
LAY PARTICIPATION IN THE ADJUDICATION
OF LEGAL DISPUTES: A LEGAL-HISTORICAL
AND COMPARATIVE ANALYSIS
FOCUSSING ON THE PEOPLE’S REPUBLIC OF CHINA
AND ITS SPECIAL ADMINISTRATIVE REGION HONG KONG

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Abstract

The participation of lay persons in the adjudication of legal disputes is generally regarded as a necessary and effective constituent for a credible and independent judicial system. This is exemplified in the trial by jury in jurisdictions with legal systems following the common law tradition, and the participation of lay assessors sitting together with (a) professional judge(s) in mixed-court tribunals in jurisdictions with legal systems following the civil law tradition. This article offers a comprehensive, legal-historical and comparative analysis of the respective modes of adjudication adopted in the People's Republic of China and its Special Administrative Region of Hong Kong, for as far as these make provision for the participation of ordinary citizens in the adjudication of criminal legal proceedings. The focus on lay participation in the criminal legal proceedings of these two jurisdictions serves as an example of legal transplants from other "Western" jurisdictions to the "East" through conquest, colonization, and legal reform. The critical analysis and review of these legal transplants as provided for here, not only elucidate the unique laws and legal systems of these two jurisdictions operating under the one country two systems principle, it also raises questions with regard to the true value and suitability of the respective lay participation models with reference to its distinct, contemporary Chinese context. The question remains, from medieval "West" to the present-day "East", whether the participation of lay persons in the adjudication of legal (criminal) disputes is not overestimated, and whether it is truly a guarantor of (or at least contributing to) a credible and independent judicial system.

I. INTRODUCTION

The participation of ordinary citizens in the various spheres of public life serves an important legitimation function as it represents the local interest, the voice of the people, the unprivileged classes, and ultimately, the ideals of democracy.¹ In terms of national legal systems and the adjudication of criminal disputes specifically, the role of lay persons is generally recognised as an essential component in the state legal machinery. This is true of most states, jurisdictions, and other legal entities the world over, and irrespective of the predominant political ideology or the specific features of their legal systems, as it

¹ Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 778 (1995). See generally Richard O. Lempert, *The Internationalisation of Lay Legal Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT'L L.J. 477 (2007).

is generally accepted that people will have greater confidence in a system – whatever that system is – if they perceive themselves and their peers as having some stake, or input therein.²

The focus of this article is on lay participation in the criminal legal proceedings of the People’s Republic of China and its Special Administrative Region of Hong Kong. This world region offers a particularly interesting locus for reflection on the two dominant modes whereby lay participation in criminal legal proceedings is ensured – the jury trial³ and the mixed court or tribunal⁴ – as both these two models feature in the courts and legal systems of the People’s Republic of China and its Special Administrative Region, Hong Kong. The focus on lay participation in the criminal legal proceedings of these two jurisdictions is not only interesting in terms of their unique laws and legal systems, but also serves as an example of legal transplants from various other “Western” jurisdictions to the “East” through conquest, colonization and legal reform. By no means does this article attempt to compare the Western systems of lay participation in the adjudication of criminal disputes with the analogous practice in the legal systems of the People’s Republic of China and its Special Administrative Region of Hong Kong. Indeed, this would be a futile endeavor; it has long been settled that one cannot “interpret the Chinese system in terms of Western juristic thought and to analyse it

² Sanja Kutnjak Ivkovic, *An Inside View: Professional Judges’ and Lay Judges’ Support for Mixed Tribunals*, 25 L. & POL’Y 93, 97 (2003); Xin He, *Double Whammy: Lay Assessors as Lackeys in Chinese Courts*, 50 L. & SOC’Y REV. 733, 733-34 (2016).

³ A jury trial is usually presided over by a professional judge who controls and guides the legal process and decide on procedure and questions of law, including the sentence in the event of a conviction. In determining the guilt or innocence of the accused, the professional judge is assisted by a number of lay persons randomly selected to constitute a jury, and who is tasked with the ultimate decision to return a verdict under the guidance and direction of the judge. These jury members may either represent a random section of the community or represent persons with a background or social status similar to that of the accused. *See generally* Hermann Mannheim, *Trial by Jury in Modern Continental Criminal Law*, 53 L. Q. REV. 99 (1937); Colin Davies & Christopher Edwards, *‘A Jury of Peers’: A Comparative Analysis*, 68 J. CRIM. L. 150, 151-152 (2004).

⁴ Mixed courts or tribunals refer to an array of lay participation models which provide for a number of lay persons to share the bench with a professional judge or professional judges and to oversee and ultimately decide together on criminal legal matters, including the guilt or innocence of the accused as well as the appropriate sentence in the event of a conviction. *See generally* Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275 (2008); Stefan Machura, *Fairness, Justice, and Legitimacy: Experiences of People’s Judges in South Russia*, 25 L. & POL’Y 123, 124 (2003).

in terms of comparative law”.⁵ Nor can one interpret and compare medieval legal processes and practices with those of our modern legal systems and laws today. However, the tracing of the legal-historical development and subsequent geographical transplants of legal systems and their institutions for adjudication, including the consistent participation of its citizenry, offer valuable insights for further analysis. It allows us to see, “with greater clarity than elsewhere, what may happen when legal institutions are transferred bodily to foreign countries, what errors are likely to arise, and what results can be achieved.”⁶

Part II of this article provides a historical overview of lay participation in the process of adjudicating criminal disputes from its early representations in medieval Europe and England, up to the nineteenth century when the rudiments of the two dominant legal traditions – the civil law tradition and the common law tradition – became well established. From here, the discussion and analysis will turn to the “East”, where these models of lay participation in the process of adjudicating criminal disputes were transplanted through conquest, colonization and legal reform. To this end, Part III of the article provides a succinct overview of the development of the Chinese legal system from its earliest origins to date. It will be noted that the Chinese legal system does not conform to, or truly resemble either the civil law tradition or the common law tradition, and continues to develop as a unique third legal tradition of the world. Part IV of the article focuses specifically on lay participation in the adjudication of criminal trials in the People’s Republic of China as well as its Special Administrative Region of Hong Kong. This overview and analysis highlight the distinctive features of and obstacles to the legal development and reform of the people’s assessor system of the People’s Republic of China, as well as the trial by jury of the Hong Kong Special Administrative Region. The article concludes with a critical reflection on the present state of lay participation in the criminal legal proceedings of the People’s Republic of China and its Special Administrative Region of Hong Kong. While it will be questioned whether lay participation in the criminal legal proceedings

⁵ JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 407 (1994); ALBERT HUNG-YEE CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA I* (H.K., LexisNexis 4th ed. 2011).

⁶ Mannheim, *supra* note 3, at 99.

of these two jurisdictions truly contributes to the credibility and independence of the respective legal adjudication processes, it will also be shown that its ultimate value may lie in its theatrical bid for consensus in society; a necessary ceremony in the adjudication of legal disputes.

II. THE HISTORY OF TRIAL BY PEERS I: OF ORDEALS, GOVERNMENTAL CONTROL, AND LEGAL TRADITIONS: THE STORY OF THE WEST

Life in medieval Europe was governed by “a bewildering variety of laws and jurisdictions”, including the local laws of towns and communes, feudal laws in the countryside, the statutes of guilds and corporations that dominated their metiers, canon law and ecclesiastical jurisdiction, the temporal legal authority of kings and princes, and finally, the *jus commune* – the Roman non-religious law based on Justinian’s *Corpus juris civilis* - studied and taught by scholars in the universities.⁷ Various methods and procedures also existed to adjudicate disputes and to determine truth or facilitate proof. Amongst this variety, the primary methods of proof in the Middle Ages were by way of ordeal, wager of battle, or compurgation.⁸ To fully understand medieval legal procedure, and specifically the trial by ordeal, trial by battle, and compurgation, it is important to remember that the theory of law at that time “placed the burden of proof on the negative side”; in other words, those who stood accused had to prove their innocence. Sometimes, the accusers were even put to the same test themselves and had to undergo the same ordeal as the one who stood accused, in proof of the veracity of their accusation.⁹ In the discussion that follows, these early medieval modes of proof will briefly be introduced as it is from these medieval modes of proof that the contemporary modes of adjudication ultimately developed. It is also in the subsequent reform of these early modes of proof that the

⁷ MERRYMAN ET AL., *supra* note 5, at 5, 350.

⁸ Elizabeth Papp Kamali & Thomas A. Green, *The Assumptions Underlying England’s Adoption of Trial by Jury for Crime*, in *LAW AND SOCIETY IN LATER MEDIEVAL ENGLAND AND IRELAND* 51, 52 (Travis R. Baker ed., 2018); John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 against Ordeals*, 36 *SPECULUM* 613 (1961); Peter T. Leeson, *Ordeals*, 55 *J. L. ECON.* 691, 710-11 (2011); ARTHUR C. HOWLAND, *TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY* 4, at 2 (1901).

⁹ HOWLAND, *supra* note 8, at 2; ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 29-30 (N.Y., Clarendon Press of Oxford Univ. Press 1986). This is also true of ancient Chinese law, where the petitioner of an accusation could receive the same punishment as the accused if the accusation proved to be false, *see* MERRYMAN ET AL., *supra* note 5, at 412.

rudiments of the two dominant legal traditions – the common law and the civil law tradition – can be traced. This legal-historical overview is therefore important for the thesis of this article, as the two dominant legal traditions and the modes of adjudication were ultimately transplanted through conquest, colonization and legal reform, to the People’s Republic of China and its Special Administrative Region of Hong Kong.

A. *The Medieval Modes of Proof*

The trial by ordeal (*iudicium Dei* or judgment of God) essentially left the fate of those who stood accused, as well as the fate of the accusers, to superstition. It was believed that God, through clergy-conducted physical tests, would condemn the guilty and exonerate the innocent.¹⁰ Bloomfield defined the ordeal as follows:

“Ordeal is a formal test or a test employed under some fixed conditions to determine the will of God, the gods, the dead or fate, in a matter of some importance, often involving innocence or guilt, for human beings. It is most usually associated with determining the guilt of a person or truth of a claim in order that justice be done, but not always or necessarily.”¹¹

During the golden age of the *iudicium Dei*,¹² two types of ordeals flourished: the hot, and the cold.¹³ Hot ordeals involved the use of hot water (*iudicium aquae fervantis*) or hot irons (*iudicium ferri*)¹⁴ and usually operated on the premise that an innocent accused would remain unscathed. For example, the hot-water ordeal required a priest to boil a cauldron of water into which he threw a stone or ring and then proceeded to request the accused to fish it out. If the arm of the accused remained unharmed, he was exonerated and if not, he was convicted.¹⁵ A cold-water ordeal (*probation per aquam frigidam*) was described by

¹⁰ Leeson, *supra* note 8, at 692.

¹¹ Morton W. Bloomfield, *Beowulf, Byrhtnoth, and the Judgment of God: Trial by Combat in Anglo-Saxon England*, 44 *SPECULUM* 545, 548 (1969).

¹² *iudicium Dei* means a period of time from the ninth to the thirteenth centuries.

¹³ Leeson, *supra* note 8, at 693. See HOWLAND, *supra* note 8, at 7-18 (discussing various types of other ordeals).

¹⁴ Leeson, *supra* note 8, at 694 (explaining that the hot iron ordeal required of the accused to carry a piece of burning iron nine paces).

¹⁵ Leeson, *supra* note 8, at 694.

Hincmar of Rheims, a ninth-century theologian, as follows: “[H]e who is to be examined by this judgment is cast into the water bound, and is drawn forth again bound.’ If he is guilty and ‘seeks to hide the truth by a lie, [he] cannot be submerged’: he will float...If he is innocent, he can be submerged: he will sink.”¹⁶ These ordeals were mainly reserved for criminal cases in England, and also for select civil proceedings in the rest of Europe.¹⁷ The trial by ordeal was, however, not the mainstay mode of proof, and a thirteenth-century German law¹⁸ suggests that the trial by ordeal was not ordered in cases where there was clear evidence of guilt.¹⁹

Ad lib, the trial by ordeal as a mode for establishing truth may seem irrational and most people today would agree that these ordeals did not actually do what they were supposedly designed to achieve; to determine the guilt or innocence of those who stood accused. Yet, the trial by ordeal played a very important role in medieval society at that time. Brown explained this as follows:

“The very course of the ritual of the ordeal helped to contain conflict and to bring about a resolution. The ceremony applied a discreet massage to the ruffled feelings of the group. The most marked feature of the ordeal is the slow and solemn processes by which human conflict is taken out of its immediate context. The representative of the conflict – the man who undertakes the ordeal, who can be accuser or accused – is publicly shorn of all contact with the normal world. Shaved, dressed in a shirt, for three days his diet and his whole rhythm of life is that of a priest not of a layman. He is solemnly blessed, stripped of talismans and amulets (the normal adjuncts of purely human conflict); he

¹⁶ Leeson, *supra* note 8, at 694, quoting HOWLAND, *supra* note 8, at 11

¹⁷ Judicial combat, in turn, was generally used to settle property disputes or to decide criminal cases. Leeson, *supra* note 23, at 694, 710. See also BARTLETT, *supra* note 9; Bloomfield, *supra* note 11; THE SETTLEMENT OF DISPUTES IN EARLY MEDIEVAL EUROPE (Wendy Davies & Paul Fouracre eds., Cambridge Univ. Press 1986); HUGH GROITEIN, PRIMITIVE ORDEAL AND MODERN LAW (London, George Allen & Unwin 1923); HENRY C. LEA, SUPERSTITION AND FORCE: ESSAYS ON THE WAGER OF LAW, THE WAGER OF BATTLE, THE ORDEAL, TORTURE (Philadelphia: Collins 3rd ed.1878); Finbarr McAuley, *Canon Law and the End of the Ordeal*, 26 OXFORD J. LEGAL STUD. 473 (2006); William Ian Miller, *Ordeal in Iceland*, 60 SCANDINAVIAN STUD. 189-218 (1988); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (Boston, Little Brown & Co. 1898).

¹⁸ This law read as follows: “It is not right to use the ordeal in any case, unless the truth may be known in no other way.” Leeson, *supra* note 8, at 695, quoting BARTLETT, *supra* note 9 at 26.

¹⁹ Leeson, *supra* note 8, at 695. See also Roger D. Groot, *The Jury of Presentment before 1215*, 26 AMERICAN J. LEGAL HIST. 1, 1 (1982); Frederick Pollock, *English Law before the Norman Conquest*, 14 L. Q. REV. 291 (1898).

is liberally doused with holy water and transformed by long prayers of benediction into a prototype of the ancient righteous man delivered in times of tribulation. He is no longer part of a human lawsuit. He is the spearhead of justice, but it is a spearhead carefully detached by long rituals from its haft, from the pressures of the groups ranged behind a disputed issue. The ordeal is entered into under conditions where the human group has usually reached deadlock. An ordeal is a tacit 'defusing' of the issue. It is not a judgment by God; it is a remitting of a case *ad iudicium Dei* 'to the judgment of God.' This is an action tantamount to removing the keystone of the arch on which, hitherto, all pressures had converged. Once removed, a decision can be reached quickly and without loss of face by either side. For being brought to the judgment of God, the case already stepped outside the pressures of human interest, and so its resolution can be devoid of much of the odium of human responsibility."²⁰

In addition to this symbolic value of the trial by ordeal during medieval times, it has also been suggested to have been quite effective, as the unwavering belief in the ordeal as a mode of truth and proof ultimately resulted in only innocent defendants being willing to undergo this fate.

"Guilty defendants expected ordeals to convict them. Innocent defendants expected the reverse. Thus, only innocent defendants were willing to undergo ordeals. Conditional on observing a defendant's willingness to do so, the administering priest knew he or she was innocent and manipulated the ordeal to find this."²¹

By the twelfth century, however, high-ranking ecclesiastics, at the behest of King Henry II who personally stood sceptical to the trial by ordeal,²² began seriously questioning the association of these ordeals

²⁰ Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 DAEDALUS 133, 137-38 (1975). See also Bloomfield, *supra* note 11, at 551.

²¹ Leeson, *supra* note 8, at 692. See also Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. INTERDISCIPLINARY HIST. 571 (1974); HOWLAND, *supra* note 8, at 2; Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISCIPLINARY HIST. 573, 580 (1992).

²² HOWLAND, *supra* note 8, at 16.

with their religion, as the ordeals had no scriptural sanction²³ and violated an important Christian proscription: “[T]hou shalt not tempt the Lord thy God”.²⁴ Judicial ordeals, in essence, “required priests to command God to perform miracles at their whim, which the Bible forbids”.²⁵ The Fourth Lateran Council subsequently rejected the legitimacy of judicial ordeals in 1215, and banned all priests from participating in or administering them.²⁶ The Fourth Lateran Council also abolished judicial combat or trial by combat (*duellum*) in that same year, but this mode of proof “survived for centuries the ordeal proper”, as duels could easily be fought without the aid of a priest.²⁷ Judicial combat is of Germanic origin and became a recognised mode of proof in England only after the Norman Conquest.²⁸ According to Bloomfield, judicial combat was generally regarded as a forward step in the development of trial procedures as it gave both parties the opportunity to actively participate in the process of determining truth.²⁹

“Trial by combat was undoubtedly a forward step in the development of trial procedures as it put under some kind of order a method which was no doubt frequently used at random – the use of force to settle disputes. The oracle, usually though not always, attempted to determine the truth of the future; the

²³ Leeson, *supra* note 8, at 709. Leeson also noted that the Bible contains but one instance of what might be construed as an actual judicial ordeal in the Book of Numbers (Num. 5:11-31) where an accused adulteress undergoes an ordeal of bitter waters (poison ingestion) to prove her fidelity.

²⁴ Leeson, *supra* note 8, at 709 (referring to Deuteronomy 6 verse 16 and Matthew 4 verse 7).

²⁵ Leeson, *supra* note 8, at 709.

²⁶ The decree read: “Let no ecclesiastic ... pronounce over the ordeal of hot or cold water or glowing iron any benediction or rite of consecration, regard being also paid to the prohibitions formerly promulgated respecting the single combat or duel.” Leeson, *supra* note 8, at 709, quoting HOWLAND, *supra* note 8, at 16.

²⁷ Denmark prohibited the trial by ordeal in 1216, England in 1219, Scotland in 1230, Italy in 1231 and Flanders between 1208 and 1233. Shortly thereafter, Norway, Iceland, Sweden and others followed suit. Leeson notes that France never formally abolished ordeals, but the last known mention made to ordeals can be found in 1218. Leeson, *supra* note 8, at 710. RAOUL-CHARLES VAN CAENEGEM, *LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 87 (London, Hambledon Press 1991). Judicial combat continued until the late thirteenth century in Spain, until the fourteenth century in Italy, Flanders, and Germany, and until the fifteenth century in Portugal, France, and Hungary. In England, the last judicial combat is believed to have been fought in 1456. And Howland suggests that the trial by battle was only formally abolished in 1819. Leeson, *supra* note 8, at 710-711, quoting THAYER, *supra* note 17, at 39. *See also* M.J. Russell, *Trial by Battle and the Appeals of Felony*, 1 J. LEGAL HIST. 135, 154 (1980); Colman, *supra* note 21, at 587; HOWLAND, *supra* note 8, at 18.

²⁸ Bloomfield, *supra* note 11, at 554.

²⁹ HOWLAND, *supra* note 8, at 2; Leeson, *supra* note 8, at 342.

ordeal that of the past. It is easy to understand why trial by combat persisted as long as it did. It favoured the strong, and it could clam divine sanction.”³⁰

Contrary to the trial by ordeal and trial by combat, an ancient device known as purgation by oath or *purgatio* had the support of scriptural sanction.³¹ Compurgation, oath swearing, or wager of law (*vadiare legem*), refers to the swearing off of an accusation by an accused himself, or with the assistance of oath-helpers who swore on his behalf. Such oath-helpers or compurgators “were originally kinsmen, who would have had to pay the *wer-gild* in case the accused had been convicted of the charge, but later custom permitted them to be neighbours or others acceptable to the court. Their number varied according to the gravity of the charge and the character of the accused.”³² This offer of an oath as evidence had its roots in the apostolic statement that “‘an oath for confirmation is to them an end of all strife’, and was utilised particularly in cases involving clergy”.³³ In fact, oath swearing just like the trial by ordeal and the trial by battle remained a mode of proof based on divine justice as it was premised on the principle *jurare est testem Deum invocare*; those swearing understood that God and the saint on whose relics the oath was made would be their witnesses, and that they (the oath swearers) would be punished for any perjury.³⁴ Despite this threat of punishment for perjury, it is important to remember that oath-helpers were in no sense witnesses; it was not expected of them to have first-hand knowledge of the matter, nor were they expected to give testimony. Oath-helpers merely expressed their confidence in the veracity of their principal’s word.³⁵ In tracing the legal-historical significance of this mode of proof, Howland explained: “This method of proof dates back to remote antiquity among the Germanic tribes, and on their conversion it was adopted by the church, which made such extensive use of it in

³⁰ Bloomfield, *supra* note 11, at 551-552.

³¹ Baldwin, *supra* note 8, at 617, referring to The Bible Hebrews 6 verse 16.

³² HOWLAND, *supra* note 8, at 3.

³³ Baldwin, *supra* note 8, at 617, referring to The Bible Hebrews 6 verse 16.

³⁴ Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in ON THE LAWS AND CUSTOMS OF ENGLAND 92-93 (Morris S. Arnold et al. eds., Chapel Hill, Univ. North Carolina Press 1981).

³⁵ LEA, *supra* note 17, at 58.

its efforts to secure immunity of the clergy from secular jurisdiction that the process finally became known as canonical compurgation.”³⁶

The oath was also important to mediaeval Romanists who generally ignored the whole problem of ordeals and were largely preoccupied with the re-establishment of ancient Roman jurisprudence.³⁷ Baldwin explains that to the Romanists, “full and clear legal proof consisted mainly of written instruments and witnesses”.³⁸ However, the Romanists also recognised that full proof was not always possible, due to lack of evidence including eye witnesses. Such cases, according to the Romans, had to be dealt with as follows:

“...in criminal cases when the plaintiff was not able to establish complete evidence the defendant was immediately acquitted, because it was preferable to allow the guilty to escape than to punish unjustly the innocent. In civil cases the Romanists generally recognised a category of semi-complete proof which included certain kinds of evidence, such as presumptions, notoriety, or one witness, instead of two, which constituted full proof. In the case of certain semi-complete evidence, the judge could assign an oath (*iusiurandum, iuramentum, sacramentum*) to one of the parties, and the case would be decided on the basis of that oath. Intricate rules were drawn up to determine whether the oath should be taken by the plaintiff or the defendant. By the time of Azo this judicial oath of the Romanists was called purgation and contained marked similarities to the canonical purgation of the ecclesiastical courts.”³⁹

As with the trial by ordeal and trial by battle, compurgation also involved elaborate ceremonies with notable weight and attention given to procedure.⁴⁰ In fact, exact compliance with the prescribed procedure and its many rigid and precise rules was a prerequisite for success in the process of oath-making: “[T]here were detailed provisions on determining the number of oath-helpers that had to be

³⁶ HOWLAND, *supra* note 8, at 3.

³⁷ Baldwin, *supra* note 8, at 615-161.

³⁸ Baldwin, *supra* note 8, at 616.

³⁹ Baldwin, *supra* note 8, at 616.

⁴⁰ H.L. Ho, *The legitimacy of medieval proof*, 19 J. L. & RELIGION 259, 266 (2003-2004).

called, and of calculating the value of an oath according to the social class to which its maker belonged. The conduct of the trial has been described as ‘rigorously formalistic’; there was punctilious regard for formalities’ and a ‘rigid adherence to forms’. ‘Things had to be done in the right way and the right things had to be said, using the correct words’.”⁴¹

An important shortcoming for both the ecclesiastical use of purgation as well as the Roman use of oaths, was the control exerted by the various pledge groups, kinship ties, and local folk assemblies of the early medieval societies.⁴² Coleman explained as follows:

“The majority of civil and criminal cases were settled by oath-swearing, the number of oath-helpers depending on the circumstances, and since every free man was enrolled in a pledge group responsible for his welfare, the unfree depending on their lords, denial of support was tantamount to an adverse verdict. How else can we explain a defendant’s failure to secure oath-helpers in a society where we know everyone had sureties? The oath, which was ‘the primary mode of proof’, went ‘not to the truth of a specific fact but to the justice of the claim or defence as a whole’, and there is no a priori reason to suppose that the community acted blindly on such occasions, nor to attribute to our forebears a token of exercise of discretion simply because the court records indicate ‘small scope...for...reasonable adjudication on the facts’.”⁴³

The oaths of unfree persons, who composed much of the medieval population, were furthermore not accepted and so too were the oaths of foreigners, those who had perjured themselves, had failed in a legal contest, or had otherwise tarnished reputations, been branded as unacceptable.⁴⁴ It was also noted that the elaborate ceremonies and rigid and precise rules of compurgation rendered it a mere technical

⁴¹ Ho, *supra* note 40, at 267, quoting MAX RHEINSTEIN, MAX WEVER ON LAW IN ECONOMY AND SOCIETY 227 (Boston, Harvard Univ. Press 1954); THAYER, *supra* note 17, at 8; Wendy Davies, *Local Participation and Legal Ritual in Early Medieval Law Courts in THE MORAL WORLD OF THE LAW* 48 (Peter Cross ed., Cambridge Univ. Press 2000); LEA, *supra* note 17, at 40.

⁴² Colman, *supra* note 21, at 575. See generally Ho, *supra* note 40, at 259-298.

⁴³ Colman, *supra* note 21, at 576.

⁴⁴ Leeson, *supra* note 8, at 695.

ceremony.⁴⁵ By the thirteenth century, therefore, compurgation had come to be looked upon with suspicion by the royal judges and the Church alike.⁴⁶

Subsequent legal reform with regard to modes of proof and adjudication, did not immediately abandon the practice of negative proof; on the Continent, it brought in the worst form of that system, reliance on confession as proof and torture as the means to obtain it.⁴⁷ And in England, the void was filled by the jury verdict as proof. Curiously, however, the English jury trial was not conceived by an Englishman, nor was it instigated by the people and for the people.⁴⁸

B. From Medieval Modes of Proof to Contemporary Modes of Adjudication: The Common Law Tradition

The origin of the English criminal jury is conventionally dated 1166 with King Henry II, ordaining by way of the Assize of Clarendon, the selection and swearing in of “twelve lawful men of each hundred; four such men were also to be selected from each vill.”⁴⁹ These jurors were to report, first to the sheriff’s court and then to the royal justices on eyre, anyone within their respective jurisdictions who was accused of or reputed to have committed certain serious crimes. Such a person was then to undergo the ordeal.⁵⁰ At first therefore, and at least until 1215, some kind of dual mode of proof continued for a period after the Assize of Clarendon was ordained.⁵¹ On the one hand were the compurgators and on the other the *juratores* summoned by a public officer at the behest of King Henry II.⁵² Pollock describes this difference between the compurgators and the *juratores* as follows:

⁴⁵ LEA, *supra* note 17, at 56.

⁴⁶ HOWLAND, *supra* note 8, at 6.

⁴⁷ HOWLAND, *supra* note 8, at 2; Groot, *supra* note 19, at 1.

⁴⁸ FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 142 (Cambridge, Cambridge Univ. Press 2nd ed. 1911).

⁴⁹ The hundred was a political subdivision of the shire or country and the vill was a yet smaller unit which Pollock describes as a township. Groot, *supra* note 19, at 3. POLLOCK & MAITLAND, *supra* note 48, at 137, 145 and 529.

⁵⁰ Groot, *supra* note 19, at 3. POLLOCK & MAITLAND, *supra* note 48, at 152.

⁵¹ Groot, *supra* note 19, at 3-4; Kerr, Forsyth & Plyley, *supra* note 21, at 574. POLLOCK & MAITLAND, *supra* note 48, at 142.

⁵² While a clear distinction exists, therefore, between the compurgators and the *juratores*, it is generally also accepted that there may have been some historical linkages. POLLOCK & MAITLAND, *supra* note 48, at 139-140; LEA, *supra* note 17, at 32 and 45.

“...we have to distinguish the jury from a body of doomsmen,⁵³ and also from a body of compurgators or other witnesses adduced by a litigant to prove his case. ...the witnesses of the old Germanic folk-law differ in two respects from our jurors or recognitors: - they are summoned by one of the litigants, and they are summoned to swear to a set formula. The jurors are summoned by a public officer and take an oath which binds them to tell the truth, whatever the truth may be. In particular, they differ from oath-helpers or compurgators. The oath-helper is brought in that he may swear to the truth of his principal's oath. Normally he has been chosen by the litigant whose oath he is to support, and even when, as sometimes happens, the law, attempting to make the old procedure somewhat more rational, compels a man to choose his oath-helpers from among a group of persons designated by his adversary or by his judges, still the chosen oath-helper has merely the choice between swearing to a set formula...or refusing to swear at all. On the other hand, the recognitor must swear a promissory oath; he swears that he will speak the truth whatever the truth may be.”⁵⁴

It is well established that the *juratores* appointed under the Assize had a duty to report every crime and every suspect and that they also transmitted rumours and community suspicions.⁵⁵ The value of this mode of proof to the King was manifold:

“He uses it in his litigation: - he will rely on the verdict of the neighbours instead of on battle or the ordeal. He uses it in order that he may learn how he is served by his subordinates: - the neighbours are required to say all that they know about the misconduct of the royal officers. He uses it in order that he may detect those grave crimes which threaten his peace: - the

⁵³ According to Pollock, doomsmen were representatives from the vill, a smaller unit or township, who were summoned by the sheriff on a regular basis every year to hear minor offences. Pollock explained that “[p]resentments respecting crimes and minor offences are disposed of on the spot; presentments of crimes merely serve to initiate proceedings against the accused who will be tried by the king's justices.” See POLLOCK & MAITLAND, *supra* note 48, at 29-530.

⁵⁴ POLLOCK & MAITLAND, *supra* note 48, at 139-140. Groot, *supra* note 19, at 3-4.

⁵⁵ Groot, *supra* note 19, at 5. POLLOCK & MAITLAND, *supra* note 48, at 138.

neighbours must say whether they suspect any of murders or robberies [etc.].”⁵⁶

And at first, these *juratores* were only tasked with providing *vere dicta* (true statements). Glaeser and Shleifer explain:

“In its original formulation (dated roughly to the various royal assesses in the 1150s and 1160s), the jury was an assembled body of local notables who would inform itinerant royal judges of local facts.... In its initial incarnation, the jury was responsible for providing *vere dicta* (true statements) and not actually given control over the outcome of the case. While the public nature of the juries’ verdicts surely made it difficult for judges to completely ignore them, initially juries were an efficient means of gathering information, and not a check on the royal prerogative.”⁵⁷

This was the origin of the English jury; established in and developed from the “Frankish *inquisitio*, the prerogative rights of the Frankish kings. ...the Frankish king has in some measure placed himself outside the formalism of the old folk-law; his court can administer an equity which tempers the rigour of the law and makes short cuts to the truth.”⁵⁸ While some evidence exists of a similar inquest procedure in France and Germany at that time, that inquest procedure was soon overwhelmed by the spread of the Romano-Canonical procedure, or inquisitorial procedure which is detailed in the subsequent Part C below.⁵⁹

Pollock explained that the old modes of proof, though abolished, did not disappear completely in English law and practice, and that proof by battle survived until 1819 and proof by oath-helpers until 1833.⁶⁰ However, under the reign of King Henry II, the exceptional inquest procedure soon became the norm and developed to the extent

⁵⁶ POLLOCK & MAITLAND, *supra* note 48, at 141.

⁵⁷ Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193, 1198 (2002). Of the jury’s original duty to only speak the truth Pollock states as follows: “Even though the form of the verdict and its conclusive force be such that the judgment must follow as mere matter of course, still between the sworn verdict and the judgment there is a deep gulf.” POLLOCK & MAITLAND, *supra* note 48, at 139.

⁵⁸ POLLOCK & MAITLAND, *supra* note 48, at 140-141, 143.

⁵⁹ POLLOCK & MAITLAND, *supra* note 48, at 141.

⁶⁰ POLLOCK & MAITLAND, *supra* note 48, at 150.

that the *juratores* were no longer limited to only reporting the truth, or casting suspicion, but they were also required to draw the usual inference from the facts presented so as to make a judgment or cast a verdict.⁶¹ This increased influence of the *juratores* can in part be attributed to the rapidly accelerated judicial business being transacted in the King's name, as criminal justice became an important source of revenue for the King.⁶² Eventually the *juratores* was "no longer an extraordinary tribunal, a court for great men, for great cases, for matters that concerned the king; it was to become an ordinary tribunal for the whole realm".⁶³ In criminal proceedings, the *juratores*' own opinion as to the guilt of the accused and the fact that the accusation was made were textually clearly distinguished in case law.⁶⁴ Groot explains that this textual distinction is evidence that "the jurors were adjudicating – first accusing and then opining about the accuracy of the accusation".⁶⁵ And with the *juratores* having enjoyed some immunity from liability for falsely accusing, they also had "a significant power to adjudicate – to say that a defendant, although the object of suspicion, was 'not guilty'".⁶⁶ The clear textual distinction between the information laid and the opinion or verdict of the *juratores* can, however, also be attributed to the fact that the King continued to exert strict control over the administration of justice; "[s]hort of proclaiming his own will to be the judgment of his court, there was little that he could not or would not do by way of controlling all the justice that was done in his name. ...Even when he had appointed judges to hear a cause, they would advise the successful litigant to wait until a judgment could be given by the king's own mouth."⁶⁷

A complete exposition of the history of English law after the death of King Henry II in 1189 does not fall within the ambit of the discussion here.⁶⁸ Suffice it to note that the system of adjudication

⁶¹ Groot, *supra* note 19, at 10; Glaeser & Shleifer, *supra* note 57, at 1198. POLLOCK & MAITLAND, *supra* note 48, at 151-153.

⁶² Glaeser & Shleifer, *supra* note 57, at 1199; POLLOCK & MAITLAND, *supra* note 48, at 150-153.

⁶³ POLLOCK & MAITLAND, *supra* note 48, 153.

⁶⁴ Groot, *supra* note 19, at 11.

⁶⁵ Groot, *supra* note 19, at 13.

⁶⁶ Groot, *supra* note 19, at 21.

⁶⁷ POLLOCK & MAITLAND, *supra* note 48 at 158-159.

⁶⁸ See generally Kamali & Green, *supra* note 8 at 51-81.

which King Henry II established in England became so strong and influential, that the Charter of Liberties or Magna Carta issued in 1215 by King John of England as a practical solution to the political crisis that he faced, included a critical statement of veto power for lay persons in the administration of justice:

“No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any wise destroyed, save by the lawful judgment of his peers or the law of the land.”⁶⁹

The Magna Carta established for the first time that everyone, including the King was subject to the law, and that all “free men” had the right to justice and a fair trial which, for all intents and purposes, included a trial by jury.

C. From Medieval Modes of Proof to Contemporary Modes of Adjudication: The Civil Law Tradition

The comparable development in Continental Europe was wholly different. France, for example, moved toward a judge-inquisitor model governed by Romano-Canon law. While the role of the judge in the developing English jury system of that time was limited to maintaining courtroom order, framing questions that the juries must answer, and ensuring compliance with the ground rules of the various forms of action,⁷⁰ the judges in the French system questioned witnesses privately and separately, prepared written records, and themselves determined the outcome of the case: “These judges were directly beholden to the king, and there is no question that the king had the ability to strongly influence their actions through appointments, reappointments, and bribes.”⁷¹ To explain this divergence in the French and English design of adjudication, regard must be had to the social history of France.⁷² The political dynamism in France was threefold at that time, and consisted of the King, the magnates (e.g. bankers, traders and opulent watchmakers) and local notables (a small

⁶⁹ Magna Carta 1215, cl. 39. Glaeser & Shleifer, *supra* note 57, at 1199; POLLOCK & MAITLAND, *supra* note 48, at 155-157

⁷⁰ Glaeser & Shleifer, *supra* note 57, at 1199, quoting JOHN P. DAWSON, A HISTORY OF LAY JUDGES 136 (New Jersey, The Lawbook Exchange Ltd. 2007) (1960).

⁷¹ Glaeser & Shleifer, *supra* note 57, at 1200

⁷² Glaeser & Shleifer, *supra* note 57, at 1194.

elite group of individuals and family lineages endowed with economic wealth, social prestige, and political power).⁷³ While the King's access to the populace for taxation was mediated through the nobles, the local magnates retained significant power in their regions, and remained impenetrable by the royal centre.⁷⁴ A jury of notables in France, "would therefore not have been able to deliver justice when the interests of the local magnates were involved... [and]...it was more efficient to surrender adjudicatory powers to royal judges, even when the preferences of the king did not reflect community justice".⁷⁵ In England, in contrast, "local magnates were weaker relative to the knights...[and]...local pressure on the juries was [therefore] weaker, and the decisions they could reach were probably closer to the community standards of justice".⁷⁶

The differences in the legal traditions that so developed in England and France, were further perpetuated in the eighteenth and nineteenth centuries when the Romanist tradition of codified law⁷⁷ - which has its origin in 450 BC, the supposed publication date of the XII Tables of Rome - reached its apex.⁷⁸ With the rise of the nation State, and the growth of the concept of national sovereignty, Kings and Rulers following the French legal tradition at that time, in an effort to exert even more control over judges, the adjudication process, and ultimately also justice, actively pursued the codification of law and the adoption of codes, of which the French Code Napoléon of 1804, is the archetype.⁷⁹ Glaeser and Shleifer observed that codification "aims to provide adjudicators with clear bright line rules, as opposed to broad legal principles or standards, for making decisions".⁸⁰ They explained that no legal system is made up entirely of bright line rules, "but civil codes are basically collections of rules intended to restrict the actions of the participants in legal systems. We maintain that the purpose of

⁷³ GRAEME GILL, *THE NATURE AND DEVELOPMENT OF THE MODERN STATE* 85 (London, Palgrave & Macmillan 2nd ed. 2016).

⁷⁴ Gill, *supra* note 73, at 85; Glaeser & Shleifer, *supra* note 57, at 1200-1201.

⁷⁵ Glaeser & Shleifer, *supra* note 57, at 1201.

⁷⁶ Glaeser & Shleifer, *supra* note 57, at 1201.

⁷⁷ Written rules as opposed to an oral legal tradition are based on standards and precedent.

⁷⁸ MERRYMAN ET AL., *supra* note 5, at 4-6; Glaeser & Shleifer, *supra* note 57, at 1211-1212.

⁷⁹ MERRYMAN ET AL., *supra* note 5, at 216, 350, 1093. One of the purposes of the French Revolution was indeed for the multiplicity of laws to be abolished, and for the all law-making power and all jurisdiction to lodge in the state.

⁸⁰ Glaeser & Shleifer, *supra* note 57, at 1211.

such rules to enable sovereigns – whether kings or parliaments – to control judges; they are a natural consequence of the reliance on state-controlled judiciaries.”⁸¹ Thus, while jurisdictions following the common law tradition of England also have codes of law and statutes, the common law judge retains to a certain extent the flexibility to interpret, to disregard the provisions when they conflict with the basic principles of the law, and to acknowledge the differences between the case under review and the specific provisions of the code or statute. Judges in jurisdictions of the civil law tradition, on the other hand, are restrained by codes in that they should not “interpret the codes very much, and in principle must seek not to differentiate a specific situation, but to fit it into the existing provisions of the code”, in conformance to a rigid principle of the separation of powers.⁸² This trend of codification in the civil law tradition in turn reinforced the inquisitorial nature of the continental systems, which stands in stark contrast to the more accusatorial English-based systems.⁸³ The reason for this development is because written evidence and reliance on codes would have been particularly difficult to institute and sustain in a jury-type system, plagued with high rates of illiteracy among the general population and therefore also its jury members. Kings, on the other hand, wanting to control their judges, needed written records of their doings and therefore preferred to appoint literate clerics as adjudicators.⁸⁴ In jurisdictions following the common law tradition evidence was for this reason collected and presented to juries in a public trial while trials in jurisdictions following the civil law tradition played a secondary role, also because a public display of evidence would have made it harder for the sovereign to review and control judicial decisions.⁸⁵

Today, most modern national legal systems in the world are either predominantly influenced by the English common law tradition, or the French civil law tradition due to the transplantation of these two legal traditions through conquest and colonisation.⁸⁶ Glaeser and Shleifer explained:

⁸¹ Glaeser & Shleifer, *supra* note 57, at 1211-1212.

⁸² Glaeser & Shleifer, *supra* note 57, at 1211-1212.

⁸³ Groot, *supra* note 19, at 1.

⁸⁴ Glaeser & Shleifer, *supra* note 57, at 1218.

⁸⁵ Glaeser & Shleifer, *supra* note 57, at 1218.

⁸⁶ MERRYMAN ET AL., *supra* note 5, at 3-9.

“The common law tradition originates in the laws of England, and has been transplanted through conquest and colonisation to England’s colonies, including the United States, Australia, Canada, and many countries in Africa and Asia. The civil law tradition has its roots in the Roman law, was lost during Dark Ages, but rediscovered by the Catholic Church in the eleventh century and adopted by several continental states, including France. Napoleon exported French civil law to much of Europe, including Spain, by conquest. French civil law was later transplanted through conquest and colonisation to Latin American and parts of Africa and Asia.

Structurally, the two systems operate in very different ways: civil law relies on professional judges, legal codes, and written records, while common law on lay judges, broader legal principles, and oral arguments.”⁸⁷

Approximately forty-two jurisdictions in the world identify with the English common law tradition and forty countries identify with the civil law tradition. In addition, German civil law, Scandinavian law and socialist law prevail in parts of the world.⁸⁸ These are mentioned separately here because their legal development is distinct; mirroring the basic tenets and foundation of the French civil law tradition, but also having retained or acquired unique features which set them apart.⁸⁹

This article will not provide a comprehensive exposition on the distinguishing features of, and major differences between the civil law and common law traditions,⁹⁰ nor will it elaborate on the possible

⁸⁷ Glaeser & Shleifer, *supra* note 57, at 1193.

⁸⁸ Glaeser & Shleifer, *supra* note 57, with reference to Simeon Djanov et al., *Courts: The Lex Mundi Project* (Nat’l Bureau of Econ. Research, Working Paper No. 8890, 2002).

⁸⁹ For an overview of the two predominant legal traditions as well as the various national legal systems, see MERRYMAN ET AL., *supra* note 5.

⁹⁰ Glaeser & Shleifer summarised the following procedural differences between civil and common law systems: “The common law system greatly relies on oral argument and evidence, while in civil law systems, much of the evidence is recorded in writing. Trials play a much larger role in a common law than in a civil law system. Civil law systems rely on regular and comprehensive superior review of both facts and law in a case; in common law systems, in contrast, the appeal is much less frequent, and is generally restricted to law rather than facts. Common law systems at least in the last century, have generally relied on heavily incentivised state prosecutors, who are separate from judges, especially in the criminal cases. In civil law systems, in contrast, judging and prosecution are generally combined in the person of the same judge. Finally, although this distinction is less clear-cut, common law systems

reasons why different choices were made by the various world jurisdictions with regard to their legal system design. This article will also not explore notions that these differences in legal traditions which ultimately underpin the various legal systems of the world, contribute to countries' political, economic, and social status and conditions, including its level of development, efficiency of governments, security of property rights, and the prevalence of corruption, to name a few.⁹¹ The focus in this article rather remains on a central choice in the design of a legal system, and that is its mode of adjudication, specifically, criminal adjudication.

III. THE HISTORY OF TRIAL BY PEERS II: OF HARMONY, GOVERNMENTAL CONTROL, AND LEGAL REFORM AND TRANSPLANTATIONS: THE STORY OF THE EAST

In the preceding part, the origins of modes of proof and adjudication were considered from medieval times to its early modern manifestation and development in the two dominant legal traditions: the common law tradition and the civil law tradition. The subsequent transplantation of these two law traditions through conquest and colonization to the rest of the world were also noted. In fact, most countries have not selected or developed their legal systems on their own, but have rather inherited them, at least to a large extent, through transplantation.⁹² But what about the Chinese legal tradition?

The Chinese legal tradition is “the longest of any enduring political system in the world, [and it] rivals that of Roman law in [both] its historical importance and lasting influence”.⁹³ As far as historical records reveal, a similar belief in divine justice as evidenced in the discussion above on medieval law, has never been a part of the history and heritage of the People's Republic of China.⁹⁴ Henry C. Lea explained as follows:

generally rely to a greater extent on the precedents from previous judicial decisions than do the civil law systems.” See Glaeser & Shleifer, *supra* note 57, at 1217-1218.

⁹¹ Glaeser & Shleifer, *supra* note 57, at 1194. See, e.g., Rafael La Porta et al., *The Quality of Government*, 15 J. OF L., ECON. 222 (1999); Rafael La Porta et al., *Government Ownership of Banks*, 57 J. OF FIN. 265 (2002); Simeon Djankov et al., *The Regulation of Entry*, 117 Q. J. ECON. 1 (2002).

⁹² Glaeser & Shleifer, *supra* note 57, at 1221.

⁹³ MERRYMAN ET AL., *supra* note 5, at 405. See also CHEN, *supra* note 5, at 9.

⁹⁴ LEA, *supra* note 17, at 219. MERRYMAN ET AL., *supra* note 5, at 406.

“...we find in the religious history of almost all races, that a belief in a Divine Being is accompanied with the expectation that special manifestations of power will be made on all occasions, and that the interposition of Providence may be had for the asking, whenever man, in the pride of his littleness, condescends to waive his own judgment, and undertakes to test the inscrutable ways of his Creator by the touchstone of his own limited reason. Thus miracles come to be expected as matters of every-day occurrence, and the laws of nature are to be suspended whenever man chooses to tempt his God with the promise of right and the threat of injustice to be committed in His Name. [...] The superstition which we here find dignified with the forms of Christian faith manifests itself among so many races and under such diverse stages of civilisation that it may be regarded as an inevitable incident in human evolution, only to be outgrown at the latest periods of development. In this, however, as in so many other particulars, China furnishes virtually an exception.”⁹⁵

Without any claim to deistic sources or divine intervention, the Chinese legal tradition has always been secular, with a high regard for rationality, and premised on the norms of various ethical or social philosophies, “especially those influenced by China’s familial orientations and Confucianist beliefs”.⁹⁶ Historical sources dating to the Xia Dynasty (夏) (circa 2100 – 1600 BC) furthermore reveal a rich history of detailed and elaborate codes, which include statutes, administrative regulations and procedural prescriptions and penal guidelines.⁹⁷ In fact, the idea of law that developed in China has in this sense, much in common with the prevailing features of contemporary administrative states in the civil law tradition. Law in the imperial Chinese system was an instrument of state regulatory control and initially only covered those matters necessary to protect or promote state interests, and focused to a large extent on the signalling of state punishment.⁹⁸ It therefore lacked, initially at least, any notion of a private ordering by law, and only included rules relating to

⁹⁵ LEA, *supra* note 17, at 218-219.

⁹⁶ MERRYMAN ET AL., *supra* note 5, at 406.

⁹⁷ MERRYMAN ET AL., *supra* note 5, at 405-406.

⁹⁸ MERRYMAN ET AL., *supra* note 5, at 405-406.

property, contracts, commercial transactions, and familial relations for as far as it served state interests.⁹⁹ Instead, it had “[a]n ideological emphasis on social harmony, ordered relationships, and observance of ritual based primarily on Confucian thought, [and which] was antithetical to the development of [a] private legal ordering. Proper behaviour and social order were to be maintained more by education and example than by legal rules. All individuals were to act benevolently to inferiors and deferentially to superiors so as not to disturb the natural order. It was therefore considered better to suffer social wrongs than to seek redress for them, even if they could be punished by law. Conflict was to be avoided. Dispute resolution was not a question of which parties had the ‘law’ on their side; what was important was to suppress conflict by making the adversaries understand how to behave according to the higher order of Confucian morality.”¹⁰⁰ The law therefore remained a secondary instrument of social control, especially with regard to the regulation of the “private”, and a “moral” rather than a “legal” order was preferred for inducing correct behaviour.¹⁰¹

Given the absence of a comprehensive corpus of legal principles, rules and categories designed to govern private affairs, popular beliefs sometimes found expression in irregular judicial proceedings as a method to adjudicate private (those in which the state had no interest) disputes.¹⁰² Henry C. Lea recorded two such examples in his 1878 monograph in which he considered some of the superstitions in the history of Chinese jurisprudence:¹⁰³

“In the popular mind, therefore, the divine interposition may perpetually be expected to vindicate innocence and to punish crime, and moral teaching to a great extent consists of histories illustrating this belief in all its phases and in every possible contingency of common-place life. Thus it is related that in A.D. 1626 the learning Doctor Wang-I had two servants, one stupid and the other cunning. The latter stole from his master a sum of

⁹⁹ “Unless a matter was of state concern and therefore subject to official regulation, no law existed.” MERRYMAN ET AL., *supra* note 5, at 406.

¹⁰⁰ MERRYMAN ET AL., *supra* note 5, at 406. LEA, *supra* note 17, at 219. Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PACIFIC RIM L. & POL’Y J. 569, 571 (2000).

¹⁰¹ MERRYMAN ET AL., *supra* note 5, at 406-407.

¹⁰² MERRYMAN ET AL., *supra* note 5, at 406.

¹⁰³ LEA, *supra* note 17.

money, and caused the blame to fall upon his comrade, who was unable to justify himself. By way of securing him, he was tied to a flagstaff, and his accuser was set to watch him through the night. At midnight the flagstaff broke in twain with a loud noise, the upper portion falling upon the guilty man and killing him, while the innocent was left unhurt; and next morning, when the effects of the dead man were examined, the stolen money was found among them, thus completely establishing the innocence of his intended victim. [...]

“If an injured husband surprises his wife *flagrante delicto* he is at liberty to slay the adulterous pair on the spot; but he must then cut off their heads and carry them to the nearest magistrate, before whom it is incumbent on him to prove his innocence and demonstrate the truth of his story. As external evidence is not often to be had in such cases, the usual mode of trial is to place the heads in a large tub of water, which is violently stirred. The heads, in revolving naturally come together in the centre, when, if they meet back to back, the victims are pronounced guiltless, and the husband is punished as a murdered; but if they meet face to face, the truth of his statement is accepted as demonstrated, he is gently bastinadoed to teach him that wives should be more closely watched, and is presented a small sum of money whether to purchase another spouse.”¹⁰⁴

These “curious form[s] of ordeal by chance”¹⁰⁵ are examples of the extra-legal remedies and sanctions that were practiced in communities by guilds and families for the adjudication of private disputes.¹⁰⁶

In contrast to the absence of law for private disputes, the modes of proof and adjudication for other legal disputes, those in which the state had an interest, were extensively and wholly prescribed in law and placed a “heavy emphasis on confession, coerced if necessary”.¹⁰⁷ To this end, the laws also provided for a set of complex rules for the degrees of torture permitted for the extraction of confessions, from

¹⁰⁴ LEA, *supra* note 17, at 220-221.

¹⁰⁵ LEA, *supra* note 17, 220.

¹⁰⁶ MERRYMAN ET AL., *supra* note 5, at 406, 414.

¹⁰⁷ MERRYMAN ET AL., *supra* note 5, at 406.

both witnesses and the accused.¹⁰⁸ Such proceedings were inquisitorial in nature and were usually presided over by a government official holding judicial and administrative functions.¹⁰⁹ No provision was made for public participation in the judicial system and its adjudicating processes.¹¹⁰ The whole of the criminal legal proceeding was furthermore aimed at securing a confession from the accused. Once a confession was secured, it was written by a clerk of the court and the confessor was forced to affix his or her signature. “This signature meant the end of the trial in court. The application of law to the fact proved by the confession was an internal matter of the officialdom, not the subject of debate in court. ...[T]here was no judgment in the genuine sense of the word, that is; there was no concept of a conclusion which, being reached through fixed rules or procedure, was to be regarded as the best substitute for the absolute truth and justice of God.”¹¹¹ The development of the Chinese law in this regard, therefore remained concentrated “on the substantive specifications of preferred behaviour in particular circumstances, on the proper punishments for misbehaviour, and on the realities of particular cases”.¹¹² No institutional distinction comparable to the Western categories of civil and criminal cases, law, or procedure, was ever made, and the focus remained throughout on the preservation and restoration of harmony as it transpired in specific cases, and within society.¹¹³ The character 法 (fa), which is usually translated as meaning “law”, reflects this as it “conveys primarily a signification of ‘model’ or ‘method’. Its connotations are primarily persuasive and exemplary rather than imperative. Even when it is used to convey specifically an imperative signification, that signification does not project the idea of universal, compulsive, rigid rules of general behaviour external to the parties, but only the idea of the immediate command of a present superior in a hierarchical social context.”¹¹⁴

¹⁰⁸ MERRYMAN ET AL., *supra* note 5, at 406.

¹⁰⁹ MERRYMAN ET AL., *supra* note 5, at 413.

¹¹⁰ Jiang, *supra* note 100, at 571-572.

¹¹¹ MERRYMAN ET AL., *supra* note 5, at 412.

¹¹² MERRYMAN ET AL., *supra* note 5, at 410.

¹¹³ MERRYMAN ET AL., *supra* note 5, at 409-410, 412; CHEN, *supra* note 5, at 18.

¹¹⁴ MERRYMAN ET AL., *supra* note 5, at 409-410.

Throughout the centuries and despite the rise and fall of many dynasties, this focus on the realities of particular cases, on the preservation and restoration of harmony, and of the central role and temporal endurance of hierarchical authority, have remained hallmarks of the Chinese legal and judicial system.¹¹⁵ To date, the law, 法 (fa), essentially remains nothing more than the regulations issued by the sovereign and delegated through the branches of a bureaucracy of sovereign appointed officials to maintain social harmony and control.¹¹⁶ While the Chinese people may enjoy the effects of 法 (fa), no person or organ of state, or other legal subject derives any authority from the law.¹¹⁷ In fact, it has been said that “[t]he notable lack of magical factors, such as ordeal, in the courts of imperial China, and lack of strict formalistic rules of procedure as well, can also be explained by the fact that the judge was not a servant of a mechanism aimed at objective truth beyond personal wisdom but was a representative of an almighty and merciful government which held the mandate of heaven to realise harmony in this world. ...there is therefore little to be said on the subject of judicial organisation other than to describe the hierarchical bureaucracy itself.”¹¹⁸ Ultimately, the Chinese legal and judicial system simply does not yield to a systems theory approach like the legal systems of the West.¹¹⁹

A complete and comprehensive legal-historical overview of the development of the Chinese legal system to date is beyond the scope of this article. The focus here remains on a central choice in the design of a legal system, and that is its mode of adjudication, specifically, criminal adjudication. In this regard, it can be noted that efforts to reform and modernise Chinese law commenced in the first decade of the twentieth century, towards the end of the Qing Dynasty (清) (1644-1911).¹²⁰ In 1904, a Law Reform Bureau was set up to translate foreign codes of law and to draft new laws for China. This gave rise

¹¹⁵ MERRYMAN ET AL., *supra* note 5, at 411.

¹¹⁶ MERRYMAN ET AL., *supra* note 5, at 410-411; CHEN, *supra* note 5, at 14.

¹¹⁷ MERRYMAN ET AL., *supra* note 5, at 410-411.

¹¹⁸ MERRYMAN ET AL., *supra* note 5, at 412-413.

¹¹⁹ In fact, the ruling ideology of Marxism-Leninism adopted by the People's Republic of China after 1949 is itself ambiguous about the value of legal construction. MERRYMAN ET AL., *supra* note 5, at 410-411. CHEN, *supra* note 5, at 2; Stephen Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L. J. 179, 197 (2008).

¹²⁰ CHEN, *supra* note 5, at 28.

to a number of new codes being drafted. A leading figure in these law reform activities was Shen Jiaben; “[h]e studied the laws of the Western nations, including the newly modernised Japanese law, and he was dedicated to the improvement of China’s traditional legal system.”¹²¹ These reform efforts were thwarted, however, with the fall of the Qing Dynasty (清) in 1911 and the subsequent period of internal strife and wars.¹²² In the period 1928-1935 under the government of the Republic of China, a series of comprehensive codes were promulgated. These were partly based on the European continental model (such as the laws of Germany, Japan and Switzerland), and partly based on the Anglo-American model, and also to some extent on the existing traditions of the law Qing and warlord periods.¹²³ These laws, however, were formally abolished when the People’s Republic of China was established in 1949 and undertook the construction of a new legal system for China.¹²⁴ After the establishment of the People’s Republic of China, legal reform and development was again stifled, this time by the Anti-Rightist Campaign which saw the abolishment of the Chinese Ministry of Justice and the organs of judicial administration in 1959, and the Great Proletarian Cultural Revolution of Mao Zedong commencing in 1966 which saw the further demise of the Chinese legal system.¹²⁵ After the death of Mao Zedong in September 1976, the Fifth National People’s Congress enacted a new Constitution at its meeting in February 1978, and the reform and develop of a new socialist legal system was initiated.¹²⁶ Albert Chen describes the progress made to date as follows:

“Since 1979, much has been done in China to rebuild a legal system. Many new laws and regulations have been enacted. By the end of 2010 – when the task of the creation of ‘a socialist legal system with Chinese characteristics’ was proclaimed to

¹²¹ CHEN, *supra* note 5, at 28.

¹²² *E.g.*, the Second Revolutionary Civil War (1927-1937), the War of Resistance Against Japan (1937-1945), and the Third Revolutionary Civil War (1945-1949). *See* CHEN, *supra* note 5, at 30. Landsman & Zhang, *supra* note 119, at 197.

¹²³ These laws were collectively known as the Collection of the Six Laws and still form the basis of the legal system in Taiwan. *See* CHEN, *supra* note 5, at 29; Jiang, *supra* note 100, at 572.

¹²⁴ CHEN, *supra* note 5, at 31.

¹²⁵ CHEN, *supra* note 5, at 36-40.

¹²⁶ CHEN, *supra* note 5, at 41.

have been completed – there existed 236 laws made by the National People’s Congress or its Standing Committee, more than 690 pieces of administrative regulations enacted by the State Council, and more than 8,600 pieces of local regulations. A new Constitution, the fourth one of the PRC, was promulgated in 1982, affirming the idea of legality and related concepts and principles. In the new constitution of the CPC¹²⁷ adopted in 1982, it is also expressly provided that the Party must operate within the scope of the state constitution and state law. Progress has also been made in legal institution building. For example, legal education has been revived and lawyers have once again begun to practice. By 2008, there were 140,000 lawyers in mainland China.”¹²⁸

IV. LAY PARTICIPATION IN CRIMINAL TRIALS OF THE PEOPLE’S REPUBLIC OF CHINA AND ITS SPECIAL ADMINISTRATIVE REGION OF HONG KONG

In this part, the focus is on lay participation in the criminal legal proceedings of the People’s Republic of China and its Special Administrative Region of Hong Kong. The Chinese legal system is largely based upon the German legal system (in the civil law tradition), and the law provides for a collegial panel (合议庭) of lay assessors serving together with professional judges to adjudicate legal disputes.¹²⁹ The Hong Kong legal system, in contrast, is based on the British legal system with a conventional trial by jury, as the territory known as Hong Kong was acquired by the British Empire as a product of the first Anglo-Chinese War (1839-42), also known as the “Opium War”.¹³⁰ The focus on lay participation in criminal legal proceedings in these two jurisdictions is not only interesting in terms of their unique laws and legal systems, but also serve as examples of legal transplants from various other “Western” jurisdictions in the “East” through conquest, colonization and legal reform.

A. *The Role of “People’s Assessors” in the Courts of the People’s*

¹²⁷ CCP represents the Communist Party of China.

¹²⁸ CHEN, *supra* note 5, at 45. See also Landsman & Zhang, *supra* note 119, at 202-203.

¹²⁹ Jiang, *supra* note 100, at 570.

¹³⁰ STEVE TSANG, A MODERN HISTORY OF HONG KONG 3 (London, I.B. Tauris & Co. Ltd. 2004).

Republic of China

Unparalleled in its previous constitutions, article 123 of the fourth Constitution of the People's Republic of China (1982) now vests the adjudicative power of the State exclusively in the People's Courts, and ensures the independent exercise of adjudicative power in accordance with the law and without the interference of administrative organs, social organisations, and individuals.¹³¹ The Chinese judiciary has, since the promulgation of the fourth Constitution in 1982, been transformed and continues to develop in terms of its commitment to justice (both substantive and procedural), fairness, conscience, openness, professionalism, and judicial independence. The latter is only tempered by the Party leadership, and the Western practice of judicial supremacy is therefore not imitated in the People's Republic of China.¹³² The Judges Law of the PRC of 1995 is described by Albert Chen as "a major step taken towards the institutionalisation and professionalisation of the Chinese judiciary", and was the first law in the history of the People's Republic of China to provide for a judiciary in a comprehensive and systematic manner.¹³³ Up to the promulgation of the Judges Law of the PRC in 1995, the expression "judge" (法官, faguan) was not officially used or defined in legislation. Article 2 of the Judges Law of the PRC of 1995 now defines judges as follows: "Judges are judicial persons who exercise the judicial authority of the State according to law, and they include the presidents, vice-presidents, members of judicial committees, chief judges and associate chief judges of divisions, judges and assistant judges of the Supreme

¹³¹ Xian Fa (宪法) [Constitution of the People's Republic of China] (promulgated by Nat'l People's Cong., Dec. 4, 1982) (2018), art. 123, 126 (Chinalawinfo); Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 5, 1979, effective Jan. 1, 1980) (2018) art. 4 (Chianlawinfo). CHEN, *supra* note 5, at 174.

¹³² With regard to judicial independence, or the lack thereof, see article 10 of the Organic Law of the People's Courts which provides, for example, for the establishment of a judicial committee to each court, comprised of the president of the relevant court and some adjudicators appointed on the recommendation of the president by the Standing Committee of the relevant People's Congress. "[C]ertain difficult and important cases" must be referred to these judicial committees and the collegial panel of the various courts are then required to implement the decision of the relevant judicial committee. CHEN, *supra* note 5, at 174-175, 186-187, 200-204; Landsman & Zhang, *supra* note 119, at 199.

¹³³ *Organic Law of the People's Courts* (人民法院组织法) was enacted in 1979, and amended in 1983, 1986 and 2006. It mainly provides for the structure and organisation of the court system and the jurisdiction of courts. CHEN, *supra* note 5, at 176.

People's Court, local People's Courts at various levels and special People's Courts such as military courts".¹³⁴

The court system of the People's Republic of China is based on the principle of "four levels of courts and at most two trials to conclude a case" (one trial at first instance, and one trial on appeal).¹³⁵ The four levels of courts comprise of thousands of basic-level people's courts at county level, hundreds of intermediate people's courts in cities and prefectures within provinces, higher people's courts at the provincial level, and the Supreme People's Court which exercises appellate jurisdiction as well as original jurisdiction in important cases at the national level.¹³⁶ The Supreme People's Court also has an important legislative function in that it promulgates judicial interpretations and documents providing general rules for courts to follow in adjudicating cases.¹³⁷ There are also specialist courts like military courts and maritime courts and at each of the four court levels there are also a number of divisions which specialise in the trial of different types of cases, such as criminal, civil, administrative etc.¹³⁸

Another important development in Chinese legal reform was the promulgation of the Criminal Procedure Law of the People's Republic of China in 1979, and specifically its amendment at the fourth Session of the Eighth National People's Congress on March 17, 1996. The main tenets of this major overhaul of the Chinese criminal justice system in 1996 were described by Landsman and Zhang as follows:

"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 defence's cases. Judges were still to be provided with the

¹³⁴ *Judges Law* (法官法) was adopted at the 12th meeting of the Standing Committee of the Eighth National People's Congress on February 28, 1995. CHEN, *supra* note 5, at 177.

¹³⁵ See *Renmin Fayuan Zuzhi Fa* (人民法院组织法) [Organic Law of the People's Courts] art. 11 ("In the administration of justice, the people's courts adopt the system whereby the second instance is the last instance"). CHEN, *supra* note 5, at 180.

¹³⁶ CHEN, *supra* note 5, at 180, 182; Landsman & Zhang, *supra* note 119, at 199. Jiang, *supra* note 100, at 574.

¹³⁷ *Renmin Fayuan Zuzhi Fa* (人民法院组织法) [Organic Law of the People's Courts] art. 31. See CHEN, *supra* note 5, at 182.

¹³⁸ CHEN, *supra* note 5, at 181.

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' (先定后审, xianding houshen) gave way to an approach that separated the prosecutorial function from the judging function."¹³⁹

The cumulative effect of these, and other reforms have generally moved the Chinese criminal law and procedure from an inquisitorial approach to a more adversarial process.¹⁴⁰

A system of lay participation in legal proceedings was first proposed in 1906, towards the end of the Qing Dynasty (清) (1644 – 1911), in a draft legal reform document titled the Criminal and Civil Procedure Law of Great Qing.¹⁴¹ However, the legal reforms set out in this document were never formally approved and it was only in 1949, when the People's Republic of China was founded, that the Provisional Organic Law of the People's Courts was enacted and the system of people's assessors (人民陪审员, renmin peishenyuan) was formally implemented.¹⁴² Article 9 of the Organic Law of the People's Courts of the PRC now enshrines the collegial system in the administration of justice for the People's Republic of China.¹⁴³ This system was later reinforced in 1954 by the Constitution which mandated that all first-instance cases should be heard by lay assessors.¹⁴⁴ Yet, by the mid-1980s, the people's assessors system of the People's Republic of China had limited use, as many Chinese courts had completely suspended or dramatically limited the practice of empanelling people's assessors in legal proceedings.¹⁴⁵

¹³⁹ Landsman & Zhang, *supra* note 119, at 203.

¹⁴⁰ Landsman & Zhang, *supra* note 119, at 203.

¹⁴¹ Landsman & Zhang, *supra* note 119, at 198; Zhuoyu Wang & Hiroshi Fukurai, *Popular legal participation in China and Japan*, 38 INT'L J. L. CRIME & JUST. 236, 238 (2010). Liling Yue, *The Lay Assessor System in China* 72 REVUE INTERNATIONALE DE DROIT PÉNAL 51, 55 (2001).

¹⁴² CHEN, *supra* note 5, at 183; Landsman & Zhang, *supra* note 119, at 198. He, *supra* note 2, at 734. Yue, *supra* note 141, at 55.

¹⁴³ Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] art. 9.

¹⁴⁴ Xian Fa (1954) (54年宪法) [Constitution of the People's Republic of China (1954)] (promulgated by promulgated by Nat'l People's Cong., Sept. 20, 1954) art. 75 ("People's Courts should utilise the lay assessor system according to the law"). Reference was also made to the system of people's assessors in the *Constitution (1978)* [78年宪法]. *Constitution (1982)* does not refer to the system of people's assessors. CHEN, *supra* note 5, at 184. Landsman & Zhang, *supra* note 119, at 198.

¹⁴⁵ Wang & Fukurai, *supra* note 141, at 238; CHEN, *supra* note 5, at 183.

Many reasons exist for its failure and various attempts were made by the government and legislature to revive lay participation in legal proceedings. For example, failure to attend court for service without a lawful excuse was not a criminal offence or liable to punishment in China and this, together with the extremely low compensation did little to convince ordinary citizens, especially those who were employed, to report to court for duty.¹⁴⁶ In an effort to motivate ordinary citizens to do service at the courts, article 38 of the Organic Law of the People's Courts of the PRC was amended in 1983, to compel courts to pay lay assessors appropriate subsidies.¹⁴⁷ But article 9 of the 1983 amendment still allocated the final decision-making power as to when lay assessors ought to be assigned to cases under the jurisdiction of each individual court by providing that "cases of first instance shall be adjudicated by a collegial panel composed of judges or of judges and lay assessors: simple civil cases, minor criminal cases and cases otherwise prescribed by law shall be adjudicated by a single judge".¹⁴⁸

The ineffectiveness of the mixed-tribunal system was far more expansive and systemic than the matter of appropriate compensation. Overloaded dockets and the shortage of professional judges both contributed to the decline in use of people's assessors, as well as its abuse. This came about as professional judges could no longer handle the increasing caseloads and either found it impracticable to sustain the collegial system, or used people's assessors as an easy substitute to save manpower and ease the courts' workload by re-employing the same lay assessors for years or even decades as quasi full-time tribunal members.¹⁴⁹ Wang and Fukurai reported that some Chinese courts chose to recruit unemployed people or pensioners as lay assessors and allocated heavy caseloads to them, effectively transforming them into full-time court employees.¹⁵⁰ Article 37 of the 1983 amendment of the Organic Law of the People's Courts had at aim to address this

¹⁴⁶ Wang & Fukurai, *supra* note 141, at 241.

¹⁴⁷ Wang & Fukurai, *supra* note 141, at 239.

¹⁴⁸ Wang & Fukurai, *supra* note 141, at 242; CHEN, *supra* note 5, at 183-184.

¹⁴⁹ In 1978, there were approximately 70,000 judges in China and this number doubled to 156,000 in 1998. Yet, the caseload of all Chinese courts increased ten times in the same two decades from about 500,000 in 1978 to 5,390,000 in 1998. Wang & Fukurai, *supra* note 141, at 240-241.

¹⁵⁰ These assessors were sometimes called "professional assessors" (陪审专业户). Wang & Fukurai, *supra* note 141, at 240. He, *supra* note 2, at 743.

problem by casting the net for the recruitment and appointment of lay assessors wide; the only requirements for lay assessors were that they had to be qualified voters on the electoral register, be at least twenty-three years' of age, and were not deprived of any political rights due to criminal convictions. No requirement was included with regard to educational achievement, language capabilities, or other possible disqualifications.¹⁵¹

A two-stage process for the selection of lay assessors was provided for in the 1983 amendment: First, each court had to select lay assessors from the local community to form a lay assessor pool and each lay assessor so selected only served a fixed tenure period of two years.¹⁵² It was only from this pool of lay assessors that courts were allowed to empanel a collegial. Yet, while the legislative provision required that the pool of lay assessors be elected by local electorates, courts rather made their own choices and instead of selecting randomly from a general list of citizens such as using the electoral register, courts persisted in choosing from their local community those known lay assessors who had served many times before and who were usually also unemployed or retired so as to ensure their attendance.¹⁵³ This state of affairs was further perpetuated by the absence of a strictly circumscribed maximum workload for lay assessors.¹⁵⁴ Courts and local governments profited from this arrangement as the additional costs and expenses involved in selecting and training new lay assessors were saved.¹⁵⁵ (Although, Wang and Fukurai also note that many courts largely ignored the training of lay assessors due to shortage of funds and manpower.)¹⁵⁶ Thus, by the mid-1980s the ideal of lay participation in legal proceedings in the People's Republic of China was effectively no more than a job-scheme for a few pensioners

¹⁵¹ Wang & Fukurai, *supra* note 141, at 243.

¹⁵² See Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] art 37. According to Zuigao Renmin Fayuan Guanyu Jiehe Jiceng Puxuan Xuanju Renmin Peishenyuan de Tongzhi (最高人民法院关于结合基层普选选举人民陪审员的通知) [Supreme Court's Notice of Incorporating the Selection of Lay Assessors into the General Election] (promulgated by Sup. People's Ct., Feb. 11, 1963) (Chinalawinfo), the tenure of each lay assessor was normally two years without any limitation of reappointment. Wang & Fukurai, *supra* note 141, at 241.

¹⁵³ Wang & Fukurai, *supra* note 141, at 240-241.

¹⁵⁴ Wang & Fukurai, *supra* note 141, at 241.

¹⁵⁵ Wang & Fukurai, *supra* note 141, at 241.

¹⁵⁶ Wang & Fukurai, *supra* note 141, at 244.

and the unemployed who were allocated massive caseloads and were effectively employed on a full-time basis as court employees.¹⁵⁷

The performance of people's assessors in Chinese courtrooms at this time (from approximately 1949 to 2004), was equally dire. Wang and Fukurai explained: "A judicial adage, popular in China in 1980s and 1990s, which states that 'Lay assessors accompany [judges] rather than adjudicate [cases],' captures exactly the very inactive and passive performances of the lay assessors."¹⁵⁸ Many assessors either remained quiet as puppets during trials or deliberations, or spoke only when specifically prompted to do so by a judge.¹⁵⁹ This passivism on the part of the people's assessors can be ascribed to a number of problems; the people's assessors did not only complain of a lack of training and insufficient instructions provided by the judges, but also reported problems in understanding the legal questions they were asked to decide upon.¹⁶⁰ Moreover, the absence in the 1983 amendment of the Organic Law of the People's Courts of the PRC of any requirement relating to literacy or educational achievement with regard to the selection of the assessor pool gave way to the hiring of illiterate citizens, simply to fill vacancies in collegial tribunals.¹⁶¹ Thus, despite article 9 of the 1983 amendment to the Organic Law of the People's Courts guaranteeing that lay assessors had the same jurisdiction and duties as a judge, except for acting as the presiding judge of a collegial panel, their inability to fully understand what was expected of them severely impacted on their ability to participate fully and effectively at trial.¹⁶² In the absence of any deterrents to regulate the non-compliance of lay assessors with their legislative duties or to regulate other improprieties such as evading court service, or dozing

¹⁵⁷ Wang & Fukurai, *supra* note 141, at 241.

¹⁵⁸ Wang & Fukurai, *supra* note 141, at 241.

¹⁵⁹ Wang & Fukurai, *supra* note 141, at 241. It is interesting to note that people in Russia used to refer to lay assessors as "the noddors" suggesting their minimal influence and regular acquiescence with the professional judge, *see* Machura, *supra* note 4, at 125; CHEN, *supra* note 5, at 184.

¹⁶⁰ Wang & Fukurai, *supra* note 141, at 244.

¹⁶¹ Wang & Fukurai, *supra* note 141, at 243.

¹⁶² *See also* Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004, effective May. 1, 2005) art. 1, 10, 11, 13 (Chinalawinfo). Wang & Fukurai, *supra* note 141, at 242.

during the trial, the effective and fair administration of justice by way of a collegial panel remained a mere pipedream.¹⁶³

1. The 2004/2005 Reforms

In light of these systemic problems and in an effort to reduce corruption and improve the quality of the Chinese judicial system, lay participation in legal proceedings was significantly revised with the adoption of three legal reforms.¹⁶⁴ First, the Supreme Court of China submitted to the National People's Congress (NPC) Standing Committee, the supreme legislative authority in China, a bill for a Decision on the Improvement of the System of People's Assessors in 1999.¹⁶⁵ This bill was later withdrawn due to a lack of support but was followed in August 2004 with the promulgation of a new Decision of the Standing Committee of the National People's Congress on Improving the System of People's Assessors (the People's Assessors Decision of 2004).¹⁶⁶ And finally, in light of the ambiguous nature of the People's Assessors Decision of 2004 on various important issues relating to lay participation, the Supreme Court of China in association with the Minister of Justice promulgated the Regulation of Selecting, Examining and Appointing Law Assessors on 13 December 2004 and the Provisional Regulation of Administration of Lay Assessors on 6 January 2005.¹⁶⁷

In addressing the declining use of lay assessors in Chinese legal proceedings, the People's Assessors Decision of 2004 specifically mandated the empanelling of a mixed tribunal of which the number of people's assessors on the collegial panel must be no less than one-third of the total number of persons serving.¹⁶⁸ Such mixed tribunals must be empanelled in "(1) first-instance criminal, civil and administrative cases with far-reaching social implications and (2) in any case in

¹⁶³ Wang & Fukurai, *supra* note 141, at 242.

¹⁶⁴ Landsman & Zhang, *supra* note 119, at 206. Wang & Fukurai, *supra* note 141, at 237.

¹⁶⁵ CHEN, *supra* note 5, at 184.

¹⁶⁶ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] Wang & Fukurai, *supra* note 141, at 236-260; CHEN, *supra* note 5, at 184.

¹⁶⁷ Wang & Fukurai, *supra* note 141, at 242-243.

¹⁶⁸ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] art 3.

which the litigant(s) request(s) the application of a mixed tribunal".¹⁶⁹ It is further stated that the use of a mixed tribunal in these two instances are mandatory unless otherwise provided for by the law and except for the cases to be decided by summary procedure by one judge sitting alone.¹⁷⁰ Courts in the People's Republic of China therefore no longer had an exclusive discretion on the decision when to initiate a mixed-tribunal, and litigants themselves could also apply for their case to be decided by a mixed tribunal.¹⁷¹ People's assessors furthermore had to be appropriately compensated for travelling and accommodation costs¹⁷² and were entitled to receive allowances and stipends during the course of their training and assessing activities at the court.¹⁷³ Employers of assessors were furthermore forbidden to reduce assessors' salaries, bonuses or other benefits due to them serving at the court.¹⁷⁴ (Yet, while these welcome financial considerations with regard to the empanelling and work of lay assessors addressed important deficiencies of the lay participation system under the 1983 amendment to the Organic Law of the People's Courts, unintended consequences were also abound due to persisting systemic problems which will be highlighted in the discussion below.)

The provisions of the People's Assessors Decision of 2004 provided for extensive reform in terms of quality assurance: For a Chinese citizen to be selected as a people's assessor under articles 4,

¹⁶⁹ *Id.* art 2. Wang & Fukurai, *supra* note 141, at 243.

¹⁷⁰ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] art 2. Wang & Fukurai, *supra* note 141, at 242-243.

¹⁷¹ Wang & Fukurai, *supra* note 141, at 243.

¹⁷² Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] art 18.

¹⁷³ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa <Guanyu Renmin Peishenyuan Xuanren, Peixun, Kaohe Gongzuo de Shishi Yijian> de Tongzhi (最高人民法院、司法部关于印发《关于人民陪审员选任、培训、考核工作的实施意见》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Opinions on the Work of Appointing, Training and Appraising People's Assessors] (promulgated by the Sup. Ct. and the Ministry of Justice, effective Dec. 13, 2004) art 14 (Chinalawinfo).

¹⁷⁴ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] art 18 (making special provision for an alternative calculation of the allowances for unemployed lay assessors so as to compensate them duly given that their assessing duties deter them from seeking employment). Wang & Fukurai, *supra* note 141, at 245.

5 and 6 of the People's Assessors Decision of 2004, he or she had to uphold the Chinese constitution, be above twenty-three years of age, be of a good moral character, physically fit, possess at least a college diploma, and must not have a criminal record or be a government official, police officer, or a legal practitioner. These requirements were largely the same as that of the 1983 amendment to the Organic Law of the People's Courts except for the requirement that lay assessors serving on mixed tribunals now also had to hold at least a college diploma.¹⁷⁵ While this requirement can certainly be seen as necessary in light of the problems experienced under the 1983 amendment, it also promoted elitism as it effectively eliminated approximately 94.6% of the Chinese population from being selected as a lay assessor.¹⁷⁶ In a 2005 report of the National Population and Family Planning Commission of China, it was recorded that only 5.4% of the national population held college diplomas or had attained the level of higher education. For the remainder of the population, it was recorded that 12.6% had received high school education, 36.9% graduated from junior high schools, and 30.4% had finished primary school education.¹⁷⁷ In strictly following Article 4 of the People's Assessors Decision of 2004, well-educated Chinese citizens were seemingly privileged contra to Article 33 of the Chinese Constitutional Law of 1982 which provides that the citizenry of the People's Republic of China are equal before law, and the article also deviated from "the democratic merits of lay participation" which is based on the notion of lay judges representing "a wide cross-section of the society" so as to allow for the input of "various community values, morals, norms and customs into the judicial decision-making process."¹⁷⁸

¹⁷⁵ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors] art 4. Wang & Fukurai, *supra* note 141, at 243.

¹⁷⁶ Wang & Fukurai, *supra* note 141, at 250, 252.

¹⁷⁷ The most recent statistics are from the 2015 National Population Survey and reflects a significant increase in the percentage of the national population (no 12.4%) with college diplomas or some other form of higher education. Similar progress has not been made with regard to other levels of education and training, see GUOJIA TONGJI JU (国家统计局) [NATIONAL BUREAU OF STATISTICS], 2015 NIAN QUANGUO 1% RENKOU CHOUYANG DIAOCHA ZHUYAO SHUJU GONGBAO (2015年全国1%人口抽样调查主要数据公报) [BULLETIN ON KEY DATA OF 1% POPULATION SAMPLE SURVEY] (2015), http://www.stats.gov.cn/tjsj/zxfb/201604/t20160420_1346151.html. Wang & Fukurai, *supra* note 141, at 250.

¹⁷⁸ Wang & Fukurai, *supra* note 141, at 252.

This problem was addressed, to some extent, in Article 2 of the Regulation of Selecting, Examining and Appointing Law Assessors of 2004, by granting courts a discretion in departing from this educational requirement in two circumstances: “(1) in rural jurisdictions, where the educational requirement makes it difficult to obtain a sufficient number of lay assessors; and (2) the availability of elderly candidates with lower educational attainment but who have excellent reputable standing in the community”.¹⁷⁹ This concession was specifically directed at courts in rural areas where residents generally have a comparatively lower educational level.¹⁸⁰

The independence of people’s assessors was strengthened by way of articles 1, 10, 11 and 13 of the People’s Assessors Decision of 2004, which not only explicitly provided for people’s assessors enjoying equal rights to judges (except that they cannot serve as presiding judges),¹⁸¹ but also recognised the right of people’s assessors to participate in judicial activities,¹⁸² including their independent right to vote.¹⁸³ Article 11 of the People’s Assessors Decision of 2004 recognised the “principle of the minority being subordinate to the majority” in the practice of deliberation of cases by a collegial panel on which the people’s assessors constituted only one third of the members empanelled, and required that differences of opinion voiced by people’s assessors be put down in writing and, if necessary, that the people’s assessors may request the collegial panel to submit the case to the president of the people’s court for a decision as to whether to deliver the case to the judicial committee for discussion and decision.

Articles 7 and 8 of the People’s Assessors Decision of 2004 provided for a more stringent process whereby lay assessors were to be selected. Wang and Fukurai described this selection process as follows:

“First, each court individually decides the number of the lay assessors it actually needs, followed by a process of approval by the standing committee of the local People’s Congress at the

¹⁷⁹ Wang & Fukurai, *supra* note 141, at 250.

¹⁸⁰ Wang & Fukurai, *supra* note 141, at 250-251.

¹⁸¹ Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu de Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision of the Standing Committee of the National People’s Congress Regarding Perfecting the System of People’s Assessors] art 1, 13.

¹⁸² *Id.* art 10.

¹⁸³ *Id.* art 11.

same level. Secondly, Article 8 sets down three methods for each court to use for identifying candidates: (1) ‘self-nomination,’ where a citizen who wants to serve as a lay assessor is allowed to nominate himself/herself to the local court; (2) ‘employer-nomination,’ where employers are encouraged to nominate their employees to the courts for lay assessor selection, after obtaining the employees’ consent; and (3) ‘nomination by grass-roots organisation,’¹⁸⁴ where various ‘grass-roots organisations’ are permitted to nominate local residents to the courts as lay assessor candidates after securing the consent of the nominees. These three nomination methods are intended to yield a sufficient number of candidates for the courts’ selection. Thirdly, these candidates are to be screened by each court jointly with the Department of Justice of the local government so that a shortlist of suitable candidates is produced. Fourthly, the candidates on the shortlist will be appointed by the standing committee of the local People’s Congress at the same level.”¹⁸⁵

Article 14 of the People’s Assessors Decision of 2004 also required that each court produce a roster of eligible lay assessors selected as per the procedure above, and that lay assessors then be randomly empanelled from this roster to designated cases.¹⁸⁶ These measures had at aim to address the problems previously encountered with regard to the poor quality of lay assessors, and the abuse of the system by courts who appointed the same assessors to the extent of them becoming full-time employees with heavy caseloads. However, despite these legislative amendments, the average Chinese lay assessor continued to carry a particularly heavy workload estimated at 4.7 cases per year due to the relatively small cohort of the Chinese

¹⁸⁴ Wang & Fukurai, *supra* note 141, at 244, (“To control and regulate the community from the very grass-roots level, China’s authority has respectively established the so-called ‘the Committee of Urban Residents’ in each town and city and ‘the Committee of Villagers’ in each village of China since 1954. These two ‘committees’ are often called ‘grass-roots organisation’ or ‘grass-roots mass organisation’. ‘The Committee of Urban Residents’ and ‘the Committee of Villagers’ are respectively established in each block of the town or city and each village, enjoying the jurisdiction to tackle some local administrative affairs. See the Act of the Organisation of the Committee of Urban Residents in 1998 and the Act of the Organisation of the Committee of Villagers in 1998.”)

¹⁸⁵ Wang & Fukurai, *supra* note 141, at 244.

¹⁸⁶ Wang & Fukurai, *supra* note 141, at 245.

population that qualified to be selected as lay assessors.¹⁸⁷ This ultimately detracted from the “acknowledged merits of lay participation” which is premised on the idea that lay assessors, in contrast to case-hardened judges, “are normally more sensitive, responsive and patient in trials because they ‘are selected for a period of several years [i.e., tenure] and are only occasionally summoned to the courts to serve on a particular day.’ Rarely entering into the courtroom, each trial could be a whole new story for them.”¹⁸⁸ This was certainly not the experience in the People’s Republic of China, where lay assessors continued to “act ‘out of routine’ like a judge, with their sensitivity and enthusiasm eroding”.¹⁸⁹ The relationship between the lay assessors appointed in terms of the People’s Assessors Decision of 2004 and the courts within which and judges alongside whom they served therefore remained tight-knitted, thwarting the valuable oversight function that independent and impartial lay participation in legal proceedings is supposed to serve. Moreover, the persistent heavy workload coupled with the more generous compensation lay assessors were entitled to pursuant to article 18 of the People’s Assessors Decision of 2004 and article 14 of the Regulation of Selecting, Examining and Appointing Law Assessors of 13 December 2004 perpetuated the risk of them becoming so financially dependent on the courts, that they “may bend over to satisfy the court, his employer, and become ‘susceptible to’ the court’s (and indirectly the state’s) ‘direct influence’”.¹⁹⁰ Wang and Fukurai noted that it had been reported in China that “concerns such as ‘maintenance of human relationship,’ ‘office politics,’ and ‘face saving’ held back the lay assessors from impeaching their professional colleagues even when they found the latter’s conduct to be akin to lawbreaking”.¹⁹¹

Further legislative amendments aimed at quality assurance included detailed provisions with regard to the training of lay assessors. These were set out in article 15 of the People’s Assessors Decision of 2004 which assigned this training responsibility to each court and the Department of Justice of the local government at the

¹⁸⁷ Wang & Fukurai, *supra* note 141, at 252.

¹⁸⁸ Wang & Fukurai, *supra* note 141, at 253.

¹⁸⁹ Wang & Fukurai, *supra* note 141, at 253.

¹⁹⁰ Wang & Fukurai, *supra* note 141, at 254.

¹⁹¹ Wang & Fukurai, *supra* note 141, at 254.

same level. Articles 10 to 14 of the Regulation of Selecting, Examining and Appointing Law Assessors of 13 December 2004 read with the Provisional Regulation of Administration of Lay Assessors of 6 January 2005 furthermore detailed and specified that courts must train lay assessors on the basic principles of legal knowledge, court rules, judicial moralities and disciplines.¹⁹² Article 19 of the People's Assessors Decision of 2004 also allowed for each court to place the potential expenses for employing lay assessors in its normal annual budget which is then approved by and provided for by the local government.¹⁹³ With regard to the training lay assessors received, it had been observed that contra to the educational requirement posited in Article 4 of the People's Assessors Decision of 2004 and which was considered above, the less educated population of the People's Republic of China actually stood more to gain from being appointed as lay assessors as "the less educated may need this educational opportunity more so than the well-educated".¹⁹⁴

2. The 2015, 2018 and 2019 Reforms

The persistent and pervasive problems after the 2004/2005 reforms of the people's assessor system of the People's Republic of China did not go unnoticed and in April 2015, the Supreme People's Court and the Ministry of Justice published the Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Programme on the Reform of the System of People's Assessors (No. 100[2015]).¹⁹⁵ This document confirmed the commitment of the government of the People's Republic of China to a system of lay participation in legal

¹⁹² Wang & Fukurai, *supra* note 141, at 244.

¹⁹³ Wang & Fukurai, *supra* note 141, at 245.

¹⁹⁴ Wang & Fukurai, *supra* note 141, at 252. See also Shari S. Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors in VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 286 (Robert E. Litan ed., Washington D.C., The Brookings Institution 1993) (observing with regard to the jury system generally, that citizens who had served as jurors seem to have a more positive opinion about the criminal justice system and the courts than citizens who came in contact with the criminal justice system in other ways, such as involvement as a party or a witness). Kutnjak, *supra* note 2, at 100. David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 SOUTHERN CAL. L. REV. 1795, 1830 (1988).

¹⁹⁵ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors] (promulgated by Sup. People's Ct. & Ministry of Justice. Apr. 24, 2015, effective Apr. 24, 2015) (Chinalawinfo).

proceedings¹⁹⁶ and set out a roadmap for a two-year reform plan to be implemented from May 2015 in ten provinces and cities across the country.¹⁹⁷ The pilot program was evaluated in May 2016, and in April 2018 the President of the People's Republic of China signed into law the new Law of the People's Republic of China on People's Assessors of 2018, thereby repealing the People's Assessors Decision of 2004.¹⁹⁸ More recently, the 2018 reforms were further developed with the promulgation of the Measures of the Supreme People's Court for the Training, Assessment, Reward and Punishment of the People's Jurors of the Ministry of Justice, and The Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Law of the People's Republic of China on People's Assessors; both dated 24 April 2019 and formally coming into force on 1 May 2019.¹⁹⁹ The most important of the reform measures will be discussed here.

Article 2(1) of this 2015 Notice amended the eligibility requirements for being selected as a lay assessor by increasing the minimum age of jurors from twenty-three to twenty-eight years and lowering the education requirement for lay assessors in urban areas to a secondary (high) school diploma, while abolishing completely the

¹⁹⁶ See also Renmin Peishenyan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018) art. 5, 6, 7 (Chinalawinfo) (stating that the 2018 law is "developed for purposes of safeguarding citizen's participation in trial activities according to the law, promoting judicial justice, and improving judicial credibility").

¹⁹⁷ These are: Beijing, Hebei, Heilongjiang, Jiangsu, Fujian, Shandong, Henan, Guangxi, Chongqing, and Shaanxi, see Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors].

¹⁹⁸ Renmin Peishenyan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] art. 32.

¹⁹⁹ See Zuigao Renmin Fayuan Renmin Peishenyan Sifabu Guanyu Yinfa Renmin Peishenyan Peixun Kaohe Jiangcheng Gongzuo Banfa de Tongzhi (最高人民法院 司法部关于印发《人民陪审员培训、考核、奖惩工作办法》的通知) [Measures of the Supreme People's Court for the Training, Assessment, Reward and Punishment of the People's Jurors of the Ministry of Justice] (promulgated by Sup. People's Ct. & Ministry of Justice, Apr. 24, 2019, effective May.1, 2019) (Chinalawinfo) and Zuigao Renmin Fayuan Guanyu Shiyong Renmin Peishenyan Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on People's Assessors] (promulgated by Sup. People's Ct. Apr. 24, 2019, effective May.1, 2019) (Chinalawinfo).

education requirement for lay assessors in rural areas.²⁰⁰ The following categories of persons were explicitly barred from serving as lay assessors: Members of the Standing Committee of the National People's Congress, employees of people's courts, people's procuratorates, public security organs, state security organs, judicial administrative organs, practicing lawyers, people with a criminal record, and those who have been discharged from public employment or who are unable to correctly understand or express themselves. These provisions were subsequently adopted in the Law of the People's Republic of China on People's Assessors which came into effect on 27 April 2018.²⁰¹ It was also noted that in selecting lay assessors, "attention shall be paid to absorbing ordinary people, structure and proportion of the people from different walks of life, and absorbing the people of different industries, professions, ages, nationalities and genders, so as to reflect the various backgrounds and representativeness of people's assessors".²⁰² This was also recognised in the subsequent 2018 Law which provided in article 2 that "[a]ny citizen has the right to serve and obligation of serving as a people's assessor according to the law".²⁰³ A mechanism of duty exemption was established in Article 6 of the 2015 Notice where it is stated that "[t]hose who have obvious difficulties in fulfilling the responsibilities of people's assessors due to age, occupation, life, disease, and other factors may be exempted from the obligations of acting as assessors".²⁰⁴ And, it was also suggested in the same article that a warning and penalty system be implemented for citizens selected and

²⁰⁰ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors].

²⁰¹ Renmin Peishenyuan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] art. 5, 6, 7.

²⁰² Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors].

²⁰³ Renmin Peishenyuan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] art. 2.

²⁰⁴ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors] art. 6.

appointed as people's assessors, but refuse to fulfil their responsibilities in this regard.²⁰⁵

While articles 7 and 8 of the People's Assessors Decision of 2004 provided for a more stringent process whereby lay assessors were selected in an effort to curb the problems experienced under the 1983 amendment of the Organic Law of the People's Courts of the PRC, the 2015 Notice placed the emphasis squarely on ensuring meaningful participation of people from all walks of life. Article 2(2) of the 2015 Notice therefore provided for grassroots people's courts and intermediate people's courts to randomly select lay assessors from the list of qualified voters in their respective areas, for these assessors' eligibility to be reviewed by the relevant courts in coordination with the judicial administrative organs at the same level, and for selected lay assessors to ultimately only serve a term of five years. These provisions were, however, not taken up in the subsequent 2018 Law of the People's Republic of China on People's Assessors. Articles 8 to 13 of the 2018 Law rather provide for courts to submit a quota of people's assessors required, and this quota may not be lower than three times the number of the judges serving in that particular court.²⁰⁶ An administrative organ of the judiciary together with the relevant court and a public security department then randomly select potential people's assessors from a list of local permanent residents in its jurisdiction. The number of individuals so selected must be more than five times the number of lay assessors that will eventually be appointed.²⁰⁷ The authorities responsible for the selection process must then "conduct qualification examination of candidates of people's assessors, and solicit opinions from such candidates".²⁰⁸ What exactly the qualification examination entails, and the nature of the proposed interviews with the selected candidates, are not clarified in the 2018 Law. Article 10 of the 2018 Law merely indicates that the ultimate number of people's assessors will then be randomly selected by the same administrative bodies from a list of those candidates who had passed the qualification examination.²⁰⁹ In credence to its aim of

²⁰⁵ *Id.*

²⁰⁶ Renmin Peishenyan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] art. 8.

²⁰⁷ *Id.* art. 9.

²⁰⁸ *Id.*

²⁰⁹ *Id.* art. 10, 19.

ensuring lay participation from a wide and diverse range of individuals from all walks of life, article 11 provides for the list of possible candidates from which the lay assessors will ultimately be appointed to be supplemented with applications filed by interested citizens, as well as recommendations made by employers and grass-root organisations. Such candidates, having applied themselves or having been nominated must also undergo the qualification examination and if selected may not exceed one fifth of the total number of the quota of people's assessors.²¹⁰ Article 7 of the 2015 Notice directed that a guarantee system must be established by way of formulating an oath which lists all the rights and obligations of Chinese lay assessors and which would ultimately safeguard the authority of the system of people's assessors.²¹¹ This has been given effect to in article 12 of the 2018 Law which requires of all people's assessors to be publicly sworn into office at a swearing-in ceremony organised by the relevant court and administrative authorities. Finally, Article 13 of the 2018 Law prescribes a five-year tenure for people's assessors and direct that people's assessors selected and appointed under the provisions of this Law may not be reappointed.

The scope of participation for lay assessors in legal proceedings was significantly widened in terms of the 2015 Notice as it was required that all criminal, civil, or administrative cases of the first instance that concerned the interest of a certain group, or public interests generally, or that attracted much attention from the general public, or was of other social influence, had to be heard by a mixed tribunal consisting of a professional judge with lay assessors.²¹² All criminal cases of the first instance where the offender was in jeopardy of being sentenced to a fixed-term imprisonment or life imprisonment also had to be heard by a mixed tribunal consisting of a professional judge with lay assessors and all criminal, civil, or administrative cases where the accused or litigant requested for the case to be heard by a mixed tribunal also had to be adjudicated under this system of people's assessors.²¹³ These provisions have been retained in modified form in

²¹⁰ *Id.* art. 11.

²¹¹ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors] art. 7.

²¹² *Id.* art. 2 § 3.

²¹³ *Id.*

the 2018 Law, but was significantly limited in the 2019 Interpretation of the Supreme People's Court. Article 5 of this 2019 Interpretation states that people's assessors shall not participate in cases that are subject to trial under special procedures, supervision procedures, and public notice procedures in accordance with the Civil Procedure Law, or cases on application for recognition of a divorce judgment of a foreign court, or cases that are rejected based on a ruling or of which a court trial is not required.²¹⁴ In terms of Article 6 of the 2019 Interpretation, people's assessors may also not participate in the trial of a case in which they had previously mediated in the capacity of people's mediator.²¹⁵

Under the 2018 Law, litigants no longer have a general right to request for their case to be adjudicated by a collegial panel. Article 17 of the 2018 Law now states that where such a request is made by a litigant, "the people's court may decide" whether the request will be granted. However, in a further Interpretation of the Supreme People's Court issued on 24 April 2019, and which came into force on 1 May 2019, parties have the right, under Article 7 of the Interpretation, to apply for the withdrawal/recusal of people's assessors in terms of the same legal provisions applicable to applications made for the withdrawal/recusal of judges.²¹⁶

Provision is made in Article 14 of the 2018 Law for a three-member collegial panel consisting of one presiding judge and two people's assessors, and a seven-member collegial panel consisting of three judges and four people's assessors. A seven-member collegial panel presides over the following cases of first instance:

"Article 16 [...]

(1) Criminal cases with great social impacts where a fixed-term imprisonment of not less than ten years' life imprisonment or death penalty may be sentenced.

²¹⁴ *Id.* art. 5.

²¹⁵ Zuigao Renmin Fayuan Guanyu Shiyong Renmin Peishenyuan Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Law of the People's Republic of China on People's Assessors] art.6.

²¹⁶ *Id.* art. 7.

(2) Public welfare lawsuits filed in accordance with the Civil Procedural Law of the People's Republic of China and the Administrative Litigation law of the People's Republic of China.

(3) Cases involving land requisition and house demolition, ecology and environment protection, and food and drug safety, and with great social impacts.

(4) Other cases with great social impacts.”

By inference then it can be accepted that the provisions of article 15 refer to those cases over which a three-member collegial panel will preside:

“Article 15 When the people's court tries a criminal, civil, or administrative case of first instance and the case falls under any of the following circumstances, people's assessors and judges shall form a collegial panel to try the case:

(1) Involving the interests of a certain group or public interests.

(2) Attracting extensive attention of the general public or otherwise having great social impacts.

(3) Having complicated case circumstances or falling under any other circumstances, which requires people's assessors to participate in the trial.

Where the people's court tries a case as prescribed in the preceding paragraph, if law prescribes that the case should be tried by a sole judge or a collegial panel consisting of judges, such provision shall prevail.”

The process of adjudication itself was noted in Article 4 of the 2015 Notice where it was stated, *inter alia*, that lay assessors must have a reasonable workload, have access to pre-trial records for effective facilitation of participation in hearings, and ultimately also in the decision-making process. It was noted that people's assessors may assist with mediation amongst litigants where appropriate, and that all opinions of lay assessors had to be recorded in the court transcript

which must ultimately be signed by the presiding judge together with the assessors. Lay assessors were also barred from deciding on matters of law as per Article 5 of the 2015 Notice and could “only participate in the trial of the issues concerning fact finding”.²¹⁷ As to what would constitute an acceptable verdict it was explained as follows:

“People’s assessors and judges shall jointly be responsible for the fact finding. In the case of difference in opinions, case facts shall be identified according to the majority opinions. However, the minority opinions shall be recorded in the transcript. In the case of significant differences in the majority opinions of judges and people’s assessors, and the case finding in the majority opinions of people’s assessors has violated the rules of evidence, which may lead to error in the application of law or give rise to a misjudged case, the case may be submitted to the president of the court to decide whether the case shall be discussed by the judicial committee.”²¹⁸

The process of adjudication under the 2015 Notice was not adopted in the 2018 Law of the People’s Republic of China on People’s Assessors. Articles 20 to 23 set out the process of adjudication under the 2018 Law and direct that the presiding judge on a collegial panel has the obligation to guide the course of the proceedings but not in a manner that will obstruct the people’s assessors from making independent judgments. However, it is stated that “[i]n the deliberation of a case...the presiding judge shall make necessary interpretations and explanations to people’s assessors on the fact-finding, rules of evidence, legal provisions and other matters, and issues to which attention should be paid”.²¹⁹ Article 23 of the 2018 Law affirms the application of the rule of majority and, similar to the

²¹⁷ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang’an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People’s Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People’s Assessors] art. 5.

²¹⁸ Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang’an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People’s Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People’s Assessors] art. 5.

²¹⁹ Zuigao Renmin Fayuan Guanyu Shiyong Renmin Peishenyuan Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People’s Court on Several Issues concerning the Application of the Law of the People’s Republic of China on People’s Assessors] art. 20.

People's Assessors Decision of 2004 and the 2015 Notice, provides for dissenting opinions to be recorded and referred where necessary. The remainder of the 2018 provisions setting out the process of adjudication deserve to be quoted in full below as a distinction is made in the process of adjudication of a three-member panel, and the process of adjudication of a seven-member panel.

“Article 21 When people's assessors participate in a three-member collegial panel to try a case, they shall independently make comments on fact-finding or application of law and exercise the right to vote.

Article 22 When people's assessors participate in a seven-member collegial panel to try a case, they shall independently make comments on fact-finding and vote jointly with judges; and they may make comments on the application of law, but may not participate in the voting.

Article 23 When deliberating a case, a collegial panel shall adhere to the rule of majority. Where people's assessors have dissenting opinions with other members of the collegial panel, the opinions of such people's assessors shall be recorded in the transcripts.

Where members of a collegial panel have significant dissenting opinions, people's assessors or judges may require of the collegial panel to submit the case to the president of the people's court for decision on whether the case should be submitted to the judicial committee for discussion and decision.”

Thus, in terms of Article 21 and Article 22 of the 2018 Law, people's assessors serving on a three-member panel may decide independently and vote together with judges on matters relating to fact alone, as well as matters relating to the application of law to the facts. The same, however, is not true of the adjudication process of a seven-member collegial panel as Article 22 directs that such people's assessors serving on a seven-member panel may only decide and vote independently on matters relating to fact. With regard to the application of law to these facts these lay assessors may make comments but have no voting rights. How exactly this distinction in

voting rights with regard to issues of fact and the application of law to these facts were to function in practice, was not set out in the 2018 Law. He suggested that the seven-member collegial panel may very well end up an example of where the first character (陪, accompanying) in the Chinese word for lay participation (陪审) is implemented, while the second character (审, adjudicating) is ignored.²²⁰ This *lacuna* was subsequently addressed in Article 9 and Article 13 of the 2019 Interpretation of the Supreme People's Court:

“Article 9 The seven-member collegial panel shall, before the court session, produce a list of fact finding issues, differentiate fact finding issues and the issues on the application of law according to specific case circumstances, and enumerate the facts in issue item by item for the reference of people's assessors in court trial. If the fact-finding issue and the issue on the application of law can hardly be differentiated, it shall be deemed as the issue on the determination of facts.

Article 13 When the seven-member collegial panel deliberates a case, the presiding judge shall summarise and introduce the issues on the determination of case facts that need to be decided through deliberation, and give the list of issues on case facts.

People's assessors shall participate in the deliberation of the collegial panel throughout the entire process. People's assessors and judges shall vote on the issues on the determination of facts based on joint deliberation. People's assessors shall not participate in voting on the issues on the application of laws, but they may offer their opinions and record them in files.”²²¹

The rights and duties of people's assessors are now provided for under articles 3, 4, 18, and 24 to 31 of the 2018 Law, and to a large extent mirror the advances that have been made in this regard since the 1983 amendment to the Organic Law of the People's Courts of the

²²⁰ He, *supra* note 2, at 734.

²²¹ Zuigao Renmin Fayuan Guanyu Shiyong Renmin Peishenyuan Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Law of the People's Republic of China on People's Assessors] art. 9, 13.

PRC.²²² Whether these are sufficient only time will tell, as it was reported in 2005, and despite the already expansive amendments in effect at that time under the People's Assessors Decision of 2004, that "a total of 45,697 Chinese lay assessors participated in 164,630 cases of various trials. However, due to the problems in schedule arrangements, expenditure payments, and work-related responsibilities, nearly half of lay assessors failed to carry out their civic duties."²²³ Of the legal reforms promulgated up to 2004/5 to ensure effective and meaningful lay participation in the adjudication process of the People's Republic of China, Landman and Zhang noted that "[i]t is possible to interpret China's people's assessors 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. There is, however, evidence that China is earnestly seeking to improve its justice system, and that the people's assessor programme is a step in that effort."²²⁴ A case in point is Article 17 of the 2019 Interpretation which now limits the number of cases people's assessors in the intermediate and basic people's courts may adjudicate to a maximum of thirty cases per assessor.²²⁵ The continuous legal reform project of the system of people's assessors in the adjudication of legal proceedings in the People's Republic of China certainly reflects the government's commitment to promote judicial justice and judicial credibility through *effective* lay participation in legal proceedings in the People's Republic of China.²²⁶

In stark contrast to this ongoing legislative process of ensuring lay participation in legal proceedings of the People's Republic of China, is the entrenched process of lay participation in the legal proceedings

²²² See, e.g., Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] art. 24 which provides that the People's Court shall, "in light of the actual local circumstances of the jurisdiction, rationally determine the upper limit of the number of cases where each people's assessor participates each year and announce it to the public". *Id.*, art. 24.

²²³ Wang & Fukurai, *supra* note 141, at 257. For an in-depth ethnography on the practical working of the people's assessor's system in the Western regions of the People's Republic of China under the *People's Assessors Decision of 2004*, see He, *supra* note 2.

²²⁴ Landsman & Zhang, *supra* note 119, at 215.

²²⁵ Zuigao Renmin Fayuan Guanyu Shiyong Renmin Peishenyuan Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Law of the People's Republic of China on People's Assessors] art. 17.

²²⁶ Renmin Peishenyuan Fa (人民陪审员法) [Law of the People's Republic of China on People's Assessors] art. 81.

of the Hong Kong Special Administrative Region, one of the PRC's Special Administrative Regions. In Hong Kong, the erstwhile institutions of a former colonial master have ostensibly been internalised as curious cultural-legal artefacts, and lay participation in the adjudication of legal disputes must for this reason, be properly understood in terms of its contemporary post-colonial context.

B. Trial by Jury in the Hong Kong Special Administrative Region

The jury system of Hong Kong was, like most of its legal institutions, imported to Hong Kong by its colonising power, the United Kingdom.²²⁷ Duff et al described the Hong Kong jury as one of the earliest features of the English criminal justice system to be adopted in Hong Kong in 1845.²²⁸ However, right from the get-go, the Hong Kong jury featured different characteristics from that of the jury system in England and Wales. Originally the Hong Kong jury only comprised six men, rather than twelve like its counterpart in England and Wales, with the “smallness of the population” cited as its rationale, as it was believed that a twelve men jury would cause “very great hardship and inconvenience” to the colonial inhabitants.²²⁹ In 1864, the number of jury members was increased to seven and it has remained at this number ever since. However, in 1986, in anticipation of a complicated trial involving commercial fraud – a case that later became known as the *Carrian* case – legislation was hurriedly passed so as to allow for a court to order that a jury should comprise nine and not seven persons.²³⁰ This was thought to be necessary as the trial was expected to last for many months, even years, and in such cases there are always a risk that some of the jury members will withdraw, which may lead to the abandonment of the trial if the number of jurors fall below the requisite five.²³¹ This discretion to expand a jury from

²²⁷ KNOX R. MAWER, *Juries and Assessors in Criminal Trials in Some Commonwealth Countries: A Preliminary Survey*, 10 INT'L & COMP. L. Q. 892 (1961).

²²⁸ PETER DUFF ET AL., *JURIES: A HONG KONG PERSPECTIVE* 37 (Hong Kong: University of Hong Kong Press 1992) quoting from Ordinance No. 7 of 1845, § 1 which provided that “...all questions of fact, whether of a civil and criminal nature upon which issue shall be taken in the course of any proceeding before the Supreme Court...shall be decided by the verdict of a Jury of six men.” Franklin Koo, *Power to the People: Extending the Jury to the Hong Kong's District Court*, 2 CITY U. H.K. L. REV. 301, 302 (2010).

²²⁹ DUFF ET AL., *supra* note 228, at 38.

²³⁰ DUFF ET AL., *supra* note 228, at 38.

²³¹ DUFF ET AL., *supra* note 228, at 38.

seven to nine members also exists to this day in terms of section 3 of the Jury Ordinance (Cap 3).

Another difference between the early Hong Kong jury system and its British counterpart was that the original Hong Kong Ordinance of 1845 imposed a financial qualification for jury service in that a jury member had to either hold property as owner or tenant with a monthly value of HK\$25 upwards, or be in receipt of a salary of more than HK\$1000 per annum. While this property and financial qualification for jury service was dropped from the list of requirements for jury duty in Hong Kong in 1851, the comparable property qualification for jury duty in England and Wales was only abandoned some one hundred years later.²³² Also, the 1851 Hong Kong Ordinance disqualified any person from jury duty who was ignorant of the English language,²³³ and language competency remains a ground for disqualification for Hong Kong jury service to this day.²³⁴ Similar issues concerning language were obviously not as problematic with regard to jury service in England and Wales. A major historical difference between the Hong Kong jury system and its British counterpart is with regard to the verdict handed down by a jury. By 1851, a verdict by a majority of the jury members was accepted in terms of Hong Kong law, while England and Wales continued to hold that only a unanimous verdict will be acceptable in terms of the law.²³⁵ It was only in 1967 that a majority verdict also became acceptable in English law.²³⁶

At present, article 86 of the Hong Kong Basic Law provides that “[t]he principle of trial by jury previously practiced in Hong Kong shall be maintained,” and section 41 of the Criminal Procedure Ordinance (Cap 221) provides that the general mode of trial in Hong Kong is for a person to be tried before a court on an indictment, and that such a trial shall “be had by and before a judge and a jury”.²³⁷ Section 42 of the Criminal Procedure Ordinance (Cap 221) furthermore empowers the Secretary for Justice to, by way of a

²³² DUFF ET AL., *supra* note 228, at 38.

²³³ DUFF ET AL., *supra* note 228, at 39.

²³⁴ Jury Ordinance (Cap 3) section 4; JAMES WILLIAM NORTON-KYSHE, *HISTORY OF THE LAWS AND COURTS OF HONG KONG* 1, at 465 (Hong Kong: Noronha & Co. 1902).

²³⁵ DUFF ET AL., *supra* note 228, at 39; It was only in capital cases that a unanimous verdict remained requisite in Hong Kong law.

²³⁶ DUFF ET AL., *supra* note 228, at 39.

²³⁷ Criminal Procedure Ordinance (Cap 221) section 41(1)-(2).

motion, request that a judge order the trial of any indictment to “be had at bar, that is to say, by and before two judges and a jury...”²³⁸ However, only trials before the Court of First Instance and in the coroner’s court will be heard by both a judge and a jury. Trials in a Magistrate’s Court will be dealt with by a magistrate only and trials in the District Court are dealt with by a judge, also in the absence of a jury.²³⁹

It has previously been questioned whether the jury system should not also be extended to the District Court of Hong Kong, especially given the historical significance of a trial by jury in most common law systems and particularly that of England and Wales.²⁴⁰ The Hong Kong District Court was established in 1953 as an intermediate court with both civil and criminal jurisdiction and with the purpose to relief the workload on both the Magistrate’s Court and the High Court (as it was known at that time).²⁴¹ The District Court was furthermore established to provide for a trial by a judge in the absence of a jury as the historically stringent eligibility requirements for jury duty described above, especially with regard to language competency, also resulted in the overburdening a relatively small cohort of the Hong Kong population for having to perform jury duty.²⁴² While the reasons for the establishment of the Hong Kong District Court, providing for a trial by a judge in the absence of a jury, may not be as pressing today as it was in the 1950s, it would not be advisable to extend the trial by jury in Hong Kong to also include trials at the District Court level. Of this, the following was said by the Secretary for Justice, Mr Wong Yan Lung SC in the Legislative Council on 11 November 2009:

“This issue was last raised in the Legislative Council in March 1997 and...it was said that any change at the present arrangements would require a lengthy, detailed and in-depth study. Having reviewed the matters set out in that paper and having consulted the Judiciary, the Administration is not convinced that a re-examination of this issue is warranted. The

²³⁸ Criminal Procedure Ordinance (Cap 221) section 42.

²³⁹ District Court Ordinance (Cap 336) section 6.

²⁴⁰ Koo, *supra* note 228, at 301-329.

²⁴¹ DUFF ET AL., *supra* note 228, at 41.

²⁴² Koo, *supra* note 228, at 303. In 1995, for example, it was quoted that only 0.3% of the Hong Kong population (i.e. 20 000 people out of an approximately six million) qualified for jury duty.

number of criminal cases tried in Chinese in the District Court has shown a steady increase in recent years, while the number of those in the Court of First Instance has shown no comparable increase. Since 2007, the availability of an increased pool of Chinese speaking jurors has not led to an increase in jury trials in Chinese in the Court of First Instance. It appears unlikely therefore that the introduction of jury trials in the District Court would lead to an increased use of Chinese in that Court...The resource implications and the demand on jurors would also be very considerable if the same number of cases were to be tried each year.”²⁴³

1. General Principles regarding the Composition and Adjudication Process of the Contemporary Hong Kong Jury

In a trial involving both a judge and a jury, the jury is tasked with settling disputed questions of fact and making a finding on whether the accused person is guilty or innocent of the offences charged. The judge, on the other hand, must decide on all questions of law, must decide if there is a *prima facie* case against an accused upon a submission of “no case to answer”, supervise the conduct of the trial and regulate its processes and procedures, and also give appropriate instructions and guidance to the jury members. On this last point, it must be noted that a judge can exercise great influence over the decisions that a jury makes, for example, a judge may rule that certain evidence be excluded from the jury’s consideration, or direct the jury to exclude a particular verdict or to consider a possible verdict, or give directions to the jury as to important evidence and its evaluation. A judge can also discharge a jury if there had been an irregularity and it is unsafe to allow for the jury to conclude a verdict or in extreme cases, a judge may even overturn the verdict of a jury if it is perverse or plainly wrong. It is ultimately also the judge that is tasked with handing down a sentence where the jury has returned a verdict of guilty. In deciding upon an appropriate sentence, the judge will also deal with questions of fact that may arise from a plea in mitigation of sentence. The jury therefore, does not decide on the admissibility of

²⁴³ Wong Yan Lung, *SC LCQ8: Implementation of jury system in District Court*, SECRETARY FOR JUSTICE (Nov. 9, 2011), <http://www.info.gov.hk/gia/general/200911/11/P200911100261.htm>.

evidence, argument or decisions, or consider motions to quash an indictment for failing to state an offence known to law.

In Hong Kong, the composition of a jury and the procedural matters related thereto is provided for in the Jury Ordinance (Cap 3).²⁴⁴ Section 3 of the Jury Ordinance (Cap 3) states that in all civil and criminal trials and in all inquiries into “idiocy, lunacy, or unsoundness of mind of any person, the jury, if any, shall consist of seven persons except where the court or the judge before whom any such trial or inquiry is or may be heard, orders that the jury shall consist of nine persons.”²⁴⁵ This is further explicated in section 20 of the Ordinance where it is stated that a judge has a discretion, on an application made by or on behalf of the parties, or even at the judge’s own instance, to order that the jury shall be composed of men only or of women only as the case may require.²⁴⁶ A judge also has the power to exempt any person from jury duty upon an application made by such a person and in respect of any case by reason of the nature of the evidence to be given or the issues to be tried.²⁴⁷

As to the question who is eligible for jury duty in Hong Kong, regard must be had to sections 4, 4A, and 5 of the Jury Ordinance (Cap 3).²⁴⁸ Section 4 of the Jury Ordinance (Cap 3) sets out the baseline requirements for eligibility and disqualifications for being called upon to serve as a jury member in Hong Kong:

“Section 4 Qualifications and disabilities

(1) A person who has reached 21 years of age, but not 65 years of age, and is a resident of Hong Kong is, except as provided by this Ordinance, liable to serve as a juror in the proceedings in the court or in an inquest under the Coroners Ordinance Cap 504 if (but only if) –

²⁴⁴ Jury Ordinance (Cap 3) was passed in 1887 but has since been amended numerous times; DUFF ET AL., *supra* note 228, at 37.

²⁴⁵ Jury Ordinance (Cap 3) section 3.

²⁴⁶ *Id.* section 20(a).

²⁴⁷ *Id.* section 20(b).

²⁴⁸ Note that the Hong Kong Law Reform Commission in a report “Criteria for Service as Jurors” dated June 2010 has made some significant recommendations to the eligibility criteria for jurors in Hong Kong. These recommendations are currently being considered by the Department of Justice. *See Criteria for Service as Jurors*, H.K. L. REFORM COMM. (June 2010), http://www.hkreform.gov.hk/en/docs/rjurors_e.pdf.

(a) the person is of sound mind and not afflicted by blindness, deafness or other disability preventing the person from serving as a juror; and

(b) the person is of good character; and

(c) the person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings.

(2) In a trial before a jury, the court or a coroner may, on the court or the coroner's own motion or on the application of the Registrar or of any interested party, discharge any person summoned to serve as a juror who is unable to satisfy the court or the coroner that the person's knowledge of the language in which the proceedings are to be conducted is sufficient to enable the person to understand the proceedings."

In order to ensure that persons identified as eligible jury members do indeed meet the baseline requirements as set out in section 4 of the Jury Ordinance (Cap 3), the Registrar of the High Court or the Commissioner in terms of the Registration of Persons Ordinance (Cap 177) may request of eligible jury members to supply certain information or to undergo an English or Chinese language examination.²⁴⁹ The following categories of persons are furthermore explicitly excluded from service as jurors: Members of the Executive or Legislative Council, justices of peace, certain public officers including members of the Hong Kong judiciary, staff members of certain public offices, members of the Hong Kong Police Force, consuls, barristers-at-law and solicitors as well as their clerks, persons duly registered as or deemed to be medical practitioners under the Medical Registration Ordinance (Cap 161) or dentists under the Dentists Registration Ordinance (Cap 156), or persons duly registered under the Veterinary Surgeons Registration Ordinance (Cap 529), editors of daily newspapers in Hong Kong, chemists and druggists actually carrying on business as such, various religious leaders and practitioners, full-time students, members of the Chinese People's

²⁴⁹ Jury Ordinance (Cap 3) section 4(a).

Liberation Army, pilots, and the spouses of certain public officials like that of the Chief Justice, a judge of the Court of Final Appeal etc.²⁵⁰

Even where a person meets all the requirements for eligibility to serve as a jury member in Hong Kong and as set out in sections 4, 4A, and 5 of the Jury Ordinance (Cap 3), statutory provisions empower the court and the Registrar to exempt a jury member,²⁵¹ and allows for the prosecution as well as the defence to exercise some choice in the selection of jury members at the stage when the jury is empanelled.²⁵² Typical examples of where such an application for exemption of jury duty will be allowed, includes instances where the jury member has a personal interest in the case or have knowledge of the parties, where serving on the jury would result in the jury member suffering some form of hardship, including financial hardship, and any other issue of practical significance. It also remains possible for a court at any time during the trial and prior to the verdict of the jury being handed down, to discharge any juror where, in the interests of justice, it appears to the court expedient to do so, or where it is in the interests of the juror to do so.²⁵³ Where a member of the jury dies or is discharged by the court, the jury shall nonetheless be considered as remaining properly constituted for all the purposes of the trial.²⁵⁴ Such a jury, sans the member who was discharged or who had died, shall proceed as if the full number of jurors are present and any verdict returned by the remaining members being a unanimous verdict or a majority verdict shall be of equal validity as if it had been returned by a jury consisting of the full number of jurors.²⁵⁵ A jury may, however, never consist of less than five persons.²⁵⁶

Jury members in Hong Kong are paid an allowance in terms of section 31 of the Jury Ordinance (Cap 3), at a rate determined by the Chief Executive from time to time and published in the Gazette.²⁵⁷ In addition to an allowance, a jury member can also receive an additional

²⁵⁰ For a full list, see Jury Ordinance (Cap 3) section 5; on the exclusion of certain professionals from the jury, see Michael B. Mushin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239 (2006).

²⁵¹ Jury Ordinance (Cap 3) section 28.

²⁵² *Id.* sections 9-20.

²⁵³ *Id.* section 25(1)(a)-(b).

²⁵⁴ *Id.* section 25(2).

²⁵⁵ *Id.* section 25(3).

²⁵⁶ *Id.* section 25(4).

²⁵⁷ *Id.* section 31(1).

allowance for a case where necessary and justified.²⁵⁸ Where a juror, having been duly served with a summons fails to attend, or being present, does not appear when called, or after appearance withdraws himself without the permission of a judge, such a juror shall be guilty of an offence and will be liable to a fine unless he or she can show some reasonable cause for the failure to comply with the summons or for not appearing or for withdrawing without permission.²⁵⁹ In terms of section 32(3) such failure on the part of a juror may also be punishable as “a criminal contempt of court committed in the face of the court”.²⁶⁰

Similar to other legal systems in the world with adjudication processes that provides for jury trials, the primary focus of legal concern subsequent to a jury verdict having been handed down usually relates to the summing up of the judge to the jury at the end of the legal proceedings and before the jury is sent away for deliberation,²⁶¹ as well as the pivotal requirement that a jury not investigate or receive evidence or be influenced in any manner whatsoever both during the course of the trial as well as during deliberations.²⁶² Also, as in other common law jurisdictions, the question has been raised in Hong Kong whether the lay jury is truly capable of comprehending the evidence and arguments led in a complex trial, and casting an appropriate verdict as to the guilt or innocence of an accused in complex proceedings. So-called “complex” criminal proceedings usually refer to cases which involve one or more of the following general features:

“First, there is the existence of a number of defendants with multiple charges against each. The difficulty for the jury in those circumstances is that of remembering who is who and who is

²⁵⁸ *Id.* section 31(2).

²⁵⁹ *Id.* section 32(1)-(2).

²⁶⁰ *Id.* section 32(3).

²⁶¹ Hong Kong case law reveal the manner in which the presiding judge explains to the jury how they should deliberate and ultimately preferably reach a majority verdict. Important case law from Hong Kong and England and Wales include the following: *Pun Luen Pan v. HKSAR* [2008] 2 HKLRD 404; *HKSAR v. Chan Ka Man* [2005] 1 HKC 162; *R v. Watson* [1988] QB 690; *Black v. R* [1993] 179 CLR 44; *R v. Accused* [1988] 2 NZLR 46; *Tam King Hon v. HKSAR* [2006] HKCU 569; *R v. Atlan* [2004] EWCA Crim 1798; *Lam Chi Kwong v. HKSAR* [2008] HKCFA 97; *Cheung Chi Keung v. HKSAR* (2009) 12 HKCFAR 502; *Cai Zong Gang v. HKSAR* (2009) 12 HKCFAR 494; *HKSAR v. Kwok Chi Wai* [2004] HKCA 251.

²⁶² *See, e.g., HKSAR v. Chan Huandai* [2016] HKCU 447; *Ellis v. Deheer* [2010] EWCA Crim 1623 [2011] 1 W.L.R. 200; *R v. Thompson* [2011] 2 All ER 85; *R v. Blackwell* [1995] 2 Cr App R 625; *R v. Oke* [1997] Crim LR 898; *R v. Orgles* [1994] 1 WLR 108.

accused of what. Another problem concerns the jury's lack of experience in the world of high finance and international trading which represents the backdrop to most commercial fraud cases. The length of such trials was seen as a further feature of complexity. This is thought to be perhaps the most significant cause of juror dissatisfaction and results from the disruption which long jury service causes to the lives of ordinary citizens. Fourth, the jury faces the problem of maintaining an adequate degree of concentration for long periods and, consequently, of understanding the issues... Another factor is the sheer volume of the evidence itself. Much of it may be in the form of documents placed before the jury and these may run into thousands of pages and are usually difficult to digest."²⁶³

This question, as to whether a jury trial is indeed the most appropriate mode of trial for complex cases is a question that has already been raised in English law in 1984, in what became known as "the Roskill Report on Fraud Trials".²⁶⁴ In this report it was noted that "[t]he increasing sophistication of business aids such as computers and the development of instant communication at an international as well as local level means that fraud investigations and trials are acquiring a new dimension."²⁶⁵ The Council responsible for this report, however, was not convinced that it could be shown that the average juror was any less capable of understanding and weighing the issues in a case of serious fraud, for example, than in any other serious criminal case.²⁶⁶ Similar concerns with regard to the trial by jury for complex commercial crimes were also raised in Hong Kong in 1979.²⁶⁷ These concerns were further exacerbated with a series of criminal proceedings against Carrian Holdings Ltd from 1986 to 1995,²⁶⁸ and

²⁶³ DUFF ET AL., *supra* note 228, at 43-44; for recent examples of complex commercial crime cases in Hong Kong *see* HKSAR v. Yeung Ka Sing & Carson [2016] HKCFA 52; (2016) 19 HKCFAR 279; [2016] 5 HKC 166; FACC 5/2015 (11 July 2016); HKSAR v. Tsang Yau May [2017] HKCA 101; CACC 16/2016 (10 March 2017); HKSAR v. Jariabka Juraj [2016] HKCA 512; [2017] 2 HKC 207; CACC 321/2014 (27 October 2016); and HKSAR v. Tai Chi Wah and another [2008] HKCA 78; CACC 497/2006 (22 February 2008).

²⁶⁴ BERYL COOPER ET AL., *FRAUD TRIALS* 21 (London Justice, 1984).

²⁶⁵ Cooper, *supra* note 264, at 1.

²⁶⁶ Cooper, *supra* note 264, at 22. *See also* R v. Simmonds [1967] 51 CAR 316.

²⁶⁷ DUFF ET AL., *supra* note 228, at 43 and 44.

²⁶⁸ The *Carrian* case lasted no less than 280 actual sitting days in court, of which the jury was out of court for 115 days, the judge delivered 53 rulings in the jury's absence, and the Crown called 104

also with the passing of the Complex Commercial Crimes Ordinance (Cap 394) in 1988. Of these concerns Peter Duff and his co-authors noted that “[a]s was the case in England, the expression of concern about the role of the jury in complicated fraud trials was often a symptom of a more general and underlying unease about the whole institution of trial by jury and, in particular, a product of doubts about the competence of the jury to perform its task.”²⁶⁹

With regard to the role of lay juries in complex criminal proceedings, the development of the English law and the Hong Kong law took divergent paths. In England and Wales, the Criminal Justice Act (Cap 44) was enacted in 2003 and allows for the prosecution to make an application for certain trials to be conducted without a jury. Section 43 of the Act relates to proceedings where the “complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.” And, section 44 of the Act relates to proceedings where there is “evidence of a real and present danger that jury tampering would take place...[and] notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.” In Hong Kong, in turn, the Complex Commercial Crimes Ordinance (Cap 394) did not abolish trial by jury in cases involving complicated commercial crimes. It rather incorporated in the final draft of the Ordinance several measures designed to make such trials less complex and easier for the jury to follow. These measures include the following: “Provision is made for a preparatory hearing before the jury is empanelled, for the purpose of identifying material issues, expediting the proceedings, assisting the jury’s comprehension and helping the judge. Thus much greater emphasis is placed on the pre-trial stage.”²⁷⁰

witnesses. The defendants in this case were ultimately acquitted by the jury. DUFF ET AL., *supra* note 228, at 45.

²⁶⁹ DUFF ET AL., *supra* note 228, at 43.

²⁷⁰ See, e.g., Jury Ordinance, Cap. 3, § 13 (H.K.) (BLIS), which allows for the submission of documentary evidence which would otherwise have been inadmissible in the proceedings, but which may serve as explanatory material which can be helpful to aid comprehension by the jury. DUFF ET AL., *supra* note 228, at 46-47.

C. Peers, Process, and Projection

The analysis and discussion in the preceding parts traced the legal-historical development of the medieval modes of proof, to the contemporary modes of adjudication and the rudiments of the two dominant legal traditions – the common law and the civil law tradition – which were ultimately transplanted throughout the world through conquest, colonization and legal reform. The jury trial and the mixed court or tribunal as distinctive features of the common law and civil tradition respectively, have also found application in the “East”, and the unique adaptations of both these legal transplantations were considered with reference to the laws of the Special Administrative Region of Hong Kong and the ongoing legislative project of the People’s Republic of China (respectively). While these two jurisdictions may have different legal systems, they are bound together by the principle of one country two systems,²⁷¹ as well as its people, the majority of whom are ethnic Chinese. The general acceptance of late that a close relationship exists between law and culture, each partaking in, reflecting, and refracting the other, the impact of dominant cultural views and practices on the operation, deliberation, and ultimate verdict of a legal relic like that of the jury system and in a post-colonial world cannot be ignored. In the discussion that follows, therefore, the characteristic collectivist Chinese culture will briefly be outlined for as far as it may be relevant to the operation, deliberation

²⁷¹ This statement also refers to the constitutional principle of “one country two systems” formulated by Deng Xiaoping in the early 1980s as a way to reconcile the socialist Mainland with its territories—Taiwan, Hong Kong and Macau which are allowed to maintain their capitalist economies and own laws and legal systems. See Xianfa (宪法) [Constitution] (promulgated by the Nat’l People’s Cong., Dec 4, 1982, effective Dec 8, 1982) art. 31 (Chinalawinfo) (“The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions.”). See also Sino-British Joint Declaration, China-Gr. Brit., art. 3(11), Dec. 19, 1984 which provides as follows:

“[T]he above-stated basic policies of the People’s Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, by the National People’s Congress of the People’s Republic of China, and they will remain unchanged for 50 years.”

Finally, see the preamble to the Hong Kong Basic Law which was promulgated on Apr. 4, 1990 and came into effect on July 1, 1997 and where it is stated as follows:

“...the People’s Republic of China has decided that upon China’s resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China, and that under the principle of ‘one country, two systems’, the socialist system and policies will not be practiced in Hong Kong.”

and ultimate verdict cast by lay participants in criminal legal proceedings in the People's Republic of China and its Special Administrative Region of Hong Kong.

In 1980, Gerard Hendrik (Geert) Hofstede, a Dutch social psychologist, published one of the most comprehensive studies on national values at that time, and introduced an important dimension of cultural variations by way of his "cultural dimension theory".²⁷² Individualism, according to Hofstede, "pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family."²⁷³ Individuals in individualistic societies therefore, "view themselves as independent of collectives and...give priority to their personal goals over the goals of others."²⁷⁴ Countries found to be high on the individualistic end of what Hofstede called the "cultural dimension" included most northern and western regions of Europe, as well as North America.²⁷⁵ Conversely, Hofstede found collectivism as a cultural pattern common in Asia, Africa, the Middle East, Central, and South America, as well as the Pacific.²⁷⁶ He defined collectivism as the opposite of individualism, pertaining "to societies in which people from birth onwards are integrated into strong, cohesive ingroups, which throughout people's lifetime continue to protect them in exchange for unquestioning loyalty".²⁷⁷ Collectivism is therefore "a social pattern consisting of closely linked individuals who see themselves as part of one or more collectives (family, co-workers, tribe, nation) and are willing to give priority to the goals of these collectives over their own personal goals."²⁷⁸ Individualism can be characterised by three critical features: "(a) emphasis on distinct and

²⁷² GEERT H. HOFSTEDE, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES* (Beverly Hill, Sage 1980).

²⁷³ GEERT H. HOFSTEDE, *CULTURE AND ORGANISATIONS: SOFTWARE OF THE MIND* 51 (London, McGraw Hill 1991).

²⁷⁴ Stella Ting-Toomey & Atsuko Kurogi, *Facework Competence in Intercultural Conflict: An Updated Face-Negotiation Theory*, 22 INT'L J. OF INTERCULTURAL REL. 187, 190 (1998).

²⁷⁵ *Id.* HOFSTEDE, *supra* note 273, at 51.

²⁷⁶ It is interesting to note, that less than one-third of the world population resides in cultures with high individualistic value tendencies, and more than two-thirds of the world's population live in cultures with high collectivistic value tendencies. Ting-Toomey & Kurogi, *supra* note 274, at 190.

²⁷⁷ HOFSTEDE, *supra* note 273, at 51.

²⁷⁸ John Oetzel et al., *Face and Facework in Conflict: A Cross-cultural Comparison of China, Germany, Japan, and the United States*, 68 COMM. MONOGRAPHS 235, 239 (2001).

autonomous individuals, (b) separation from ascribed relationships such as family, community, and religion, and (c) emphasis on abstract principles, rules, and norms that guide the individual's thoughts, feelings, and actions".²⁷⁹ And for collectivism, in turn, two main types exist: Horizontal collectivism generally refers to the team orientation of a group of people working together to the benefit of the group as a whole, and vertical collectivism refers to the tendency of people in a society to obey and be subordinate to laws and authority. This too is a form of collectivism as the collective interests and security of the group or society as a whole are advanced when people conform to societal norms and authority.²⁸⁰

Traditional Chinese culture shares characteristics of both horizontal and vertical collectivism. For example, in terms of Confucian teachings, social harmony and collective benefits are particularly important and deference to societal norms, laws, and authority, as well as in terms of interpersonal relationships, are essential. "Face" is furthermore a particularly important value in terms of traditional Chinese culture. The Chinese cultural concept of "face" can be described as "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact".²⁸¹ Erving Goffman explains: "A person may be said to *have*, or *be in*, or *maintain* face when the line he effectively takes presents an image of him that is internally consistent, that is supported by judgments and evidence conveyed by other participants,

²⁷⁹ Uichol Kim, *Chapter 9 Asian Collectivism: An Indigenous Perspective in ASIAN PERSPECTIVES ON PSYCHOLOGY* 147, 149 (Hendry S.R. Kao & Durganand Sinha eds., Thousand Oaks, California: Sage Publications 1997).

²⁸⁰ In 1980, Hofstede characterized individualist societies in emphasizing "I consciousness, autonomy, emotional independence, individual initiative, right to privacy, pleasure seeking, financial security, need for specific friendship, and universalism". And collectivist societies in emphasizing "we consciousness, collective identity, emotional dependence, group solidarity, sharing, duties and obligations, need for stable and predetermined friendship, group decision, and particularism". Kim, *supra* note 279, at 2, quoting HOFSTEDE, *supra* note 273.

²⁸¹ ERVING GOFFMAN, *On Face-work An Analysis of Ritual Elements in Social Interaction, in INTERACTION RITUAL ESSAYS ON FACE-TO-FACE BEHAVIOUR* 5, 5 (Penguin Books 1967); John Oetzel et al. define "face" as "an individual's claimed sense of positive image in the context of social interaction". Oetzel, *supra* note 278, at 235. Stella Ting-Toomey and Atsuko Kurogi define "face" as "a claimed sense of favourable social self-worth that a person wants others to have of her or him." Ting-Toomey & Kurogi, *supra* note 274, at 187; Weixia Cher Chen, *A critique of "loss of face" arguments in cultural defense cases: A comparative study, in MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE* 247-260 (Marie-Claire Foblets & Alison Dundes Renteln eds., Hart Publishing 2009)

and that is confirmed by evidence conveyed through impersonal agencies in the situation.”²⁸² “A line” in this context refers to patterns of “verbal and nonverbal acts by which [a person] expresses his view of the situation and through this his evaluation of the participants, especially himself. Regardless of whether a person intends to take a line, he will find that he has done so in effect. The other participants will assume that he has more or less wilfully taken a stand, so that if he is to deal with their response to him he must take into consideration the impression they have possibly formed of him.”²⁸³ A person’s “face”, in this sense, is clearly not something that is lodged in or on their body, “but rather something that is diffusely located in the flow of events in the encounter and becomes manifest only when these events are read and interpreted for the appraisals expressed in them.”²⁸⁴

This synergy between “face” and the taking of “a line” can be explained by way of the following examples: “A person may be said to *be in wrong face* when information is brought forth in some way about his social worth which cannot be integrated, even with effort, into the line that is being sustained for him. A person may be said to *be out of face* when he participates in a contact with others without having ready a line of the kind participants in such situations are expected to take. The intent of many pranks is to lead a person into showing a wrong face or no face, but there will also be serious occasions, of course, when he will find himself expressively out of touch with the situation. When a person senses that he is in face, he typically responds with feelings of confidence and assurance. Firm in the line he is taking, he feels that he can hold his head up and openly present himself to others. He feels some security and some relief, as he also can when the others feel he is in wrong face but successfully hide these feelings from him. When a person is in wrong face or out of face, expressive events are being contributed to the encounter which cannot be readily woven into the expressive fabric of the occasion. Should he sense that he is in wrong face or out of face he is likely to feel ashamed and inferior because of what has happened to the activity on his account and because of what may happen to his reputation as a

²⁸² GOFFMAN, *supra* note 281, at 6-7.

²⁸³ GOFFMAN, *supra* note 281, at 5.

²⁸⁴ GOFFMAN, *supra* note 281, at 6-7.

participant. Further, he may feel bad because he had relied upon the encounter to support an image of self to which he has become emotionally attached and which he now finds threatened. Felt lack of judgmental support from the encounter may take him aback, confuse him, and momentarily incapacitate him as an interactant. His manner and bearing may falter, collapse, and crumble. He may become embarrassed and chagrined; he may become shamefaced. The feeling, whether warranted or not, that he is perceived in a flustered state by others, and that he is presenting no usable line, may add further injuries to his feelings, just as his change from being in wrong face or out of face to being shamefaced can add further disorder to the expressive organization of the situation.”²⁸⁵

Face, is therefore a quantitative concept which means that a person can possess a certain amount of face and the amount of face a person possess can vary by the acts of that person or those of others. Hsien Chin Hu described “face” as consisting of two criteria; (面子, *mian-zi*) referring to “a reputation achieved through getting on in life, through success and ostentation”, and (脸, *lian*) referring to “the respect of the group for a man with a good moral reputation: the man who will fulfill his obligations regardless of the hardships involved, who under all circumstances shows himself a decent human being. It represents the confidence of society in the integrity of ego’s moral character, the loss of which makes it impossible for him to function properly within the community. Lien is both a social sanction for enforcing moral standards and an internalized sanction.”²⁸⁶ One therefore lose *lian* for immoral or socially disagreeable behaviour, and this loss is felt acutely,²⁸⁷ especially when the person holds a particularly high social standing in society, as the more dignity he has to maintain, the more vulnerable this *lian* becomes.²⁸⁸ *Mian-zi*, in turn, “can be borrowed, struggled for, added to, padded, - all terms indicating a gradual increase in volume. It is built up through initial high position, wealth, power, ability, through cleverly establishing social ties to a number of prominent people, as well as through

²⁸⁵ GOFFMAN, *supra* note 281, at 8-9.

²⁸⁶ Hsien Chin Hu, *The Chinese Concepts of “Face”*, 36 AM. ANTHROPOLOGIST 45, 45 (1944); Oetzel, *supra* note 277, at 236.

²⁸⁷ Hu, *supra* note 286, at 46 and 50.

²⁸⁸ Hu, *supra* note 286, at 47.

avoidance of acts that would cause unfavourable comment.”²⁸⁹ To have no *lian*, therefore casts doubt on the integrity of a person’s moral character, while the absence of *mian-zi* signifies the failure of a person to achieve a reputation through success in life.²⁹⁰ These two criteria of “face” should not be seen as separate, or entirely independent from one another, as *lian* is bound to overlap with *mian-zi*. For example, *lian* is included among the conditions determining the amount of a person’s *mian-zi*.²⁹¹

Given the general collectivist nature of traditional Chinese culture, “face” can be lost in the confrontation with others or the disruption of the harmony of a group. It is furthermore not only the face of the confronter or disrupter that is lost, but also the face of those who are the target of the confrontation or disruption, and it even extends to all those who have an interest in the advancements or set-backs of those involved, including family members, the wider community of friends and superiors and colleagues.²⁹² Oetzel et al explained this as follows: “Self-face is the concern for one’s own image, other-face is the concern for another’s image, and mutual-face is a concern for both parties’ images and/or the “image” of the relationship.”²⁹³ When a face of a person is threatened, that person will react to it by taking counteractions to preserve or restore his or her face. These counteractions are generally referred to as “facework”, or “face-negotiation”, which can be defined as “the communicative strategies one uses to enact self-face and to uphold, support, or challenge another person’s face”.²⁹⁴ While all people of all cultures “try to maintain and negotiate face in all communication situations”, cultural variability exists and it is closely linked with collectivist/individualist cultural patterns in society. “Face negotiation” in terms of traditional Chinese culture is, for example, a primary concern in social interaction and contexts, and is generally regarded as deeply imbedded in everyday discourse.²⁹⁵

²⁸⁹ Hu, *supra* note 286, at 61.

²⁹⁰ Hu, *supra* note 286, at 61.

²⁹¹ Hu, *supra* note 286, at 62.

²⁹² Hu, *supra* note 286, at 51.

²⁹³ Oetzel, *supra* note 278, at 235-238.

²⁹⁴ Oetzel, *supra* note 277, at 235-236; GOFFMAN, *supra* note 281, at 12.

²⁹⁵ Oetzel, *supra* note 277, at 239 and 253; Ting-Toomey & Kurogi, *supra* note 273, at 188.

It is against this background of the collectivist nature of traditional Chinese culture and the cultural concept of “face”, that the operation of the respective models of lay participation in the People’s Republic of China and its Special Administrative Region of Hong Kong must be critically evaluated and understood. In 2016, statistics showed that 42.7% of criminal trials in the Hong Kong Court of First Instance was conducted in Chinese, and by inference had a fully Chinese conversant jury empanelled.²⁹⁶ It is not, therefore, unlikely that jury members in Hong Kong may exhibit many traditional Chinese cultural views, values, and practices, including the cultural concept of “face”, and that they may tend to avoid voicing differing opinions, posing questions, or even admitting when they do not understand a particular aspect of the trial or evidence. For example, in a 1992 survey conducted amongst Hong Kong jury members, it was found that almost half of all jury members had difficulty in understanding the evidence admitted at trial. Other jurors reported difficulty in following the proceedings given their inadequate English language proficiency and only 24% of these jurors indicated that they would seek clarification and help in this regard. The jurors explained their avoiding in seeking assistance or voicing their concern as follows: “We did not ask for [help]...because the circumstances are very intimidating and there is a natural human desire not to look stupid...The whole atmosphere prevented anyone raised questions. You’ll make yourself a fool in front of everybody. If you speak in Chinese, the question will be translated. You’ll feel more stupid.... The procedure of the trial was led by professionals. I found myself a stranger at court. Naturally I kept silent.”²⁹⁷

Likewise, in the discussion and analysis of lay participation in the People’s Republic of China above, the passivism on the part of people’s assessors was also remarked upon from as early as the 1983 legislative endeavours to the most recent 2019 enactments. In addition to lack of training, instructions and more fundamental educational concerns, it was also noted - and contrary to the position in Hong Kong - that a tight-knitted relationship continued to exist between the people’s assessors and the courts within and judges alongside whom

²⁹⁶ *Key Figures and Statistics*, H.K. DEP’T OF JUST. (Dec. 31, 2018), <http://www.doj.gov.hk/eng/about/stat.html>.

²⁹⁷ DUFF ET AL., *supra* note 228, at 70-74.

they served, thwarting the valuable oversight function that independent and impartial lay participation in legal proceedings is supposed to serve. The persistent heavy workload coupled with the more generous compensation lay assessors were entitled to pursuant to article 18 of the People's Assessors Decision of 2004 and article 14 of the Regulation of Selecting, Examining and Appointing Law Assessors of 13 December 2004, further perpetuated the risk of them becoming so financially dependent on the courts, that they "may bend over to satisfy the court, his employer, and become 'susceptible to' the court's (and indirectly the state's) 'direct influence'".²⁹⁸ These systematic problems in the system of lay participation in the adjudication of legal disputes in the People's Republic of China certainly exacerbate the extent to which the collectivist nature of traditional Chinese culture and the cultural concept of "face" may impact on the role and value of lay participation in the adjudication of legal disputes.

While it must be granted that most people, from all cultures, will find the courtroom setting intimidating and may avoid asking questions or attracting attention, it remains unclear, without further and more contemporary research on this topic, to what extent dominant cultural views and practices may impact on the operation, deliberation, and ultimate verdict of lay participants in the adjudication of legal disputes. Such research, however, remains an impossibility as the deliberations of lay participants in both jury trials in Hong Kong, as well as collegial panels in the People's Republic of China are, to a large extent, obscured from public scrutiny and review.

IV. CONCLUSION

In this article, the legal-historical development of trial by peers was traced from its origins in medieval law to date. It was shown that the medieval modes of proof – trial by ordeal, trial by battle and compurgation – were not a proof outcome in the sense of the proof of facts, but rather an adjudication outcome in the sense of vindication.²⁹⁹ Ho explained that "[t]he justice sought through use of the medieval modes of proof was not grounded in substantive norms operating on

²⁹⁸ Wang & Fukurai, *supra* note 141, at 254.

²⁹⁹ Ho, *supra* note 40, at 279.

the facts of the case; it was based, rather, on submission to and faith in a spiritual power”.³⁰⁰ The legal-historical overview provided in this article also showed that these medieval modes of proof or adjudication should not easily be dismissed as primitive, irrational, or mystical.³⁰¹ Brown explained that the “very course of the ritual of the ordeal helped to contain a conflict and to bring about a resolution. The ceremony applied a discreet massage to the ruffled feelings of the group. [...] [A] ceremony such as the ordeal was a theatrical bid for consensus in a society still so balanced as to make any other form of human agreement on insoluble issues seem to involve all participants in a loss of face.”³⁰²

It was from the abolition of these early modes of proof that our modern modes for adjudication developed. These modes of adjudication no longer look to the spiritual realm for resolution, but are rather premised on facts and reasoning.³⁰³ Lay participation in these adjudication processes has always been present in some way or form, in legal systems of both the common law tradition as well as the civil law tradition. Lay participation in the adjudication of legal disputes is furthermore not only a vessel for representing the society, including its norms, customs, practices, and beliefs, but is also as a tool for legitimation in state legal machinery. The power and (legal) value of such lay participation should not be underestimated. Of its ancient origins Colman explained: “Although in the small medieval community the administration of law was often indistinguishable from the other business of everyday life, the situation had certain merits denied us by our more specialised machinery. The socio-judicial apparatus built into the social structure may be seriously underestimated by those who are unduly impressed with all the paraphernalia of modern law courts with their supporting prison and police machinery and professional personnel. As more than one observer of African tribal justice has noted, ‘undue homage to legality is unnecessary’ where firm institutional arrangements protect the

³⁰⁰ Ho, *supra* note 40, at 279.

³⁰¹ Colman, *supra* note 21, at 577. *See also* Ho, *supra* note 40.

³⁰² Brown, *supra* note 20, at 138 and 143.

³⁰³ Ho, *supra* note 40, at 291.

weak, provide safeguards against exploitation, and enforce speedy restitution and reconciliation in cases of misdemeanour or crime.”³⁰⁴

The focus of this article was specifically on lay participation in the adjudication of criminal trials in the People’s Republic of China and its Special Administrative Region of Hong Kong. Although an analysis of legal regulations, secondary sources, and sporadic media reports can never truly provide us with a full view and textured insight as to how exactly lay participation in the process of adjudication works, such an analysis can nonetheless provide a valuable legal-historical and comparative overview of how lay participation in the adjudication of criminal disputes are effected in different jurisdictions.³⁰⁵ The geographical transplants of legal systems and their institutions for adjudication, including the participation of peers, can be traced and considered in light of obvious geographical, cultural, and historical commonalities and shared value systems, as well as those diverging.

With regard to the People’s Republic of China and its Special Administrative Region of Hong Kong, it was noted that the increasingly tenuous border between the PRC and Hong Kong masks a deeper, invisible but very real ideological, if not cultural cleft between the two jurisdictions. Hong Kong’s qualified attachment to English colonial institutions, such as the adapted jury system, and the Administrative Region’s staunch insistence on keeping the laws and processes of the erstwhile colonial power, serve as more than just colonial relics and reminders; this attachment reveals a deeper jurisprudential identification and some kind of self-determination through the modes of adjudication usually associated with the common law tradition. But it is not mere mimicry. From early on the trial by jury system in Hong Kong developed its own unique features and diverged from its counterpart in the laws of England and Wales. Jurisdictional self-confidence and adaptability also played out in the People’s Republic of China, where a practice of legal transplantation and adaptation to local needs are also prevalent.³⁰⁶ For example, the system of people’s assessors adopted in the People’s Republic of China and its ensuing legal reform is curiously moving in the direction

³⁰⁴ Colman, *supra* note 21, at 575, quoting J.D. Krige, *Some Aspects of Lovhedu Judicial Arrangements*, 13 BANTU STUD. 119 (1939).

³⁰⁵ He, *supra* note 2, at 735.

³⁰⁶ Landsman & Zhang, *supra* note 119, at 219.

of an adversarial process; “[t]he judge-driven investigation, punctuated by episodic hearings, that is the hallmark of the inquisitorial process is at odds with the lay assessor mechanisms, which pull toward concentrated hearings, witness examination and diminished reliance on dossiers”.³⁰⁷ In a justice system that has been described as “deeply troubled by corruption and plagued by undereducated judges” and “that cries out for public scrutiny and assistance”, the hope on the part of the government of the People’s Republic of China is of course that the people’s assessor system will ultimately assist in the curbing of corruption, favouritism, and undue influence in the Chinese judiciary.³⁰⁸

“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.”³⁰⁹

However, the question must also be asked whether the added value of greater lay participation which can be observed in both the People’s Republic of China and its Special Administrative Region of Hong Kong can actually be *overestimated*. This article described various cultural and political forces at work in both the PRC and Hong Kong and which have relevance for the question at hand. Perhaps all the various strands, motives, policies and tendencies can come together and can find a synthesis in the idealised but ultimately banal “lay person”. The singular voice of reason, justice, and accountability in a complex world. A Lady Justice in the flesh. In the second decade of the twenty-first century, what does this individual look like in the fast-developing world of the People’s Republic of China and the post-colonial, sometimes ambivalent world of Hong Kong? Is this idealised yet supposedly “ordinary” individual, the peer of the accused, the

³⁰⁷ Landsman & Zhang, *supra* note 119, at 218. See also Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Dispositions in China*, 37 L. & SOC’Y REV. 549, 554 (2003).

³⁰⁸ Landsman & Zhang, *supra* note 119, at 211-214.

³⁰⁹ Landsman & Zhang, *supra* note 119, at 213.

guardian of a value system, really capable to carry all the institutional, historical and cultural baggage of an ancient institution such as the jury system? Will our idealised peer, who, in formalised, even intimidating settings such as criminal trials, perhaps rather opt for face saving than to be an interrogator of fact and circumstance; will this person really be a legitimator of a system in flux? One can, for instance, point out the rather arbitrary characterisation of the idealised lay person in the People's Republic of China as being at least 28 years of age. Why 28? A quirk of the administrative state, perhaps, or indicative of a perception of what minimum life experience the idealised lay person can be expected to have.? It may be the case that a more experienced, more mature individual makes for a better lay participant in the judicial process. But compare this to the experience in Hong Kong, where one can note something else as well: despite generations' worth of colonial experience, a remarkable percentage of jurors in the Special Administrative Region exhibit the kind of cultural reactions to unusual or difficult situations (such as adjudicating in complex criminal cases) with the deep seated concept of "face". On the assumption that this cultural feature is still pervasive in both jurisdictions, it brings us to the question of whether any significant lack of probing, questioning and other deviations from "face saving" may undermine a conception of lay participation which many in the West may have because of an emphasis on individualistic and critical lay engagement with evidentiary matters. Even if the conclusion is that deep seated cultural practices and values make for an unusual lay participation experience (at least from a Western perspective), the institutions of lay participation in the People's Republic of China and its Special Administrative Region of Hong Kong must ultimately be evaluated on their own terms.

Whether lay participation in the legal proceedings of the People's Republic of China and its Special Administrative Region of Hong Kong truly contribute to the credibility and independence of the respective legal adjudication processes, remains questionable. In the People's Republic of China, under the People's Assessors Decision of 2004 and before the most recent legislative scheme was enacted, little empirical evidence existed to support that these ideals have been achieved.³¹⁰ Xin He described the Chinese people's assessors as

³¹⁰ He, *supra* note 2, at 755.

“little more than lackeys” who only contribute to the positive impression of Chinese courts to the Chinese public and outside world.³¹¹ And in the Special Administrative Region of Hong Kong with its jury trials at the Court of First Instance, the true value and impact of lay participation in the bureaucratic legal machinery remain a mystery, shielded by the sacrosanct nature of the jury system itself.

Ultimately, it should be clear that - like in medieval times in Europe - lay participation in the adjudication of legal proceedings today, whether in the West, in the People’s Republic of China, or in Hong Kong, continue to serve as an important ritual; “a discreet massage to the ruffled feelings of the group... [and] a theatrical bid for consensus in a society still so balanced as to make any other form of human agreement on insoluble issues seem to involve all participants in a loss of face.”³¹²

³¹¹ He, *supra* note 2, at 756.

³¹² Brown, *supra* note 20, at 138, 143.