issues as well. These include the risks of prejudice due to pretrial publicity and of jury tampering.<sup>76</sup> At bottom, these concerns express a deep skepticism that citizen assessors can match the level of performance maintained by Japan's elite judiciary. Such arguments also tend to denigrate the legitimacy benefits emphasized by reformers. If the Supreme Court continues to hold such views (although turnover on the Japanese Supreme Court leaves that an open question), assessor decisions are likely to remain suspect and subject to close judicial scrutiny. The Court also expressed concern about the non-reviewability of an assessor-determined acquittal.<sup>77</sup> Here the Supreme Court seemed to be voicing a concern about the potential erosion of judicial power worked by the *saiban-in* arrangement. If the assessor system is regarded as a threat to judicial authority

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*Judges in the Polish Criminal Courts: A Legal and Empirical Description*, 7 CASE W. RES. J. INT'L L. 198, 206 (1975).

72. See *Benevolent Paternalism*, *supra* note 8, at 322-23.

73. Anderson & Nolan, *supra* note 12, at 953.

74. See *supra* note 68.

75. See *supra* note 69.

76. *Id.*

77. See Kodner, *supra* note 60, at 242 n.83.

it is likely to be curtailed by hostile court rulings limiting the law's applicability. Hostility may also be expected from prosecutors and defense counsel. For prosecutors, assessor cases heighten the career threatening risk of acquittal.<sup>78</sup> For defense counsel, the process is likely to mean far more pre-trial labor.

The lay assessor law, although remarkably detailed, still leaves a great deal to be worked out. Where a system is rich in experience and can draw upon a robust body of empirical research, there are sufficient resources to enable it to successfully address the sorts of practical challenges posed by a process that relies on non-professionals to make legal decisions. The American Bar Association ("ABA") recently undertook such a project when it revised its *Principles for Juries and Jury Trials*.<sup>79</sup> In doing so, it relied upon a wealth of prior case law (hundreds of cases are cited in the commentary appended to the new Principles), several sets of previously developed standards (the ABA had three previously endorsed sets from which to work)<sup>80</sup> and a large body of social science materials (research materials are cited in support of 12 of the 19 Principles). These made it far easier for the ABA to adopt reforms embracing the one-day-one-trial concept (Principle 2), juror note taking (Principle 13), juror questioning of witnesses through the submission of written queries to the court (Principle 13) and heightened support for unanimous verdicts. (Principle 4) The Japanese law fails adequately to address any of these problems, although all are likely to confront Japanese courts, judges and assessors. These omissions are not surprising in light of the dearth of experience and research available. Whether trials can be concentrated in a specific and designated moment, so that assessors will not face excessive demands on their time and will be offered a comprehensive view of the evidence, is not at all clear.<sup>81</sup> Whether assessors should be allowed to take notes or use other aids to recollection has not been determined.<sup>82</sup> It would appear that, at least as to witnesses and

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78. See *Right to Silence in Japan*, *supra* note 21. at 471-72; McKenna, *supra* note 69, at 142 & n.105.

79. AMERICAN BAR ASSOCIATION, *PRINCIPLES FOR JURIES AND JURY TRIALS* (2005).

80. See AMERICAN BAR ASSOCIATION STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993); AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996); AMERICAN BAR ASSOCIATION CIVIL TRIAL PRACTICE STANDARDS (1998).

81. The Reform Council's call for concentrated trials was set forth above. See *supra* note 64. There is no indication in the *saiban-in* law that concentrated trials are required. Article 52 of the law requires that assessors "appear at the time and place for questioning and inspection of witnesses and other persons that is done by the court in trial preparation or on the trial date." This phrasing suggests an episodic process, although the matter is not free from ambiguity.

82. See Bloom, *supra* note 59, at 61.

victims, assessors will be free to ask whatever questions they wish.<sup>83</sup> This unmediated questioning by laymen may pose a range of relevancy, privilege, prejudice and questioner-competence issues.<sup>84</sup> Finally, it would appear that the law has concluded that unanimity is an objective which need not be pursued. Such an approach is likely to result in weaker decisions and ones that are open to criticism because they marginalize dissent.<sup>85</sup> Considering these and similar difficulties, implementation is going to prove challenging and vulnerable to serious missteps.

It was fashionable in some American scholarly circles in the 1970s and 1980s to praise German criminal procedure as a superior method for dispensing justice.<sup>86</sup> Recent academic consideration of these claims suggests that the German system, which is very similar to the *saiban-in* procedure, offers little in the way of justice system improvement in terms of citizen involvement, efficiency or effective scrutiny of the evidence presented in court.<sup>87</sup> German lay assessors are authorized to serve along with professional judges in a fairly broad array of criminal cases.<sup>88</sup> Empirical assessment suggests, however, that they only serve in 5.4 percent of the cases for which they are eligible.<sup>89</sup> Even when they do sit, their function is mainly decorative. It has been estimated that German lay assessors affect the outcome in only 1.4 percent of the cases they hear.<sup>90</sup> In part, that is because criminal trial outcomes are powerfully influenced by the dossiers prepared by prosecutors and submitted only to the professional

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83. Lay assessor authority to question witnesses and victims is provided for in Articles 56-58 of the *saiban-in* law.

84. For ABA concerns about unmediated questioning of witnesses by jurors, see PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 79, at Principle 13C, Commentary.

85. On the value of unanimity see PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 79, at Principle 4 and Commentary (unanimity increases accuracy and representativeness of decisions as well as enhancing public confidence). The Japanese bar believed that a unanimity requirement was needed. See Anderson & Nolan, *supra* note 12, at 950.

86. See John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195; see also Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

87. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997); see also Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW U. L. REV. 705 (1988).

88. See Dubber, *supra* note 87, at 558, figure 1.

89. *Id.* at 563.

90. *Id.* at 565 & n.93, 584 citing Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 189 (1972).

judges.<sup>91</sup> The presiding professional judges generally “dominate” both criminal and civil proceedings.<sup>92</sup> The lay assessors most frequently sit in silence. According to one study, assessors asked no questions 60 percent of the time when they sat on three professional/two assessor panels and 54 percent of the time when they sat on one professional/two assessor panels.<sup>93</sup> Assessor contributions have been viewed as so modest that there have been calls to dispense with their participation.<sup>94</sup> German mixed panels are generally agreed to be slow and inefficient.<sup>95</sup> Their use was begun as a way to save money (by cutting the number of lay participants) rather than speed litigation.<sup>96</sup> Lay assessor proceedings have done little to improve the operation of German courts.

This German research raises serious questions for Japan. There does not appear to be any mechanism built into the *saiban-in* system to inhibit prosecutorial shifting of cases to other sorts of tribunals to avoid mixed-panel trials.<sup>97</sup> Such shifting is a fact of life in Germany, and the availability of opt-out mechanisms in Japan’s law make the same result likely there.<sup>98</sup> The German professional judge domination of proceedings is likely to be replicated in Japan. The judges’ high status, elite backgrounds and legal knowledge make them particularly powerful figures in a society, such as Japan’s, which honors high status and is acutely sensitive to hierarchical arrangements.<sup>99</sup> The inefficiencies of mixed tribunals, like Germany’s, are likely to be particularly irritating in Japan, where significant reform efforts are under way to speed trials and cut costs. Finally, Japan also relies on a prosecution-submitted dossier to inform the professional judges. This document has been identified as a powerful influence on judges in Germany—one that often determines the outcome of cases

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91. *Id.* at 555.

92. *Id.* at 580.

93. *Id.* at 582-83 & n.205 citing Casper & Zeisel, *supra* note 90, at 150.

94. *Id.* at 587 & n.234.

95. *Id.* at 555, 567-69.

96. *Id.* at 576.

97. Article 2 of the *saiban-in* law allows the defendant to ask the court to “revoke” the mixed tribunal process whenever it “is not suitable for handling the case considering the trial situation and other circumstances.” Article 3 authorizes a broad exception to the use of mixed tribunals when there is “fear of significant violation of [a lay assessor’s] peaceful existence. . . or other similar circumstances.” And, of course, the prosecution has vast discretion in deciding what sorts of charges to bring and, thereby, may control the prospects for a mixed tribunal trial. See *Benevolent Paternalism*, *supra* note 8, at 346-51.

98. See Dubber, *supra* note 87, at 567.

99. See Kiss, *supra* note 9, at 273-75; Bloom, *supra* note 59, at 56-57; Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 L. & SOC’Y REV. 347, 376 (1989) (in situations “bounded closely by law” lay decision makers are inclined to “turn to those with apparent authority or greater legal knowledge for guidance.”)

but that lay assessors never see.<sup>100</sup> Former High Court judge Takeo Ishimatsu has indicated that the same is true in Japan.<sup>101</sup> In such circumstances it should not be anticipated that Japanese lay assessors will have any greater impact on criminal adjudication than their German counterparts. Most cases will have been decided before the assessors begin their work.

It is claimed that the Japanese reform will serve to reassure the public about the criminal process and demonstrate to the citizenry the high quality of Japan's judiciary. This line of argument is familiar to those who have read De Tocqueville's work on the American jury.<sup>102</sup> Whether it has any application in Japan, where the work of judges and lay assessors will be intertwined and where judges are likely to dominate, is open to question. Assuming that lay assessors are impressed by what they see in the courts, the educational effect is still doubtful. There will be so few lay assessors in Japan that whatever they see is not likely to be widely disseminated. This difficulty is compounded by the lay assessor law, which establishes a set of strict and broad ranging secrecy requirements. Those who "leak deliberation secrets" are subject to a fine and imprisonment. (Article 79) Persons who disclose the identity of lay assessors are subject to even stiffer penalties. (Article 80) This curtain of secrecy is likely to hide virtually all mixed tribunal activity from public examination. If the lay assessors are supposed to be watchdogs on behalf of the public, they are going to be ineffective ones. The law under which they serve forbids them to bark.

Japan today has a criminal justice system with an incredibly high conviction rate and an impressive record of social rehabilitation of offenders. It has been fairly described as a system of genuinely benevolent paternalism and has, to all appearances, mirrored the values of the vast majority of Japanese citizens.<sup>103</sup> The country is served by a highly regarded judiciary. Under such circumstances, it is hard to imagine that significant change will be embraced.<sup>104</sup> Lay assessors are likely to serve no more than a decorative role. If their presence threatens to undermine the sys-

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100. See Dubber, *supra* note 87. at 555, 578-80.

101. See *supra* text accompanying note 38.

102. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 295-96 (1945).

103. See *Benevolent Paternalism*, *supra* note 8.

104. Richard Lempert, in his excellent article exploring the viability of jury trials in 1970s Japan highlighted a key issue when he stated: "In deciding whether we want to entrust legal fact-finding responsibilities to such a group, we must examine the alternative." Lempert, *supra* note 9. at 45. Today, the comparison may be framed as between a highly talented cadre of judges and a reticent citizenry, reluctant to participate in the challenging task of dispensing justice. On the citizens' reluctance to participate see Norimitsu Onishi, *Japan Learns Dreaded Task of Jury Duty*, *NEW YORK TIMES*, July 16, 2007, A1 & A5 [hereinafter *Task of Jury Duty*].

tem as presently constituted, there is every likelihood that the lay assessors will be sent packing, as were twelve-person juries before them. This does not mean that Japan's present system is perfect, or even enviable. It vests police with vast discretion which they use to pressure suspects into confessions—sometimes false.<sup>105</sup> It vests prosecutors with powers that generally dictate the outcome of proceedings. The power granted to police, prosecutors, and judges leaves little room for lay assessors.

### III. CHINA

Legal proceedings did not form a central part of social ordering in pre-modern China.<sup>106</sup> Things began to change early in the twentieth century, but the Japanese invasion, civil war and rise of the communist regime slowed the development of courts and legal processes. In 1957, less than a decade after seizing power, the Chinese Communist government launched the so-called "Anti-Rightist Campaign." This initiative promoted a purge of intellectuals, including a large number of legal professionals.<sup>107</sup> Attempts in the early 1960s at rebuilding the legal system were short-lived because in 1966, Mao Zedong initiated the ten-year reign of terror commonly referred to as the Cultural Revolution. The forces directed by Mao sought to destroy the courts because they were "a bastion of bourgeois justice."<sup>108</sup> It was only with Mao's passing and the rise of Deng Xiaoping that China finally took a decisive turn toward the establishment of an effective legal system.<sup>109</sup> In 1979, China's law schools were reopened, criminal law was reformed, and China began what has been described as legal "institution-building."<sup>110</sup>

It is interesting to note that despite (or perhaps because of) these challenges to professional legal activity, Chinese initiatives

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105. See *Death Row to Freedom*, *supra* note 24.

106. See Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM L. & POL'Y 569, 571-72 (2000) ("The judicial system in Imperial China functioned as part of the administrative delegation of the central government, and no private legal profession served the system in any significant capacity.")

107. See Mike P.H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157, 166 (2001).

108. See Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT'L LAW 1039, nn.33 & 34 quoting JASPER BECKER, *THE CHINESE* 326 (2000). Judge Jack Weinstein, writing about the period of the Cultural Revolution concluded: "There was really no Chinese legal system." Jack B. Weinstein, *Some First Impressions of the Legal System in Three Chinese Cities*, 24 BROOK. J. INT'L L. 221, 229 (1998).

109. See Di Jiang, *supra* note 106, at 572-73.

110. See Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People's Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433, 442 (2005).

involving lay participation in adjudication stretch back to the early twentieth century. In 1906, during the waning days of the Qing Dynasty, plans were drafted for a jury system.<sup>111</sup> These were never realized, but were picked up by the government of Sun Yat-Sen in 1927.<sup>112</sup> The idea of participation by the “people” in legal decision making was one the communists found congenial and utilized, at least occasionally, behind their front lines during the civil war.<sup>113</sup> With the communist victory in 1949, lay participation received a boost. Article 75 of the 1954 Constitution, perhaps drawing inspiration from the Soviet Union, specified that: “People’s courts should utilize the lay assessor system according to the law.”<sup>114</sup> Because of the small volume of legal business and reliance on legal machinery that made little allowance for lay assessors, they were not much used. When called to court, the assessors were most likely to be selected on the basis of their loyalty to the Chinese Communist Party and their peasant background.<sup>115</sup> These early assessors had little education and were brought into the system because of their ideological zeal. With the start of the Cultural Revolution in 1966, normal legal processes were swept aside and replaced by public demonstrations following the mass line, directed by acolytes of the Cultural Revolution.<sup>116</sup> These sessions were generally violent, cruel, and grossly unfair. To this day, the recollection of such proceedings colors how many in China think about non-professional involvement in the courts.<sup>117</sup> When Deng sought, in 1979, to revive the judicial system, he turned to professionals rather than the masses. The use of lay assessors was made optional in the Constitution of 1982.<sup>118</sup> Nevertheless, assessors continued to be used in a number of places. Beginning in the late 1980s, China sought to improve the quality of its professional judges. This proved to

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111. Li Jian, *Yi lun wo guo renmin pei sheng yuan zhi du: yi li shi, jia zhi, fa li ji shi xian wei jing jiao – jian ping quan guo rend a chang wei “guan yu wan shan renmin pei sheng yuan zhi du di que ding”* [*An Analysis of People’s Assessor System: from the Perspective of History, Value, Legal Theory And Practice—with a Discussion of Directive on the Improvement of the People’s Assessor System*], at <http://www.fsou.com/redirect/index.asp?url=http://law.chinalawinfo.com/newlaw2002/slc/slc.asp?db=art&gid=335578952>.

112. See Huai Xiaofen & Sun Benpeng, *Renmin pei sheng yuan zhi du he li shi bian qian* [RESEARCH ON PEOPLE’S ASSESSOR SYSTEM] 155 (2005).

113. Li Jian, *supra* note 111.

114. HUAI & SUN, *supra* note 112 at 19; see Cherif Bassiouni, *The Criminal Justice Systems of the Union of Soviet Socialist Republics and The People’s Republic of China*, in *HANDBOOK OF CRIMINOLOGY* (Daniel Glaser ed. 1974) 582-83 (in the middle 1950s China adopted a mixed tribunal system “patterned after that of the U.S.S.R. *Id.* at 582).

115. HUAI & SUN, *supra* note 112, at 4.

116. *Id.* at 7.

117. *Id.* at 11.

118. *Id.* at 9.

be a daunting task because in the early days of Deng's reforms (and for a long time thereafter), the ranks of the judiciary were filled with poorly educated and poorly trained retired military servicemen.<sup>119</sup> These things stood until another round of reforms was embarked upon in the second half of the 1990s.

The system created in response to Deng's call for a legal revival is powerfully hierarchical.<sup>120</sup> At its apex is the Supreme People's Court, which has extensive authority over the entire justice system.<sup>121</sup> Below it are 31 "higher courts," one for each Chinese province. Next come the "intermediate courts," of which there are 389 located in each prefecture. Finally, there are 3,067 "primary courts" which do their business at the county level. Cases work their way up this legal ladder, although all need not be commenced at the lowest rung. The cases move from lower to next higher court according to a "two trial" scheme, in which the initial decision may be reviewed *de novo* at the next higher court level.<sup>122</sup> Cases are decided by collegial panels. However, the key decision-making body in many cases is not the panel hearing the matter, but an "adjudicative committee" composed of senior judges either at, or above, the collegial panel's level. This body is consulted in difficult or important matters and, without hearing the evidence, may render binding instructions about how the case should be resolved.<sup>123</sup>

Observers and participants alike have noted that this system makes little allowance for judicial independence, a point reflected in the internal regulation of the judiciary, which cedes substantial authority to senior judges over their juniors (*qingshi*) and to the adjudicative committee over collegial panels.<sup>124</sup> Those below have little choice but to follow the direction of those above. Independence is also sharply curtailed through Chinese political arrangements. As with virtually all other aspects of Chinese life, the Communist Party has extensive power over the ju-

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119. See Zou, *supra* note 108, at 1051.

120. See Vernon Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 99 ("The lack of independence in the Chinese judiciary is also reflected in the widespread practice of *qingshi*—that is, junior judges or judges of lower courts frequently reporting to and seeking advice from senior judges or those in upper courts.")

121. The description of the Chinese legal system is drawn from Zou, *supra* note 108, at 1043-44.

122. *Id.*

123. See Chu, *supra* note 107, at 184 (focusing on "adjudicative committees" in the criminal process); Zou, *supra* note 108, at 1044 (considering the function of the same entity, though referred to as the "judicial committee" in the broader civil and administrative settings); Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved this Goal?*, 13 J. TRANSNAT'L L. & POL'Y, 393, 397 (2004) (same, using term "adjudication committee").

124. See *supra* note 120.

dicial system. Knowledgeable commentators have called the party an “invisible but decisive hand’ hidden in the legal machinery.”<sup>125</sup> More than 90 percent of all judges are party members and are subject to party discipline.<sup>126</sup> The party has, at the level of each political subdivision, a committee dedicated to monitoring the doings of the justice system. In any case in which the party takes an interest, it may issue instructions or less formal suggestions highly likely to determine the outcome of the matter.<sup>127</sup> Politics of another sort may also come into play. Judges are selected by the People’s Congress constituted in the political subdivision in which it sits. Not only do local political entities select the judges, they provide the budget for the court’s operations. This gives local politicians substantial leverage over the judges.<sup>128</sup> In 1998, when a group of 288 Chinese judges was surveyed about judicial independence, not a single judge thought that judges “completely realized” the constitutional principle that “judges shall independently exercise their adjudication rights.” More than 40 percent of the judges agreed that the courts had “basically not realized” this principle.<sup>129</sup>

China’s judicial system is operated by more than 170,000 judges.<sup>130</sup> Many of these came to the courts upon retirement from the military with little formal education or training in the law. Although a substantial effort has been commenced to improve the quality of the judiciary, it is still, especially at the lowest levels, full of judges “lacking the knowledge needed to do their jobs.”<sup>131</sup> In 1997, approximately 5.6 percent of judges had the equivalent of a bachelor’s degree and only 0.25 percent any advanced degree. The rest had, at most, two years of higher education—and in the majority of cases, none at all.<sup>132</sup> The weakness of the lower court bench has led to a steady stream of appellate reversals. More than 50 percent of trial decisions are appealed, and only 26.6 percent stand upon second hearing. It is

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125. Zhong & Yu, *supra* note 123, at 415.

126. See Zou, *supra* note 108, at 1049 & n.56; Deborah Chow, *Development of China’s Legal System Will Strengthen Its Mediation Program*, 3 CARDOZO ONLINE J. CONF. RESOL. 4 (2002).

127. See Zou, *supra* note 108, at 1048.

128. See Hung, *supra* note 120, at 95-97; Zou, *supra* note 108, at 1047.

129. See *Ming shi si fa gai ge yan jiu*, [Research on Civil Litigation Reform] 65 (Qi Shuite ed., 2004).

130. See Hung, *supra* note 120, at 99-100.

131. In 2000, Xiao Yang, the President of the Supreme People’s Court, used these words to describe a significant segment of the Chinese judiciary. Hung, *supra* note 120, at 105 & n.141, citing John Pomfret, *China Claims Clean-Up in Courts; Reports Run Counter to Perceptions of Broad Corruption*, WASH. POST, Mar. 10, 2000.

132. See Zou, *supra* note 108, at 1051.

not judges alone who are poorly trained.<sup>133</sup> Lawyers also have little education. It was only in 1986 that a nationwide licensing examination was initiated. Before that, individuals entered the legal profession with neither adequate training nor demonstrated ability.<sup>134</sup>

The problem posed by judicial incompetence (along with corruption) has been considered so serious that China has adopted a system of “Wrong Verdict Liability” to punish judges for serious errors that cause significant harm.<sup>135</sup> These errors can arise from negligence as well as willful misconduct.<sup>136</sup> The existence of this mechanism suggests a system so poorly staffed as to warrant the most draconian discipline. It is reminiscent of the attain system used to punish jurors for wrongful verdicts in sixteenth century England. That system was premised on the notion that jurors were, essentially, witnesses and errors were akin to perjury.<sup>137</sup> In China, the idea seems to be that judges are so careless, ill-informed, or corrupt that they should be deterred from independent judgment, and punished whenever they stray from the presumptively clear dictates of the law.

It is widely agreed that China’s judiciary is plagued by corruption and favoritism. From 1993 to 1997, more than 17,000 judicial workers (judges and other court personnel) were convicted of corruption-related offenses.<sup>138</sup> From 1998 to 2003, the number was 7,500,<sup>139</sup> and in 1998, the Supreme People’s Court, along with other governmental entities, launched an intensive anti-corruption campaign.<sup>140</sup> This first effort appeared to fall short of the mark, and a second campaign was begun in 2001.<sup>141</sup> Xiao Yang, President of the Supreme People’s Court, has repeatedly spoken out against corrupt judges — castigating members of the judiciary for authorizing torture, condoning document forgery and using the trial process to collect bribes.<sup>142</sup> Particularly widespread abuses include *ex parte* meetings with litigants, recommendations that parties hire particular lawyers and solicitation of loans from litigants, notwithstanding the fact that all have specifically been banned.<sup>143</sup>

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133. See Zhong & Yu, *supra* note 123, at 428-29.

134. See Lo & Snape, *supra* note 110, at 444.

135. See Zou, *supra* note 108, at 1056.

136. *Id.*; Hung, *supra* note 120, at 105.

137. See Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 584-85 (1993).

138. See Huai & Sun, *supra* note 114, at 83.

139. See Hung, *supra* note 120, at 106.

140. See Zhong & Yu, *supra* note 123, at 433.

141. *Id.* at 434.

142. See Hung, *supra* note 120, at 106.

143. See Zou, *supra* note 108, at 1058 & n.106.

Overtly venal behavior is not the only form of impropriety to be observed in China's courts. Local political leaders and government agencies have used their appointment power and budget control to exert pressure on courts, especially in administrative cases, to decide in their favor.<sup>144</sup> Not only have hometown officials brought pressure to bear on judges, they have refused to appear to answer charges, pressured witnesses, blocked the transfer of cases to higher courts beyond the reach of their influence, and intimidated claimants into dropping cases.<sup>145</sup> More subtle influences have also been at work. The Chinese have long relied on special relationships to facilitate business. These connections can grow out of family ties, local allegiances, or ingratiation through gift giving. Such connections are summed up in the Chinese word "*guanxi*."<sup>146</sup> At its best, *guanxi* describes that sort of social relationship that binds the members of a community together in friendship and mutual obligation. At its worst, it can become an organized system of favoritism. *Guanxi* is a way of life in China and contributes to corruption concerns. A group of attorneys polled about their profession reported that one of the things that most disturbed them in their practice was the pressure of *guanxi*.<sup>147</sup>

Despite the challenges posed by a lack of legal traditions, an ill-trained legal community and corrosive corruption, China's court system has made significant strides in recent years. The number of cases filed has soared from 2.9 million in 1990 to roughly 5.1 million in 2002.<sup>148</sup> Qualification requirements for both judges and lawyers have been raised and there has been a steady influx of talented professionals.<sup>149</sup> China has also embarked on a series of reforms designed to improve the system. In 1996, a statute was passed concerning the practice of law. The legislation shifted China away from conceptualizing members of the bar as "government workers," as had previously been the case, toward viewing them as independent professionals charged with the duty of zealously representing individual clients.<sup>150</sup> This shift toward a client-centered legal practice has raised the status and appeal of the bar, both to clients and talented young people considering a legal career. The bar jumped from 70,000 in 1993

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144. See *supra* note 125,.

145. See Hung, *supra* note 120, at 91-92.

146. *Id.* at 94-95.

147. See Lo & Snape, *supra* note 110, at 450.

148. See Hung, *supra* note 120, at 83, Table 1 (in 1990 there were a total of 2,916,774 "first-instance" cases, that number grew to 5,132,199 in 2002).

149. See Lo & Snape, *supra* note 110, at 433-34.

150. *Id.* at 452.

to 150,000 in 2001, and a healthy rate of growth has continued.<sup>151</sup> Standards were further raised by the institution of a national bar examination in 1986.<sup>152</sup> An older generation of less talented lawyers remains, but is being augmented and slowly replaced by far more skilled advocates. China has moved toward an American-style legal profession and has seen lawyer skill and importance grow.<sup>153</sup> There is still, however, a great deal to be done. In a range of cases, attorneys face disbarment and other penalties if their advocacy on behalf of private clients shades into what officials determine to be obstruction of justice.<sup>154</sup> Officials have used this vague charge, in some cases, to punish lawyers for their zeal. However, the forces unleashed by the reform of the Chinese legal profession are growing ever stronger and are unlikely to be extinguished unless the government commits itself to a drastic crackdown—a decision likely to have the most serious national and international repercussions.

In the same year that the new lawyer law was adopted (1996), China also embarked on a major criminal justice system reform initiative.<sup>155</sup> An accused defendant's right to counsel was expanded and the rudimentary beginning of a legal aid system was put in place. Judges were directed to cease conducting independent investigations into criminal charges and instead to function as decision makers whose task was to weigh the prosecution's and defense's cases. Judges were still to be provided with the prosecutor's dossier outlining the case for conviction, but were no longer to seek to confirm it outside the trial process. The old system of "verdict first trial second" (*xianding houshen*) gave way to an approach that separated the prosecutorial function from the judging function.<sup>156</sup> The effect of these and other reforms was to move China's criminal procedure in the direction of an adversarial process and away from an inquisitorial one.<sup>157</sup>

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151. *Id.* at 433-34.

152. *Id.* at 442.

153. *Id.* at 441-42.

154. See Hung, *supra* note 120 at 88-89 ("[M]ost lawyers are not keen to handle administrative cases for fear of losing their license to practice law [if officials deem their advocacy excessively zealous.]; Chu, *supra* note 109, at 203 (The risks of practicing criminal law "include the risk that a lawyer may be prosecuted by the procuratorate for presenting evidence that contradicts that of the prosecution [on an obstruction of justice theory.]")

155. See Chu, *supra* note 107, at 158.

156. The foregoing details of China's 1996 criminal justice reform are outlined in Chu, *supra* note 107, at 179-84.

157. *Id.* at 185 ("The reform of trial procedure under the 1996 revision sets the stage for a more adversarial-type proceeding in China. The revisions are designed to enhance the neutrality and independence of the collegiate panel, and to promote more debates between the defense and the prosecution, with judges rendering ver-

As with so many announced reforms in China, there is reason to harbor doubts about change in the criminal justice system. Yet, empirical scrutiny, while rudimentary, does appear to suggest that change may be afoot. The acquittal rate in 1997 was 0.66 percent, similar to that of Japan. That rate almost doubled in 1998, to 1.03 percent, despite a vigorous anti-crime campaign (but has fluctuated since then).<sup>158</sup> Defendants have been winning roughly as many criminal verdict appeals as prosecutors since the reforms, which is a sign that openness to defense arguments has penetrated higher levels of the court system.<sup>159</sup> Prosecutors have left more first instance acquittals unchallenged, which may signal changing attitudes.<sup>160</sup> In many localities, the criminal courts have been opened to public and press observation.<sup>161</sup> Despite all this, a note of caution is warranted. Prosecutors retain great power and discretion. Judges remain subject to a range of external influences, especially in high profile cases. Defense counsel remain passive in many cases, and the number of defendants represented by counsel actually declined between 1993 and 1998. However, this may be due to the rising cost of hiring a lawyer and enactments authorizing defendants to employ non-lawyer relatives and friends to represent them.<sup>162</sup>

Pursing the reform agenda, the Supreme People's Court, in October of 1999, adopted the "Five-Year Reform Programme of the People's Courts." In that plan, the court sought to continue the effort to improve the quality of the judiciary and to enhance adjudicatory speed and efficiency. Following the criminal procedure reform strategy, the Supreme People's Court called for an expansion of the "principle of open trial." It sought to introduce new managerial judging techniques that would "strengthen the responsibility of judges and the collegiate bench." In a direct response to the challenge of corruption, it also sought "to improve the supervisory mechanisms safeguarding the fairness and integrity of the judicial personnel."<sup>163</sup>

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dicts based on arguments and evidence prepared by both parties." *Id.*); Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Dispositions in China*, 37 L & SOC. REV. 549, 554 (2003) ("the 1996 legal reforms, as embodied in the revised [Criminal Procedure Law], were intended to transform a traditional inquisitorial system of justice into a more adversarial legal process.").

158. See Chu, *supra* note 107, at 187.

159. *Id.* at 191-93.

160. *Id.* at 194.

161. See Zou, *supra* note 108, at 1053 & n.88 citing Tang Min, *Trials to Open to Public in Beijing*, China Daily, Sept. 20, 1998.

162. See Chu, *supra* note 107, at 200-01.

163. For a more complete description of the Five-Year Reform Programme, see Zou, *supra* note 108, at 1045.

Despite all this effort, Chinese reformers appeared to conclude that further steps were necessary. In 2000, the number of court filings leveled off. Chinese reluctance to sue was attributed to popular “lack of faith in the impartiality of judges.”<sup>164</sup> That lack of faith was, in the eyes of many observers, linked to the ongoing problem of corruption. Chinese legal scholars stressed this point<sup>165</sup> as did both the President and one of the Vice Presidents of the Supreme People’s Court.<sup>166</sup> In addition, there was a general perception that the quality of the judiciary remained low.<sup>167</sup> Although progress was being made on this front, it was virtually invisible to those who had no contact with the system. Citizens had previously formed negative impressions of the justice system and had very little information that might warrant them to change their ideas. The challenge was how to win greater legitimacy and convince the populace that the system deserved greater trust and respect.<sup>168</sup>

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164. Hung, *supra* note 120, at 87.

165. Professor Gao Yifei of Southwestern Law School has estimated that one-third of Chinese judges are corrupt. Gao Yifei, *Zhongguo di fa guan wei he ru ci fu bai* [Why Are Chinese Judges So Corrupt] Nov. 07, 2006, at <http://column.bokee.com/188584.html>. Professor He Bin of the Law School of China University of Political Science has stated: “The weak groups of the society and peasants who have lost their land consider ways other than the courts to solve their problem first. Even when they go to court, they distrust judges.” He Bing, *quoted in* HUAI & SUN, *supra* note 112, at 84. Professors Huai Xiaofeng and Sun Benpeng of the National Judges College have made similar points in advocating greater use of the lay assessor system. HUAI & SUN, *supra* note 112, at 85. These arguments have been echoed by Professor Tang Weijian of the People’s University College of Law. Tang Weijian, *Ying mei pei sheng tuan zhi du de jia zhi zheng lun – jian yi wo guo renmin pei sheng zhi du de gai zao* [The Debate about the Value of British and American Jury System—A Brief Discussion on Reforming the People’s Assessor System], at [http://www.shunz.net/2006/11/britain\\_and\\_the\\_united\\_states\\_over\\_the\\_value\\_of\\_the\\_jury\\_system.html](http://www.shunz.net/2006/11/britain_and_the_united_states_over_the_value_of_the_jury_system.html).

166. Xiao Yang, the President of the Supreme People’s Court, has described corruption as a problem so serious that it has caused him to “lose sleep.” *Chief Judge Pledges to Fight Judicial Corruption*, available at <http://chinadaily.com.cn>, Mar. 24, 2007. Since his elevation to Chief Justice in 1998 he has emphasized the importance of the fight against corruption on at least eleven occasions in official reports. *Dou shi buo chan re de huo?* [Are All Trouble Caused by Bankruptcy Cases?], available at <http://sina.com.cn>, 11/06/2006, at <http://news.sina.com.cn/c/2006-11-06/111211438273.shtml>. Xiao’s concerns have been echoed by Shen Deyoung, a Deputy President of the Supreme People’s Court. *Zui gao yuan da wen “guan yu wan shan renmin pei sheng yuan de jue ding”* [Supreme Court’s Answers to Questions about Directive on the Improvement of the People’s Assessor System], at <http://www.china.org.cn/chinese/law/649985.htm>.

167. See Hung, *supra* note 120, at 87 (citing a survey in 11 Chinese cities in which up to 40 percent of respondents perceived judges as perverters of the law “and neither honest, trustworthy, nor morally upright.”).

168. *Id.* at 88; see also Chu, *supra* note 107, at 159 (criminal justice reforms were undertaken by party leadership due to realization “that further legal reforms cannot be pursued effectively without making the legal process socially legitimate.”)

In August of 2004, China returned to an old idea—the lay assessor system—in its battle to reduce corruption, improve the quality of those deciding cases and convince the Chinese people of the justice system’s legitimacy.<sup>169</sup> The Standing Committee of the National People’s Congress promulgated a Directive designed to secure the “improvement of the People’s Assessor system.” The Directive required the selection of a vast body of people’s assessors who will “participate in all hearing activities of the People’s Courts as authorized by law, and are to have the same rights as judges.” (Article 1) These lay assessors are to serve on collegial panels in criminal, civil and administrative cases of first instance with “relatively significant social impact,” or when requested to do so by the defendants in criminal cases, by either party in civil matters or by the plaintiff in administrative cases. (Article 2) They are to constitute no less than one-third of the members of the collegial panels on which they sit. (Article 3) People’s assessors are to be upstanding citizens and are, whenever possible, to have at least a “junior college” degree. (Article 4) This requirement will mean that, in many cases, assessors will have significantly more schooling than their professional counterparts. They are to be selected from among a pool of self-nominated candidates as well as those proposed by “the unit where [the citizen works] or the organization at the place of [the citizen’s] permanent residence.” (Article 8) The assessors are to be chosen from among the members of this pool by the local courts and confirmed by the local people’s congress. (Article 7) They are to serve five-year terms. (Article 9)

When assessors sit on a collegial panel, their participation is to be fostered by the professional judges. (Article 10) The cases on which they sit are to be decided by majority vote. (Article 11) This indicates that where people’s assessors constitute the majority of a three-person panel (a configuration permitted by law), their votes can override that of the professional judge. If an assessor disagrees with a panel’s decision, his or her dissenting vote is to be recorded and the assessor is empowered to request that “the president of the court” consider submitting the case to the adjudicative committee “for discussion and decision.” (Article 11) People’s assessors are bound by the rules that govern judicial behavior, including those intended to preserve “the secrets of a trial.” (Article 13) The courts selecting assessors are required to train them. (Article 15) An assessor can be removed if he or she violates “a relevant law or regulation pertinent to trial activities, displays favoritism, or commits irregularities that result in a faulty judgment or cause any other serious consequences.” (Ar-

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169. See Appendix I for the text of the DIRECTIVE.

ticle 17) People's assessors are to have their expenses paid, and be provided a stipend if they do not receive a regular salary from their employers (the employers must continue to pay assessors' salaries while they serve). (Article 18) In striking contrast to Japan's elaborate statute, the Chinese Directive is only a few pages in length.

According to an article in *China Today*, by May 8, 2005 (the date fixed by law for the commencement of the assessor initiative), there were 27,000 people's assessors enrolled in China.<sup>170</sup> Cao Sianmin, a Vice President of the People's Supreme Court, stated that the objective at the start of the new program was to find candidates of "good cultural background," "knowledge of the law" and "high moral standards."<sup>171</sup> Recent journalistic reports and internet blog entries provide a revealing portrait of the assessors in action during the first two years of the initiative. One striking thing is how many of the profiled assessors have legal expertise. This may simply be an artifact of reporting, but it suggests that the program is being used to enlist law-trained individuals to help raise the quality of the trial bench.

Ge Yanqing is one of the assessors profiled in *China Today*.<sup>172</sup> She serves in Beijing Intermediate Court Number Two. She had served as an assessor for six years before she got her certificate under the 2004 Directive. She is a retired law professor. She has heard at least 40 cases and personally reviews the files before each case. She participates in the questioning at most hearings. She estimates that in simple cases, she attends approximately four hearings and in more complex matters that figure grows to around 12. She reports that she has had a significant influence on the decisions in a number of cases, making particular reference to a proceeding in which she persuaded the panel to impose a life sentence rather than the death penalty. The people's assessors in her court in Beijing are an elite group. Of the 78 assessors, two have PhDs, 11 have master's degrees, 52 have bachelor's degrees and the remaining eight have two-year college diplomas.<sup>173</sup>

Law professors and other legal experts have been recruited to join other courts as well. He Bing described his service on his personal blog.<sup>174</sup> He, like Ge, had been an assessor before the

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170. See Hu Yang & Zhang Zueying, *The Jury System Progresses Amid Controversy*, CHINA TODAY at <http://www.chinatoday.com.cn/English/e2005/e200511/p32.htm>.

171. *China Issues Reforms on Jury System*, XINHUA GENERAL NEWS SERVICE, Dec. 20, 2004.

172. Ge Yanqing's story appears in Hu & Zhang, *supra* note 170.

173. *Id.*

174. He Bing's personal blog may be found at <http://blog.sina.com.cn/hebing1>.

advent of the new Directive.<sup>175</sup> He describes himself as an active participant at trial. It should be noted that some of those responding to his blog have voiced doubts that a few legal expert assessors can save China's court system.<sup>176</sup> Others, however, have praised his efforts and believe that his work enhances the independence of the judiciary. In a 2007 article in China's *Daily Legal News*, another law professor, Chen Aiping, described her role in court as very much like that of a professional judge.<sup>177</sup> She has even drafted court decisions. In the same article, an expert in intellectual property law, Guo Chunyuan, was profiled.<sup>178</sup> He described his role as providing specialized expertise to the court—very much like an expert witness.

Legal scholars are not the only people's assessors to have been heard from. Duan Lian was the first assessor profiled in the *China Today* article.<sup>179</sup> She is 26 years old and a personnel administrator. She appears to be a prime example of China's new middle class. She did six months of study, three days of training and took a two-and-one-half hour examination in order to qualify as an assessor. She, like Ge, serves in Beijing. She reports being permitted to ask questions of witnesses and being included in discussions with the presiding judge during adjournments and at the conclusion of cases. She has no legal expertise and her contribution to deliberations has been limited to fact assessment. Her upbeat appraisal of the people's assessor mechanism should be contrasted with that of Li Junde, an assessor interviewed in the *China Youth Daily* in 2007.<sup>180</sup> Li says that he felt intimidated by the process in his first case. He did not ask questions and his comments were brushed aside by the presiding judge. In his second case, he and another assessor, convinced the professional judge to acquit two defendants who claimed that they were beaten by police and framed. The panel's decision was overturned by the adjudicative committee. Li says that in some cases, he is treated as nothing more than a "vase"—a decorative object with no real role to play. This problem has been reported by

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175. He Bing, *Renmin pei sheng yuan: wo de jing yan yu gan yu* [ *People's Assessor: My Experience and Thoughts* ], Nov. 7, 2004, at <http://www.tianya.cn/New/PublicForum/Content.asp?strItem=law&idArticle=5664>.

176. For responses on He Bing's blog, see *Id.*

177. For Chen Aiping's story, see Pan Congwu & Li Sun, *Pei sheng yuan zhi du liang nian hui mo he xie cheng wei qiang ying fu*. [ *Looking Back at Last Two Years of The Assessor System, Harmony Has Become the Strong Note* ], Mar. 4, 2007, at <http://news.sohu.com/20070304/n248490489.shtml>.

178. *Id.*

179. See Hu & Zhang, *supra* note 170, for the details concerning Duan Lian.

180. Li Junde, *Wo dang pei sheng yuan* [ *My Experience as an Assessor* ], CHINA YOUTH DAILY Apr. 25, 2007, available at [http://zqb.cyol.com/content/2007-04/25/content\\_1744346.htm](http://zqb.cyol.com/content/2007-04/25/content_1744346.htm).

other assessors as well. In Chengdu (the capital of Sichuan Province), assessors complain that they are no more than decorations, and were described by one journalist as “wooden people.”<sup>181</sup>

From these reports, it is difficult to determine the efficacy of the assessor system. A similarly mixed evaluation is to be found in the remarks of professional judges. A number of judges, many of them highly placed, have praised the assessors.<sup>182</sup> Judges in less exalted positions, however, have voiced a variety of concerns. Zhang Minghua, Chief Judge of Beijing Intermediate Court Number Two was sharply critical in his remarks to *China Today*.<sup>183</sup> He believes that assessors are, for the most part, not well versed in “legal-speak” nor are they accustomed to “courtroom battlers.” The assessors’ naivete led him to conclude that their presence “will only hamper us judges.” Moreover, where they constitute the majority of a panel, their voting power may lead to the mishandling of a case. In that situation, Judge Zhang feared the professional judge would be blamed for the assessors’ error. Another judge, Xu Guoyun, who handles criminal cases in the Runan County, Henan Province primary court made similar observations in a 2004 article in *China Daily*.<sup>184</sup>

What are the prospects for the success of the Chinese people’s assessor program? While there is the strongest doubt that Japan will meet its objectives by adding a system of lay assessors, the situation is much harder to evaluate in China’s case. A number of factors argue against China’s being any more successful than Japan. First, there is a substantial possibility that assessors will be marginalized in China’s courts — turned into decorative fixtures or “vases” in the courtroom. Such treatment has already been reported by people’s assessors like Li Junde and the reporter who observed the “wooden people” of Chengdu. Judges, used to having their way or fearful about draconian punishments for erroneous decisions, may be strongly tempted to push assessors aside. Such action by judges like Zhang Minghua and Xu Guoyun would come as no surprise. They would not be acting from venal motives but from a sense of professional pride and

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181. Chengdu renmin pei sheng yuan zao yu gai ga ban er bu sheng chen wei bai she [Assessors In Chengdu Are In An Awkward Position, Who Have Become The Decoration Of The Court], at <http://news.sina.com.cn/c/2005-11-21/06557493123s.shtml>.

182. See *Promote a Mature Jury System*, CHINA DAILY, Dec. 23, 2004 (Shen Deyoung, a vice-president of the Supreme People’s Court, indicated, according to the CHINA DAILY, that the assessor system would “make judicial activities more transparent and better monitored by the public, and therefore promote justice.” *Id.*

183. See Hu & Zhang, *supra* note 170, describing the concerns of Zhang Minghua, Chief Judge of Beijing Intermediate Court Number Two, quoted in the text.

184. See CHINA DAILY, Dec. 23, 2004, *supra* note 182.

concern to preserve their judicial positions. In the less pressured environment of Germany, judges appear to have taken exactly this route; dominating mixed tribunal proceedings, prejudging cases on the basis of dossiers and dictating outcomes about 99 percent of the time.<sup>185</sup> That sort of judicial response in China would render the people's assessors a useless frill.

Mechanisms that place substantial adjudicatory power in the hands of laymen tend to foster the independence of the legal arm of government and its separation from the other branches.<sup>186</sup> This, at least, has been the Anglo-American experience in connection with the use of jury trials. Blackstone has persuasively argued that lay decision makers are less beholden to the government and more likely to act freely.<sup>187</sup> Since the victory of the communist forces in the Chinese Civil War, it has been a central tenet of government that the Communist Party is supreme and that no agency of government is independent of its power.<sup>188</sup> China's courts have been organized in a way that insures the pre-eminence of the party, both because of the fealty of the judges (more than 90 percent of whom are Chinese Communist Party members) and because of the operation of reviewing mechanisms within the courts (e.g., the adjudicative committees) and outside of them (e.g., Communist Party and people's congresses reviewing committees). It seems doubtful that the party will tolerate the level of independence that might be fostered if assessors were allowed to do their job unfettered by political constraints.

Despite rhetoric to the contrary, the Chinese people's assessor Directive is careful to impose a series of independence-stifling controls on assessors. Many assessor candidates are the nominees of local political and social entities. This approach is reminiscent of the so-called "key man" juror selection system in

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185. See *supra* note 90 and accompanying text.

186. See Lempert, *supra* note 9, at 58.

187. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 683 (1978) (1959) ("[A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice.")

188. See Chih-Yu Shih, *China's Socialist Law Under Reform: The Class Nature Reconsidered*, 44 AM. J. COMP. L. 627, 627 (1996) ("It goes without saying that such a proletarian dictatorship is considered the paramount principle of socialist existence and is not restrained in any sense by the nation of law." *Id.*); Randall Peerboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 535-36 (2002) ("China would seem to be an unlikely candidate to implement and sustain rule of law without democracy given the limits of socialist ideology and the Party's commitment to single party socialism and maintaining its grip on power.")

the American South.<sup>189</sup> In this system, politically powerful individuals were asked to nominate juror candidates. Not surprisingly, they generally nominated candidates whose views on segregation and similar matters were reliable and protective of the status quo. Similarly, each Chinese assessor candidate is vetted both by the courts and the local people's congress. (Articles 7 and 8) As Cao Sianmin of the Supreme People's Court has made clear, assessors are expected to have a "good cultural background."<sup>190</sup> With this as a guide, politically reliable assessors are highly likely to be selected. To make sure that they understand their role, the Directive requires that each candidate undergo "training." This stipulation, in Article 15, may be perfectly benign, but some Chinese critics have seen it as a ploy to indoctrinate assessors and strengthen government control over them.<sup>191</sup> The selection process increases the likelihood that a compliant group of assessors will be assembled. If some should go astray, the government still has the adjudicative committee and second-trial appellate procedure to insure its hegemony. Li Junde's story about the reversal of the acquittal of the two peasants allegedly tortured by the police seems to illustrate how control can be maintained. It is open to serious doubt that the people's assessor system will lead to greater judicial independence or secure the social benefits attributed to the Anglo-American jury, Chinese apologists' claims to the contrary notwithstanding.

Among China's highest hopes for the people's assessor system is that it will help curb corruption, favoritism and influence. This hope may be well-founded, but there are reasons to doubt the efficacy of the people's assessor procedure to thwart bribery and influence peddling. If judges resort to corrupt, covert schemes like *ex parte* meetings and secret transfers of funds, there is little evidence of corruption for assessors to observe.<sup>192</sup> Additionally, the judges' power to dominate proceedings and the authority of senior judges to dictate outcomes and overturn verdicts offer avenues for corruptors to circumvent the assessors. The Directive may, in fact, leave open avenues for the corruption

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189. For a description of the "key man" system, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 207 & n.26 (1995).

190. See *supra* note 171 and accompanying text.

191. Gao Yifei, *Lun pei sheng zhi du yu ji ben zheng zhi lun li, jian ping wo guo xin pei sheng zhi* [An Analysis Of The Jury System And Its Political Base, With A Discussion Of Our New Assessor System], at [http://www.honglaw.com.cn/Article\\_Show.asp?ArticleID=10434](http://www.honglaw.com.cn/Article_Show.asp?ArticleID=10434).

192. Where such corrupt schemes were employed in Chicago it took a major FBI undercover investigation, Operation Greylord, to ferret them out. See Peter F. Nardulli, *Criminology: "Insider" Justice: Defense Attorneys and the Handling of Felony Cases*, 77 J. CRIM. L. & CRIMINOLOGY 379, 382-84 (1986)

of the assessors themselves. Articles 7 and 8 of the Directive place so much of the selection process in local hands that a corrupt court could stack the assessor ranks with pliable individuals or “wooden people.” This may take too dim a view of the ability of assessors to deter or identify corruption but it seems doubtful that assessors are likely to lead the way in discovering and ousting corrupt judges.

With respect to the challenges posed by favoritism and influence, the problem seems even more difficult. Local government and business entities may have a raft of options open to them to exert influence over the courts. These include budget and judicial selection power as well as strategies that impede effective litigation by placing pressure on witnesses, parties and the appellate panels that review first-instance decisions.<sup>193</sup> Assessors can do very little about these matters, almost all of which take place outside the assessors’ purview. As for the sort of influence secured through *guanxi*, the challenge seems even greater. The practices underlying *guanxi* are deeply woven into China’s cultural fabric.<sup>194</sup> Good will is built up over the course of years, or even generations. While the assessors may be beyond the reach of *guanxi* (a proposition open to question in light of the assessor selection procedure), its courtroom effects may be so subtle and pervasive as to be beyond control.

President Xiao Yang of the Supreme People’s Court noted another serious risk faced by the people’s assessor system. In the 2004 *China Daily* article, he warned a meeting of provincial court chiefs that the assessor system is not “designed to relieve the short-handed judiciary at the expense of professionalism.”<sup>195</sup> He noted two dangers: first, that the system could be subverted from its objective of increasing non-professional citizen participation in legal matters and, second, that rather than expending funds to improve the judiciary, poorly paid substitute judges might be designated “assessors” to swell judicial ranks. The stories of law professors Ge Yanqing, He Bing and Chen Aiping all suggest that Xiao’s concerns are well-founded. Such assessors may help China’s judiciary in the short run but are not likely to help build a permanent system that forges a bond between citizens and courts.

One further difficulty is that the people’s assessor system will not be inexpensive. Resources will have to be found to pay the assessors and defray their expenses. In cash-strapped locali-

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193. See *supra* notes 144-45 & accompanying text.

194. See *supra* note 146 & accompanying text.

195. See CHINA DAILY, Dec. 23, 2004, *supra* note 182.

ties, this may constitute an overwhelming challenge.<sup>196</sup> If the German experience is a guide, the mixed tribunal process will be relatively slow-moving and inefficient.<sup>197</sup> In light of calls by China's highest officials for greater speed and efficiency, one must wonder how patient and supportive the nation is going to be with its assessor system.

However, despite all of this, the assessor system holds out some genuine promise. In a seminal article about the possibility of introducing juries into Japan, Professor Richard Lempert suggested that in thinking about lay participation, one should ask the question: "As compared to what?"<sup>198</sup> In the Japanese case, the comparison is between an untested lay assessor system of the most modest scale and an elite corps of judges. There is good reason in that context to doubt the appeal of the lay assessor program. In China's case, however, the calculus is quite different. China has a justice system deeply troubled by corruption and plagued by undereducated judges. It is a system that cries out for public scrutiny and assistance. The introduction of a substantial number of assessors into such a process poses serious risks, but may offer genuine rewards. The assessors' presence may deter overt corruption, place pressure on the judges to get their house in order and provide some assurance that disinterested individuals are policing the system. Lay assessors may also bring sorely needed talents and energy into a system where skill and morale may not be particularly high. There is no guarantee of success but, as compared to the status quo, lay assessor involvement offers a real chance for improvement.

China's past experience with citizen involvement in judicial decision making is not so decisively negative as that of Japan. It is a strike against the people's assessors that their work may be compared with the mass movement "trials" of the Cultural Revolution. These trials scarred many Chinese and have made officials who lived through the purge era wary of anything remotely like Cultural Revolutionary justice.<sup>199</sup> On the other hand, lay assessors have been at work in China for more than fifty years. In the recent past, they have helped to rebuild the justice system as demonstrated in the remarks of Ge Yanqing, He Bing and others. The door to citizen-based reforms seems far more likely to be open in China than Japan.

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196. See Hung, *supra* note 120, at 101 (some courts in "poorer regions" cannot even afford judicial training).

197. See Dubber, *supra* note 94 & accompanying text.

198. See Lempert, *supra* note 104.

199. See *supra* note 117 & accompanying text.

Jiang Zemin, Xiao Yang and other Chinese leaders have emphasized the importance of using China's "advanced productive forces" in the effort to improve the justice system.<sup>200</sup> In light of China's meteoric economic rise, this notion makes a great deal of sense. The workers and entrepreneurs who have produced the Chinese miracle do seem to be a valuable resource. If that resource can be harnessed by the courts, their skills—including technical excellence and business acumen—may be injected into a court system in real need of such abilities. The "advanced productive forces" of China are its nascent middle class.<sup>201</sup> They not only can bring skills to the courtroom, but also middle class values, including an expectation of competence and antipathy to corruption. In England, from the late 1600s on, the "middling sort" of Englishmen were, in ever increasing numbers, drawn into jury service.<sup>202</sup> Their decisions in matters like *Bushell's Case*,<sup>203</sup> the *Trial of the Seven Bishops*<sup>204</sup> and the acquittals of various political opponents of the government, like John Wilkes,<sup>205</sup> ushered in an era of greater judicial independence and restrictions on government power. It is far too soon to suggest that anything like that might happen in China, but the potential for change is heightened with the influx of middle class jurors like Duan Lian.

If Article 2 of the people's assessor Directive is a guide, assessors will be involved in a wide array of significant cases. Their involvement, even if it is minimal, will afford them an opportunity to observe, participate in and report on key legal matters. If they are permitted to do so, the transparency of the Chinese legal process will be dramatically increased. Whether this will actually happen is hard to say. As was the case in the Japanese law, there is a fairly broad secrecy provision incorporated in the people's assessor scheme. If it is vigorously enforced, transparency will be diminished. Observers are only valuable if they are allowed to

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200. Jiang Zemin forcefully promoted a concept of social improvement referred to as the "Three Represents" theory. Pursuant to that theory one of the forces the Chinese Communist Party was obliged to represent was "advanced productive forces." This theory was incorporated into the Chinese Communist Party Charter at its Sixteenth National Congress. See Hung, *supra* note 120, at 128 & n.250. One of the ways such forces might be represented in governance is through their incorporation into the justice system as lay assessors. In his *Work Report of the Supreme People's Court* to the Second Session of the 10th National People's Congress on March 10, 2004, Xiao Yang, President of the Supreme People's Court, specifically endorsed the "Three Represents" concept. See *Text of Chinese Supreme Court President's Annual Report*, BBC MONITORING INTERNATIONAL REPORTS, Mar. 24, 2004.

201. See Hung, *supra* note 120, at 128.

202. See Stephan Landsman, *supra* note 137, at 589-92.

203. 124 Eng. Rep. 1006 (C.P. 1670).

204. 87 Eng. Rep. 136 (C.P. 1688).

205. See, e.g., *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

report on what they have seen. The press coverage and blog conversations concerning the people's assessor system provide some suggestion that open discussion about assessors' experiences will be tolerated. Assuming this toleration continues, transparency and the confidence it induces will be enhanced. A related point may be drawn from De Tocqueville's observation that jury service has an educational effect.<sup>206</sup> Of course, De Tocqueville was talking about the American jury, but some positive educational effect may be anticipated if tens of thousands of assessors are exposed in a positive way to the justice system.

The Chinese assessor program is up and running. The governing law is brief and has already shown itself capable of widescale implementation. This stands in sharp contrast to the Japanese approach where an elaborate set of rules, a multi-year run up to implementation, and a highly restricted jurisdictional mandate<sup>207</sup> all lead one to wonder if the process has any real chance to evolve into a significant instrument of justice. It has been said that "procedure is based on repetition."<sup>208</sup> China has been using its assessor system on a major scale. This experience has the potential to promote the development of an effective process capable of future growth and adaptation. As the saying goes, use it or lose it.

It is possible to interpret China's people's assessor program as democratic window dressing on a centrally-controlled legal system that is not open to the rule of law, but rather seeks to use the law to control the citizenry.<sup>209</sup> There is, however, evidence that China is earnestly seeking to improve its justice system, and that the people's assessor program is one step in that effort.<sup>210</sup> The legal profession has been reformed and the landscape of legal practice in China dramatically altered. The criminal process has been changed and data suggest that it is a fairer and more balanced system than it was before. There is still a very long way to go, and immense challenges remain regarding judicial independence, the quality of the judiciary, and proper financial support for the machinery of adjudication. But change has been achieved and the assessor Directive may legitimately be viewed as a further step in the reform program. Inga Markovitz has noted that as ideological zeal faded in the communist regimes of

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206. See *supra* note 102.

207. That painstaking approach is described in some detail in *Task of Jury Duty*, *supra* note 104.

208. See Markovitz, *supra* note 71, at 110 ("procedure is based on repetition, role-playing, and tradition . . . and is saturated with unspoken assumptions and conditioned reflexes." *Id.*)

209. See Peerenboom, *supra* note 188, at 521.

210. *Id.* at 522.

Eastern Europe, dedication to and respect for law grew. It is not out of the question to imagine a similar course of development in China.<sup>211</sup>

#### IV. IMPLICATIONS

Legal reform is in the air in both Japan and China. Japan has embarked upon an effort that will transform its legal profession. New law schools have been opened, the size of the bar is to be tripled, and new approaches are being pressed in both civil and criminal procedure. Similar activity is under way in China where, in terms of quality and size, both the legal profession and the judiciary are in the midst of transformation. Chinese procedure is also undergoing radical surgery that seems to be more than cosmetic. Why both countries have embarked on such an effort at the same moment is an interesting question. In both nations, there is a sense of needing to meet the challenge of international competition and commerce by establishing an efficient and reliable system for the adjudication of disputes. Each nation also seems to feel the need to respond to what the citizenry perceives as serious domestic issues. In Japan, these have to do with concerns about erroneous convictions and about an elite judiciary that is seen as aloof and out of touch. In China, the concerns are about the honesty of the justice system and the need to infuse its ranks with the most effective practitioners available.

In both countries, the domestic challenge might be described as a crisis of legitimacy. Japanese citizens are showing signs of disaffection because their judiciary neither reflects their life experiences nor gives them a stake in the legal process. Japan's courts might avoid criticism if they operated flawlessly, but they are distressingly slow moving and, as demonstrated in a spate of criminal matters, are vulnerable to error. For very different reasons, China's citizens too are feeling dissatisfied. In their case, the problems are corruption and a shortage of judicial talent. These problems have driven a wedge between people and courts. In both societies, legal reformers have concluded that the gap must be bridged if legal legitimacy is to be enhanced and society persuaded to trust in and use the courts. Viewed in this light, it is not surprising that both societies have turned to lay participation

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211. See Markovitz, *supra* note 71, at 112 (speaking of East Germany, Professor Markovitz stated: "As the image of a socialist utopia faded, legal professionalism gained strength. If you no longer believe that your ideology can provide the answers to important social questions, you need to rely on formal rules to find them. Doubt in predictability of outcomes breeds trust in procedure.").

mechanisms which, by their nature, draw citizens and the justice system together.<sup>212</sup>

But leaders in each society have manifested deep suspicion of justice system mechanisms that rely on the people. Japan, with its well qualified and trained judiciary, has been loath to open the courthouse doors to citizens who are perceived as generally incapable of dealing with the challenges of scrutinizing witnesses and parsing laws. The system's masters have only seen fit to open its doors a crack, allowing lay participation in a tiny percentage of criminal cases and no civil matters whatsoever. Japan also proposes to seal the lips of those it allows into the judicial sanctum with stringent secrecy rules. The elite of the legal world have sought to protect their authority and in doing so have designed a lay participation procedure so cautious as to raise questions about its worth. The Chinese story is quite different. There, the courts face a serious challenge because of the inadequacies of the judiciary. In an effort to replicate the process that transformed its economy, China has sought to use the energy and skill of its "advanced productive forces" to change the courts. However, those designing reform have been inhibited by two concerns; first, to insure the Chinese Communist Party's continuing hegemony and, second, to prevent any repetition of the turbulence that marked public participation in the justice system during the Cultural Revolution. To address those worries, the reformers have put a fence around citizen participation. They have created assessor candidate screening mechanisms that can be used for ideological purposes and insisted on "training" that may all too easily cross the line into indoctrination. Furthermore, whatever the assessors do is subject to review and reversal by a number of bodies exceedingly sensitive to political questions.

How the two schemes will play out remains to be seen. In the Japanese setting, the number of cases is probably going to be so small and the justice system incentives for conviction so strong, that it seems likely the process will seldom be used and will provide little inspiration to the citizenry. The Chinese case is different. The interests of the Chinese Communist party do not directly touch on every case. It is conceivable that "middle class" jurors will prove themselves valuable in the broad range of civil, criminal and administrative cases they will be asked to hear. Their expectations of fair play as well as their special skills may

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212. See Shari S. Diamond, *Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates*, 15 L. & Soc. INQ. 191, 194 (1990) ("A number of governments in both democratic and socialist countries also view the fact of lay participation as beneficial in itself on the assumption that greater legitimacy may flow from decisions handed down by judges who appear to represent the community.")

seep into the justice system, moving it toward the rule of law. This is the story E.P. Thompson told in his celebrated book, *WHIGS AND HUNTERS*, about the middling sort in eighteenth-century England.<sup>213</sup> Intimations of movement in this direction may already be glimpsed in the stories of Ge Yanqing, who persuaded a trial panel to reject the death penalty in the case of a young man who confessed to a crime of passion, and even in that of Li Junde, who won an acquittal for two peasants beaten by the police (only to see it reversed by the court's adjudicative committee).

China and Japan share a cultural and historical background that views litigation with strong reservations. However, the lay participation initiatives adopted in each nation have been undertaken with the avowed objective of encouraging greater citizen respect for and reliance on the courts. This attitude is a new one in both societies. It suggests that each is moving away from a set of views that considers litigation a social pathology. The trial is no longer considered a systemic failure. Growth in caseload and citizen reliance on court intervention is being encouraged. Much of this shift may be premised on an unspoken conclusion that litigation is a necessary adjunct to robust economic activity, especially in a global marketplace. These attitudes are in striking contrast to those voiced by many American leaders who depict the court system, law, and lawyers as a blight on productivity and social governance. While each might be correct in its time and place, the Japanese and Chinese conclusions, backed up by concrete action, should give us pause about accepting blanket criticism of courts and litigation.<sup>214</sup>

It is interesting to note that in both Japan and China, reform has moved in the direction of adversarial mechanisms and away from inquisitorial ones. The judge-driven investigation, punctuated by episodic hearings, that is the hallmark of the inquisitorial process is at odds with lay assessor mechanisms, which pull toward concentrated hearings, witness examination and diminished reliance on dossiers. In both countries, a significant number of other adversarial reforms are being adopted. Japan, according to Professor Kojima, has clearly moved toward the "common law family" in its recent civil procedure reforms.<sup>215</sup> Its criminal practice has also undergone adversarial reorientation that places greater responsibility on the parties to adduce the proofs the court is to consider in reaching a verdict. The same

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213. See EDWARD P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT*, 258-69 (1975).

214. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

215. See *supra* note 46 & accompanying text.

may be said of China, where the criminal process, in particular, has taken on a decidedly more adversarial cast.

Not too many years ago, prominent scholars were extolling the virtues of the inquisitorial regime, most particularly the criminal process of Germany, as an efficient and fair means of giving every litigant a day in court. Subsequent scholarship suggested that this was an idealized picture of the German process. A more penetrating examination grounded in the realities of German litigation has concluded that the process is no panacea. The steps taken by China and Japan signal that legal scholars and reformers have found much to admire in the once reviled adversarial approach.

Almost two hundred years ago, De Tocqueville wrote his famous analysis of the benefits Americans derived from jury trials. These included the education of the citizenry in the ways of the law and the democratic grounding of the justice system through regular citizen participation. It would seem that both Japan and China have concluded that De Tocqueville's analysis has real merit. Each society has chosen to attempt to draw its people into decision making. A part of the reason, in each case, has been the belief that exposure to the task of judging teaches powerfully positive lessons that enhance the law's legitimacy. De Tocqueville has been the target of sharp criticism recently but his insights remain, at least in some quarters, persuasive.<sup>216</sup>

The distinguished comparative law scholar Inga Markovitz has written provocatively about the risks of incorporating foreign procedures and mechanisms into indigenous legal systems. She has suggested that borrowing is a risky business that can lead to the squandering of resources and the pursuit of unworkable mechanisms. Her poster child for such an error is the restoration of the jury trial in Russia. She sees this as a romantic and wrong-headed approach of no real benefit to the Russian justice system.<sup>217</sup> Despite the likely substantial merits of Professor Markovitz's analysis for the Russian jury, the Chinese experience with the people's assessors suggests that borrowings involving citizen participation may work and be adapted to local needs. It may be too soon to reach any definitive conclusions about China, but there are grounds to believe that the system holds promise, both as a useful procedural mechanism and as a means of extending the reach of the rule of law in a contested environment.

China has 1.3 billion people, Japan 125 million. Each country is a force in the global economy. Both are blessed with so-

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216. See, e.g., Gary Wills, *Did Tocqueville 'Get' America?*, 51 N.Y. REV. BOOKS, Apr. 29, 2004.

217. See Markovitz, *supra* note 71, at 106-08.

phisticated scholars and jurists. It is remarkable in light of all this, how little empirical work is being done or planned with respect to the reforms each country has adopted. It would appear that neither nation has given serious consideration to a social science initiative to assess the strengths and weaknesses of reform. Instead, each has plunged ahead, in precisely the same way both European nations and the United States have, assuming that thought experiments are a fine way to pursue reform. Products from toothpaste to motion pictures are never developed in this way. They are the subjects of extended focus group and other sorts of research. Marketing and performance research are integral to successful business development. It is unfortunate that these attitudes and techniques have not been introduced into the business of legal reform. It is difficult not to conclude that there is a better way.

## V. AFTERWARD

The senior author of this article has, for many years, been an advocate of greater American utilization of trial by jury. In light of that fact, it may seem anomalous that the article is so critical in its appraisal of Japan's first effort in eighty years to advance the cause of citizen participation in judicial decision making. Citizen participation in the job of deciding cases is neither easy, nor simple to achieve. It requires a willingness to trust citizens with some of the most important decisions facing a nation—decisions involving billions of dollars, the ordering of society, and even life itself. What appears to be lacking in Japan's effort is trust in the citizenry.

Japan's *saiban-in* mechanism is a system of half measures. It wants citizens involved in justice, but under the direct control of judges in the narrowest range of cases. While the serious criminal cases in which the *saiban-in* process may be used are potentially important, their number will be exceedingly small and is likely to shrink ever further as prosecutors and police steer cases elsewhere. Whatever impact lay assessors have will be kept secret. The assessors are not being placed in a position to bring about change. They will be left alone when they should be helped, as with respect to the questioning of witnesses, and "helped" when they should be left alone, as with respect to deliberating about guilt and innocence. They will be thrust into the middle of a system where professional incentives and long established expectations yield a conviction rate near 100 percent. The prospects for citizen impact, either immediately or over time, seem exceedingly small. What is it about assessors' hermetically sealed-off experiences that is going to lead to a shift in attitudes

among judges, the legal profession and the population at large? To all appearances, nothing. If citizens are to be trusted with a real part in the justice system, opportunities must be created for them to act and to be seen to act. It does not seem as if Japan has made that choice. The likely result is a withering of the experiment, not because citizen participation is a mistake, but because of the lack of faith displayed in the reforms adopted.

At first blush, much the same conclusion might be said to be warranted about China's effort. People's assessors are being thrown into a system with weak judges and all the political pressures that have hobbled Chinese justice for decades. Assessors' experiences have been of mixed quality. In a number of places, they have been treated as little more than courtroom decorations—echoing patterns observed in Germany and elsewhere. Judges, even highly skilled and honorable ones, may view the assessors as a dangerous impediment to them doing their job. Lay inclination to acquit in criminal cases will, in all likelihood, pose a challenge to the Chinese Communist Party. The party has not been shy about crushing challenges to its authority. The Directive regarding the people's assessors is carefully drafted to maintain controls over assessor selection and training.

However, in this article, we have suggested greater hope with respect to the Chinese initiative. Fundamentally, the people's assessors are really needed by the justice system and are treated, in various sections of the Directive, as quite important. If anything, lay assessors are to be more fully trusted than their professional counterparts. They will be allowed to make up the governing majority of panels and will not be subject, it would appear, to all the disciplinary apparatus created in China to control judges. As already observed, there is something analogous to the English jury story in Chinese developments. Over time, jurors of the middling sort in the English countryside came to be given a great deal of responsibility for making critical decisions in both civil and criminal matters. Their participation provided experience in self-governance that grew into political independence and democracy. E.P. Thompson, the great English historian of a Marxist orientation, saw in this the establishment and expansion of the rule of law. It eventually produced social attitudes stronger than the interests of the rich and powerful. These developments came about slowly and regularly suffered significant setbacks. However, the process begun in assize jury rooms paid real democratic dividends. While we cannot say that anything remotely similar is afoot in China, the conjunction of lay assessors, the need for citizen assistance in running the justice system, and the infusion of China's middling sort (with their new views about fairness and opportunity) offer prospects for im-

provement. China is vast and complex. There will be all sorts of reactions to the people's assessor initiative. But the potential for improvement over the present unreliable and corrupted system deserves to be recognized, applauded, and assisted.

## APPENDIX I

DIRECTIVE OF THE STANDING COMMITTEE OF THE  
NATIONAL PEOPLE'S CONGRESS CONCERNING  
IMPROVEMENT OF THE PEOPLE'S  
ASSESSOR SYSTEM\*

(Adopted August 28, 2004, by the Standing Committee of the Tenth National People's Congress of the People's Republic of China at its Eleventh Session)

The following regulations are specifically formulated in order to improve the people's assessor system, ensure citizen participation in hearing activities according to law, and promote justice.

## ARTICLE 1

People's assessors are to be selected according to this Directive, are to participate in all hearing activities of the People's Courts as authorized by law, and are to have the same rights as judges except with respect to performing the function of presiding judge.\*\*

## ARTICLE 2

Except in procedurally simple matters or matters specifically excluded by law, all of the following cases of first instance in the People's Courts are to be adjudicated by a collegial bench composed of people's assessors and judges:

- (1) criminal, civil and administrative cases with relatively significant social impact;
- (2) criminal cases where the defendant so requests, civil cases where the plaintiff or defendant so requests, or administrative cases where the plaintiff so requests.

## ARTICLE 3

When a case is tried by a collegial bench, the number of people's assessors shall be no less than one-third of the panel.

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\* This translation draws upon a previous effort by Beijing University School of Law. See <http://www.lawinfochina.com/law/display.asp?db=1&id=3678&keyword=Decision,of,the,Standing,Committee,of,the,National,People%20%20AFs,Congress,Regarding,Perfecting,the,System,of,People%20%20Fs,Assessors>. The title we have chosen also draws upon *Work report of China's Supreme People's Court 2004/2005*, BBC MONITORING ASIA PACIFIC, March 22, 2005.

\*\* Article 1 draws upon material from CHINA DAILY.

## ARTICLE 4

To serve as a people's assessor, a citizen shall:

- (1) support the Constitution of the People's Republic of China;
- (2) have reached the age of 23;
- (3) be of good ethics, upstanding, and decent; and
- (4) be in good health.

To serve as a people's assessor a citizen shall, as a general rule, have a junior college or higher education.

## ARTICLE 5

Members of the Standing Committee of the People's Congress, People's Courts, People's Procuratorates, public security organs, state security organs, and judicial administrative organs, as well as practicing lawyers may not serve as people's assessors.

## ARTICLE 6

A citizen may not serve as a people's assessor if he:

- (1) has been subject to criminal punishment for committing a crime; or
- (2) has been dismissed from a public post.

## ARTICLE 7

The list of people's assessors to hear cases shall be determined by the Primary People's Court based upon need, and shall be submitted to the Local Standing Committee of the People's Congress at the same level for approval.

## ARTICLE 8

Qualified citizens may apply to be assessors or may be recommended by the unit where they work or the organization at the place of their registered permanent residence. The Primary People's Court and the local judicial administrative organ shall examine all applications. The president of the Primary People's Court shall then propose a list and submit it to the Local Standing Committee of the People's Congress at the same level for appointment.

## ARTICLE 9

The term of a people's assessor shall be five years.

## ARTICLE 10

People's assessors shall have the right and duty to participate in trial activities in accordance with law. Their participation is protected by law.

The People's Court shall ensure people's assessors' participation in trial activities in accordance with law.

The unit where an assessor works or the organization at the place of the assessor's registered permanent residence shall ensure the assessor's participation in trial activities in accordance with law.

## ARTICLE 11

When a people's assessor, as a member of the collegial bench, participates in trial activities, he has the right to vote independently in determining the facts and applying the law.

The principle of the minority being subordinate to the majority shall be followed in the deliberations of the collegial bench. When people's assessors have different opinions from other members of the bench, their opinions shall be recorded. In such cases people's assessors may, where necessary, request that the collegial panel refer the case to the president of the court to decide whether or not to submit it to the adjudication committee for discussion and decision.

## ARTICLE 12

The withdrawal of people's assessors shall be regulated in the same manner as with respect to judges.

## ARTICLE 13

When taking part in trial activities people's assessors shall abide by the rules and regulations that govern judge's fulfillment of their duties, that preserve the secrets of a trial, that determine judicial etiquette, and that defend the image of the judiciary.

## ARTICLE 14

In cases tried by a collegial bench at a Primary People's Court according to law, people's assessors shall be randomly selected from the list of people's assessors assembled by the Primary People's Court.

In cases tried by a collegial bench at an Intermediate Court or a higher People's Court, people's assessors shall be randomly selected from the list of people's assessors assembled by the Primary People's Court where the court sits.

## ARTICLE 15

Primary People's Courts and the judicial administrative organs at the same level shall conduct training for the people's assessors to improve the quality of the people's assessors.

## ARTICLE 16

People's assessors whose achievements are outstanding or who perform in an exemplary manner should be commended and rewarded.

## ARTICLE 17

Under any of the following circumstances a people's assessor shall be removed by the Standing Committee of the People's Congress at the same level, upon the request of the president of the Primary People's Court, after investigation and verification by the Primary People's Court jointly with the judicial administrative organ of the same level at the location where the people's assessor serves:

- (1) where the assessor resigns;
- (2) where the assessor without justifiable reason refuses to participate in trial activities, thereby affecting the normal progress of hearing activities;
- (3) where the assessor fails to satisfy one of the qualifications specified in Article 5 and Article 6; or
- (4) where the assessor violates a relevant law or regulation pertinent to trial activities, displays favoritism, or commits irregularities that result in a faulty judgment or cause any other serious consequences.

In case a people's assessor behaves in the manner set forth in Item (4) of the preceding paragraph, and such behavior constitutes a crime, the assessor shall be subject to criminal liability.

## ARTICLE 18

People's assessors' transportation and meal expenses for participation in hearing activities shall be subsidized by the court.

Employers of people's assessors shall not deduct from their salaries or bonuses or other benefits either directly or indirectly any sums during their participation in hearing activities.

People's assessors without fixed income shall be paid by the court for their actual working days at court according to the average local income in the previous year.

## ARTICLE 19

The subsidies enjoyed by people's assessors due to participation in trial activities and the necessary expense for implementing the system of people's assessors by the People's Court and the judicial administrative organ shall be included in the operational expenditures of the People's Court and the judicial administrative organ and shall be guaranteed by the government treasury at the same level.

## ARTICLE 20

The present Directive shall come into force as of May 1, 2005.