

China's Lay Participation in the Justice System: Surveys and Interviews of Contemporary Lay Judges in Chinese Courts

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I Introduction

China preserves civic participation in its judiciary by adopting the so-called lay judge system, under which lay judges sit with professional judges to adjudicate cases. This lay participation system saw its decline due to its problematic operation since the 1980s. The 2004 Lay Judge Act of China went into effect on May 1, 2005, in an attempt to substantially reform this system. Our study provides an analysis of two surveys conducted among professional judges and lay judges at nine law courts in China in 2007. The agreement with those courts disallowed the disclosure of the data for five years (i.e. until 2013). Since the tenure of lay judges is five years, our analytic results reflect the current practice of China's lay judge system. The survey investigates the representativeness of lay judges such as their gender, political affiliation, occupation, educational level, and graduation qualification. Finally, interviews with lay judges and a presiding judge in the civil court in 2013 provide additional insight into how the lay judge trials are currently being conducted in China.

II The Evolution of China's Lay Adjudication System

China's experiment with employing popular legal participation in the courtroom can be traced to 1906 when an all-citizen jury system was first proposed. Four years earlier, in 1902, the Ching Dynasty had appointed the prominent legal reformer Jiaben Shen to chair the legal reform. Shen was influenced by Western legal thought and considered the bench trial system to be gravely insufficient for meeting the needs of a modernized judicial institution. His draft of the *Criminal and Civil Procedure Law of Great Ching* in 1906 provides a

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rich description of the establishment of all-citizen juries in both criminal and civil deliberations. Yet this legal draft was not formally approved by the Ching Government until after the fall of the Dynasty in 1911.

A modern version of this lay judge system was formally instituted by the Chinese Communist Party in 1949. The system was originally designed to employ a judicial panel composed of both ordinary citizens and professional judges to adjudicate both civil and criminal cases. The lay judge system is also known as the mixed tribunal system because of its hybridized composition of participants in decision-making.

Despite its formal commitment to institute popular legal participation, the lay judge system, prior to the promulgation of the new Lay Judge Act of 2004 (hereinafter the LJA 2004), failed to achieve its equitable objective in the judicial process and proved problematic in practice. The reported deficiencies included the following: (1) a total suspension or sporadic use of lay judges; (2) inappropriate stipends of lay judges; (3) the “professionalization” of lay judges; and (4) lay judges’ passive role in decision-making.¹

From the mid 1980s, both academic and official information indicated that a number of Chinese courts had ceased to use lay judges entirely or had severely limited their use.² The financial compensation was considered a key ingredient in motivating ordinary citizens to serve as a fair-minded judge on a mixed-court panel. In practice, some lay judges were poorly compensated prior to the LJA 2004. It has been reported that the poor benefits directly undermined the enthusiasm and commitment of lay judges.³

Before the LJA 2004, in some jurisdictions, lay judges became “long-serving” or even “full-time” and abusive practices slowly emerged, involving lay people

1 Hiroshi Fukurai and Zhuoyu Wang, “Popular Legal Participation in China and Japan,” *International Journal of Law, Crime, and Justice* 38 (2010): 236.

2 See e.g. Wei Min, “Shall the Lay Judge System Be Suspended: The Discussion about the Developing Direction of the Lay Judge System,” *Gansu Social Sciences* 4 (2001): 31–32; Wang Minyuan, “The Lay Judge System and Its Improvement,” *Law Study* 4 (1999): 31; and also “The Foundations for the Reform of Lay Judges’ Function Setting,” *China Daily*, December 4, 1999.

3 See Yisheng Ding and Lijuan Sun, “The Comparative Research on the Applicable Area of the Lay Judge Systems in China and the Jury System in West Countries,” *Jurisprudence* 11 (2002): 12; this reality has been reported as well by the Pengzhou Court of Sichuan Province and the Jingjiang Court of Jiangsu Province, see Dide Wang, “The Analysis of the Operational Situation of the Lay Judge System in Pengzhou Court,” accessed July 7, 2014, <http://www.pzfy.org/Article/gzdt/qkfy/200608/977.html>; and Gao Yujun, “The Problems in Applying the Lay Judges and the Solution,” Jingjiang Law Court of Jiangsu Province, accessed July 7, 2014, http://www.jsfy.gov.cn/cps/site/jsfy/lilunyanjiu/dc_content_22007110830351.htm.

-serving for many years. Some of China's courts re-employed the same lay judges for years or even decades.⁴ Some courts also chose to recruit unemployed people or pensioners as lay judges and allocated heavy caseloads to them, effectively transforming them into full-time court employees.⁵ On one hand, Chinese lay judges were said to remain silent like puppets during trials and deliberations before the LJA 2004.⁶ On the other, lay judges were criticized for their "passive obedience to the judge during deliberation, which has transformed the process into a speech instigated by the judge instead of the facilitation of group discussion amongst individuals within the mixed tribunal."⁷

In an attempt to correct these issues, the Supreme Court of China (SCC) submitted the Motion of Reforming the Lay Judge System to the Chinese People's Congress in 1999. On August 28, 2004, the LJA 2004 was enacted. The reform contained 20 principled articles relating to lay judges, but remained ambiguous about some important issues in lay participation. As a remedy, the SCC in association with the Ministry of Justice promulgated the Regulation of Selecting, Examining and Appointing Lay Judges on December 13, 2004 (the Regulation 2004), while the SCC promulgated the 2005 Provisional Regulation of Administration of Lay Judges (the Regulation 2005) on January 6, 2005 in order to further strengthen the system.

The LJA 2004, in association with the Regulation 2004 and the Regulation 2005, was committed to changing the lay judge system. The following section examines whether or not these three separate reforms were able to eradicate both domestic and international criticisms of its judicial corruption, lack of judicial independence, and the closed nature of its judicial process.⁸ This chapter attempts to answer this question in two ways: in the following section, major legislative changes embodied in these three legal documents will be discussed; and finally, findings of our empirical research and interviews will be presented to enrich and verify our discussion.

4 See Xiao Yang, "The Speech on the First Conference of Chinese Lay Judges," accessed July 7, 2014, <http://www.chinacourt.org/html/article/200709/03/262886.shtml>.

5 Article 38 of the Act of the Organisation of Courts in 1983 provided that local electorates should elect lay judges. This provision however was largely abandoned. In practice, it became the norm that many courts made their own choices. In addition, in contrast to some countries where the workload of each lay judge was strictly circumscribed, there was no such limitation in China's law. This left the courts free to overuse a lay judge if they so wished.

6 See "The Lay Assessor System Confronts Four Difficulties," *Legal Daily*, May 8, 2008.

7 Bing He, "Merits of the Lay Judge System," *The People's Court Daily*, April 25, 2005.

8 "China to Introduce Jury Trials," *Agence France Presse*, December 20, 2004.

III Major Reforms of the Lay Judge System 2004–2005

A *Encouraging the Use of Lay Judges*

Article 10 of the Act of the Organization of Chinese Courts in 1983 placed the decision to use lay judges under the jurisdiction of each individual court, providing that “cases of first instance shall be adjudicated by a collegial panel composed of judges, *or of judges and lay judges*; simple civil cases, minor criminal cases and cases otherwise prescribed by law shall be adjudicated by a single judge.” This optional use of lay judges led to a dramatic decline of lay judge trials in the 1980s and 1990s. By contrast, the LJA 2004 promoted the use of lay judges by specifically providing two circumstances under which a mixed tribunal must be used: (1) first-instance criminal, civil, and administrative cases with far-reaching social implications; and (2) any case in which the litigant(s) request the application of a mixed tribunal.⁹

Those provisions are significant in two aspects. First, in contrast to the previous exclusive jurisdiction of the courts to initiate a mixed tribunal, this provision specifically requests the courts to employ mixed tribunals more regularly. Second, for the first time since the establishment of the Chinese national state in 1949, the litigants are entitled to apply for the use of mixed tribunals. This could be seen as a move by China towards principles of justice such as “the right [of each citizen] to be judged by his peers.”¹⁰ Of all the major changes embodied in the LJA 2004, none are more fundamental than the above two.

B *Promoting the Quality of Lay Judges by Addressing Education and Training Needs*

Article 4 of the LJA 2004 specifically sets forth the educational eligibility, requiring that lay judges should have at least a college diploma. Before the LJA 2004, there were no nationally applicable rules to regulate the training of lay judges. Each court managed the training of lay judges at its own discretion. Due to the shortage of funds and manpower, a number of courts were found to largely ignore the training of lay judges, which was believed to contribute to the frequently reported incompetence, passivity, and inactivity of these lay

⁹ In China, simple civil litigations and minor criminal offenses can be handled with the summary procedures where a single judge sits alone and applies the simplified procedures (for example, the litigants are allowed to be summoned by telephone by the judge in a civil case), see Article 142–146, the 1991 Code of the Civil Procedure, and Article 174–179, the 1996 Code of the Criminal Procedure.

¹⁰ Sanja Kutnjak Ivkovic, “An Inside View: Professional Judges’ and Lay Judges’ Support for Mixed Tribunals,” *Law & Policy* 25 (2003): 98.

judges.¹¹ In response to this, Article 15 of the LJA 2004 assigned the training responsibility to each individual court and the Department of Justice of the local government at the same level. In addition, Article 10–14 of the Regulation 2004 also commissioned each court to train lay judges and specify that the training session should teach the basic principles of legal knowledge, court rules, judicial moralities, and disciplines. Since courts are designated with the duty to provide the training to lay judges, the Regulation 2005 further established eight articles in order to further regulate the proper execution of the training practices. The imposition of enhanced educational eligibility and the provision of adequate lay judge training were designed to eradicate the previous incompetence of lay judges.

1 Specifying Selection Procedures of Lay Judges

Prior to the LJA 2004, lay judges came primarily from the local community. However, gradually, chaotic practices began to emerge, such as the exclusive recruitment of the pensioners and the unemployed as the lay judges in some jurisdictions. Meanwhile, there was no regulation as to how Chinese courts should allocate the workload of each lay judge, thereby leaving each individual court with the discretion to overuse lay judges and transform them into full-time court employees. The LJA 2004 intended to resolve these problems by setting forth the following three provisions.

Articles 7 and 8 of the LJA 2004 laid down a four-step process for selecting lay judges. First, each court individually decides the number of the lay judges it actually needs, followed by a process of approval by the standing committee of the local People's Congress at the same level. Second, Article 8 set down three methods for each court to identify candidates: (1) "self-nomination," where a citizen who wants to serve as a lay judge 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 judge selection, after obtaining the employees' consent; and (3) "nomination by grass-roots organization," where various "grass-roots organizations"¹² are permitted to

11 See Jungui Shen, "The Negative Views of the Mixed Tribunal System of Our Country," *Chinese Lawyers* 4 (1999): 13.

12 To control and regulate the community from the very grassroots level, China's authority has respectively established the so-called "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 organization" or "grass-roots mass organization." 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

nominate local residents to the courts after securing the consent of the nominees. These three nomination methods were 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. This four-step process prescribed by the LJA 2004 attempted to outline a clear routine and to involve more parties, such as the standing committee of the local People's Congress and the Department of Justice of the local government, in overseeing the proper selection of lay judges. In this way, the courts were procedurally prevented from potentially engaging in discriminatory selection practices in favor of specific groups.

Further, Article 14 of the LJA 2004 provided that each court shall produce a roster of eligible lay judges and "randomly select" the specific lay judge from the roster and designate him/her to each specific case. This rule should serve to prevent the previous practice where some courts kept summoning one or several specific lay judges repeatedly and commissioned them with large workloads, eventually transforming them into the full-time court employees.

2 Promoting the Welfare of Lay Judges

The LJA 2004 attempted to improve the benefits for lay judges in three ways. First, Article 18 mandates that Chinese courts shall compensate lay judges for travelling and accommodation costs. Secondly, the employers of lay judges are forbidden to reduce their salaries, bonuses and other benefits during their court services. Thirdly, any lay judge without employment shall be paid an allowance calculated on the basis of multiplying lay judge's serving days with the average daily income of local workers in the previous year. Article 14 of the Regulation 2004 added that lay judges also be paid allowances and stipends during their training process.

3 Addressing Local Governments' Financial Support

Each court in China is financially dependent on the local government. During the two decades before the LJA 2004, some courts complained that their budgets for maintaining lay judges had been slashed or even totally rejected by the local governments so that they had to reduce or discontinue the use of lay

tackle some local administrative affairs. See the 1998 Act of the Organization of the Committee of Urban Residents and the 1998 Act of the Organization of the Committee of Villagers.

judges.¹³ To address these complaints, Article 19 of the LJA 2004 prompted local governments to provide adequate financial support, specifying that each court be permitted to place the potential expenses for employing lay judges into its normal annual budget that should be approved and duly provided by the local government. These remedial measures represented an important step, not only to eliminate various logistical and procedural deficiencies in the selection of lay judges, but also to improve the structural quality of the court and related institutions by establishing the financial security for the equitable operation of the lay judge system.

Those innovations brought about by the three legal documents, however, have raised further questions and various practical concerns. First, does the selection process for lay judges ensure the appropriate diversity and representativeness of lay judges? Second, does the random assignment of lay judges eliminate the notorious practice of full-time lay judges? Third, can the "common" people, via improved educational eligibility and less fragmented training, be transformed into competent lay judges responsible for deciding on questions of both fact and law? Fourth, will the long-term passivism and limited influence of lay judges continue to be entrenched due to unresolved institutional weaknesses, such as an absence of their legal knowledge and a lack of checks on their own improprieties?

Legal scholar Sanja Ivkovic once declared that "despite the actual widespread use across [different] countries [in the world], existing empirical studies on mixed tribunals are relatively rare,"¹⁴ a picture that holds true in China as well. Since May 1, 2005, when the much-anticipated LJA 2004 came into force, neither the Chinese authorities nor the academic community has published a systematic study to empirically evaluate the practical situation of the mixed tribunal system since its reforms. Meanwhile, it is striking that official government material has been recently released to commend the LJA 2004 for the positive changes it has brought to China, claiming (1) lay judges have worked effectively since the introduction of the LJA 2004, and (2) lay judges have been

13 The Law Court of Yuzhong District of Chongqing City and the Law Court of Jinshi County of Hunan Province have revealed this reality. See, for example, "The Lay Judges Pay Money and Labour and Proceed Unsteadily," Chinese Government, accessed July 7, 2014, http://news.xinhuanet.com/politics/2005-11/14/content_3776737_1.htm; see also "The Court of Jinshi County Addressing the Application of Lay Judges," Court of Jinshi County, accessed July 7, 2014, <http://zjfy.changde.gov.cn/zjfy/937312784843014144/200610/165606.html>.

14 Sanja Kutnjak Ivkovic, "Mixed Tribunals in Croatia," *International Review of Penal Law* 72 (2002): 57–86.

carefully selected and represented the community from which they came.¹⁵ Nonetheless, these positive official conclusions were not premised on relevant empirical evidence. For example, the claim for the alleged representativeness of lay judges failed to quote any empirical data or actual statistics, such as the gender distribution, education levels, occupations, or political beliefs of those within the lay judge pool. An empirical study would therefore seem to be both desirable and necessary.

IV Empirical Research on the Reformed Lay Judge System Under the LJA 2004

This section presents results of the surveys conducted in 2006 and 2007 and in-person interviews conducted with lay judges and a presiding judge in a district court in Chengdu, Sichuan Province in 2013. The lay judge's representativeness and their views on their duties and responsibilities are systematically analyzed and presented.

A *Lay Judge Survey Research and Findings*

Between December 2006 and June 2007, fieldwork was conducted to examine the operation of the mixed tribunal system since the introduction of the LJA 2004, drawing particular attention to the following issues: (1) whether the courts have embraced the new Act and have abandoned previous practices, those now viewed as inappropriate, particularly given that their discretionary jurisdiction has been largely preserved by the Act; (2) whether the selection of lay judges with a higher educational level, together with some limited training, has produced lay judges competent to perform their dual role of both the fact-finder and law-decider; (3) whether lay judges recruited since 2004 have escaped the role of "puppet," thereby effectively participating in judicial decision-making; and (4) whether professional and lay judges in practice upheld the integrity of the deliberative process of the reformed system.

Two sets of information were collected to examine lay judges' representativeness: (1) data from both official and restricted-circulation sources, in archives, libraries and government or public websites; and (2) original empirical data gathered through a questionnaire survey across nine law courts in China. Meanwhile, the scope of the findings was also limited by statutory restrictions. Some parties to the procedure, such as defense counsels, public prosecutors,

15 See, for example, "Implementing the LJA 2004 and Carrying out the Mixed Tribunal System," *The People's Court Daily*, April 21, 2005.

and defendants, are not permitted access to the content of deliberations: these were open only to professional and lay judges. To explore the inner workings of mixed tribunals, analysis of our interviews with professional and lay judges provides the inner working of the deliberative process.

In 2000, there were approximately 250,000 judges practicing in China,¹⁶ and 55,681 lay judges had been appointed by 2006.¹⁷ The list of names and contact details of these two groups were not accessible for reasons of confidentiality. It was therefore not possible to draw a random sample from national lists of professional and lay judges. Sampling on a court-by-court basis via a random selection of courts presented a possible alternative method. However, access to, and co-operation with, China's courts is extremely difficult to obtain, principally because information about the internal operations of the courts is officially classified. Confronting these frustrations and the limitation in time and funds, we adapted the project so as to take advantage of the opportunities that arose through the first author's personal contacts in the Research Department at the High Court of X Province. Approved by this Department, we were allowed to randomly select nine law courts to conduct the survey.

The results are thus illustrative and exploratory and may not be generalized to China's entire court jurisdiction. The Research Department also provided reports of two investigations conducted by the Intermediate Court of C City and the High Court of X Province in 2006. As part of the research agreement with the Department, all the findings and data obtained from the surveys in 2007 would not be disclosed within the next five years. This is why we have not publicized research results until now.

1 Developing the Questionnaires

The judges' questionnaire consisted of four question modules. The first module explored how the courts have carried out the mixed tribunal system in practice, given that the LJA 2004 gives them wide discretion. The second module requested professional judges to evaluate the performance of lay judges during trials. The third module asked for the judges' opinions about the mixed tribunal system, and the fourth module contained a series of demographic questions about the respondents. The questionnaire also had a blank area for respondents to add any further comments.

16 See Han Zhang, "Lay Judges Have Adjudicated 644,723 Cases in More Than Two Years," *Old China Court*, September 4, 2007.

17 Jianqing Chen and Ning Wang, "A Study on Reforms of the Chinese Judge System: Intermediate Law Court of Jinhua City," last modified June 2, 2008, http://www.jhcourt.cn/wenhua/lunwen_detail.asp?id=112.

The questionnaire for lay judges was similarly comprised of four modules. The first explored how, in the experience of the lay judges, the courts have exercised their discretion in implementing mixed tribunals. The second asked them about their own participation in trials, while the third asked about their attitudes towards the lay judge system. The last question asked them to provide their demographic information, followed again by a blank space for any further comments.

The questionnaires were then distributed to 63 professional judges serving at the nine sampled courts, and 49 responded (77.8%). Overall, 172 questionnaires were delivered to all of the lay judges serving at the nine courts and 104 valid questionnaires were received (60.5%).¹⁸ The survey results were also compared with findings from the two internal surveys conducted by the Intermediate Court of C City of X Province among 21 local courts in 2006 and by the High Court of X Province among all the courts in X Province in the same year. The survey results were also compared with statistics from the National Bureau of China (hereinafter the Chinese Census).

(a) *Gender Composition*

The majority of lay judges were male (67.3%). The Chinese Census indicated that males comprised 51.5% of the national population in 2000, and 51.6% in X province.¹⁹ The females are obviously under-represented in the lay judge pool. Males were similarly over-represented in an internal survey conducted by the Intermediate Court of C City of X Province among 21 local courts in 2006 (64.3%).²⁰

(b) *Occupational Distribution*

The survey found that nearly one third (32.6%) were civil servants at local governments; 27.8% worked in public service such as at hospitals and educational institutions administrated by the government; 13.4% were employed by for-profit firms or enterprises; 18.2%, 4.8% and 0.9% were pensioners, the self-employed, and farmers respectively; and 4.8% engaged in other occupations.

18 See "National Population by Age and Gender," National Bureau of Statistics of China, accessed July 7, 2014, <http://www.stats.gov.cn/tjsj/nds/renkou/pucha/2000pucha/html/t0301.htm>.

19 Id.

20 The Intermediate Law Court of C City, "The Present Reality and Realistic Resolution – An Empirical Survey and Analysis of the Implementation of the Mixed Tribunal System," [hereinafter Present Reality] unpublished internal-circulated research report of the Intermediate Law Court of C City, at 2 (on file with the first author) The real name of the courts is omitted here for the sake of confidentiality.

According to the Chinese Census in 2000, only 0.8% of the population of X Province were civil servants,²¹ and civil servants were over-represented. The Chinese Census did not reveal the proportion of people employed by government in X Province. However, until the end of 2005, there were 1.25 million Government undertakings across the whole country, with approximately 30.3 million employees, i.e., 2.3% of the national population.²² The large proportion of public service employees (27.8%) in the lay judge pool suggests that they were also over-represented as well.

According to the Chinese Census, 0.2% of the population in X Province were pensioners,²³ in contrast to 18.2% in the lay judge pool. The survey finding also suggests the significant under-representation of farmers, since they occupied 72.9% of the entire population in X Province, but only made up 0.9% of the lay judge pool.²⁴

The over-representation of civil servants was also found in an internal survey of the Intermediate Court of C City (38.1%).²⁵ Further, the High Court of X Province conducted an internal investigation as to the implementation of the mixed tribunal system in 2006. There were a total of 2,122 lay judges in X Province. Of these, 1,029 were civil servants and 402 were government employees (51.5% and 18.9% respectively).²⁶ The survey data and governmental statistical data show a significant over-representation of civil servants in the lay judge pool.

As discussed above, the LJA 2004 sets the selection process for lay judges under the jurisdiction of the courts. Civil servants, administratively affiliated to the government and thus with the desired accountability, irrespective of their minority position among the national and provincial population, have been given preference by the courts during the selection of lay judges. Likewise, all of the public service undertakings are under the direct sponsorship and

21 Yuling Zhang, "How Many Civil Servants Does China Need? An Interview with Wang Jian," *Guang Ming Daily*, February 27, 2006.

22 Yong Peng and Yaoguo Tang, "Reforms of Government-sponsored Enterprises of Public-service in China: The Return to Their Original Roles of Public-service," *China Elections & Governance*, accessed July 7, 2014, <http://www.chinaelections.org/NewsInfo.asp?NewsID=102801>.

23 National Bureau of Statistics of China, *supra* note 18.

24 *Id.*

25 Present Reality, *supra* note 20, 2.

26 The High Court of X Province, "An Investigation Report about the Implementation of the Mixed Tribunal System in X Province," unpublished internal-circulated document of the High Court of X Province, file with the author, at 3 and 4. (The real name of the courts is omitted here for the sake of confidentiality.)

control of the government; therefore their employees, probably with an equally trustworthy accountability, have been given a similar preferential opportunity to be chosen as lay judges.

(c) *Political Affiliation*

The survey shows that almost three-quarters (73.0%) of the lay judges were Chinese Communist Party (CCP) members, almost triple the number of non-CCP lay judges. The Central Organizational Department of the CCP would not reveal the number of CCP members in X Province, but did reveal that there were 72,391,000 CCP members in China in 2006,²⁷ accounting for only 5.5% of the national population. The CCP members were significantly over-represented in the lay judge pool. The over-representation of CCP members was also found in an internal survey carried out by the Intermediate Court of C City (66.5%).²⁸

(d) *Educational Level*

Nearly all lay judges (94%) had a college diploma or higher educational degrees, including 60% holding at least four-year university degrees (i.e., 54%, 2%, 3%, and 1% holding a bachelor's degree, postgraduate diploma, master's degree, and Ph.D., respectively). In stark contrast, in 2005, only 3.4% of the population of X Province had an educational level up to college diploma or higher educational degrees.²⁹

An internal survey showed a similar outcome: 90.2% had college diplomas or university degrees/diplomas.³⁰ Moreover, an internal investigation by the High Court of X Province also indicated that the large majority of lay judges were college-educated (89.1%).³¹

(f) *Legal Graduate Qualifications*

Many legally trained lay judges were chosen: 34.9% had obtained a degree or diploma in law, and 57.8% had obtained degrees or diplomas in other majors.

27 See "2006 Statistics Show That the National Party is Full of Vigor and Vitality," *Communist Party of China News*, accessed July 7, 2014, <http://cpc.people.com.cn/GB/78779/86328/86927/5986458.html>. However, the CCP has not revealed the amount of its party members in X Province.

28 Present Reality, *supra* note 20.

29 The statistical data was from the official website of the Government of X Province; for the sake of anonymity, as requested, the source is omitted herewith.

30 Present Reality, *supra* note 20.

31 *Id.*, 3-4.

A similar finding was reported by an internal survey: more than a third (34.4%) of the total lay judge pool had degrees in law.³² Both surveys found the significant over-representation of lay judge candidates who were trained and educated in the field of law.

2 *Has the Presence of Full-Time Lay Judges Been Eliminated?*

The LJA 2004 established a so-called “random selection” of lay judges and designated him or her to be assigned to a specific case. The law also allowed the courts to execute this random selection but neglected to specify how to ensure such randomness, possibly granting the courts an opportunity to evade this provision completely. Further, neither the LJA 2004 nor the subsequent two regulations imposed any maximum limit on the workload of a lay judge. When a court, by circumventing the random selection process, repeatedly summons a specific lay judge and allocates him/her a significant workload, the “full-time” lay judge may be reborn. The survey has attempted to probe this concern.

(a) *Have the Courts Insisted on the Random Selection of Lay Judges?*

The questionnaire for judges asked them whether their courts had been selecting each lay judge randomly from the registered list and designating them to a specific case. Surprisingly, only 10.4% of professional judges reported that their courts had been strict in doing this in each case, while 22.9% responded that their courts had not followed the protocol.

The internal survey conducted by the Intermediate Court presents an even more negative picture. The survey report revealed that “the random selection of lay judges has not been strictly carried out yet in the 21 courts.”³³ A report published by the official website of China’s courts indicated a similar negative situation. Up to September 2007, 937 courts had strictly implemented random selection of lay judges in practice, accounting for only 31.8% of the total courts in China.³⁴

(b) *Have the Courts Been Distributing Reasonable Caseloads to the Lay Judges?*

With random selection not currently practiced in many courts, these courts may effectively have the opportunity to select a lay judge from the registered list and allocate him/her a workload at their own discretion, and this practice might lead to an imbalanced workload allocation among lay judges.

32 *Id.*, 2.

33 *Id.*, 8.

34 Hong Li, “56,000 Lay Judges Participating in Cases via Random Selection,” *Old China Court*, September 3, 2007.

From May 2005 when the LJA 2004 came into effect, to May 2007 when the survey was conducted, nearly one-third (31.7%) of lay judges handled more than 50 cases, while in contrast, about one-fifth (21.1%) had adjudicated on less than ten cases, including 8.6% handling less than five cases. Further, among the 104 responding lay judges, there were nineteen pensioners and sixteen of them (84.2%) had participated in more than 50 cases.

The internal survey conducted by the Intermediate Court reported an even more skewed workload imbalance among lay judges. Within the nine months from May 1, 2005 to February 1, 2006, and among 398 lay judges serving at 21 courts, eight (2%) lay judges had participated in over 100 cases, while 59 (14.8%) had not participated in any cases at all.³⁵

According to the internal survey of the Intermediate Court, the courts, when enforcing random selection, felt confused with regard to: (1) which department or person of a court shall be liable for the execution of the random selection; (2) how to ensure the randomness: by computer or lot, or using other means; and (3) who shall oversee execution of the process.³⁶ These ambiguities provided the courts with further excuses for evading the random selection process.

On the other hand, it appears that some courts have encountered practical difficulties in exercising random selection. The internal survey by the High Court of X Province in 2006 disclosed that “the conflict between the employment of some lay judges and their court duties is very prominent,” and “some lay judges who had been randomly selected from the registered list often asked for exemption or deferral of their court duties and caused the delay of the judicial process.”³⁷ When this happens on a frequent basis, it is possible that the court might have lost patience with the process and replaced random selection with manual selection, in order to avoid selecting unreliable lay judges who are often busy with their employment.

Our survey among 104 lay judges showed that nineteen were found to be pensioners, and sixteen of them (84.2%) had participated in more than 50 cases over two years. It is certainly not a coincidence that these pensioners assumed heavier workloads. A more reasonable explanation is that the courts, with random selection suspended, purposefully summon pensioners more frequently and assign them larger caseloads, due to their economic status, which increases their availability and responsiveness to court summons. The internal survey of the Intermediate Court also suggests the return of full-time lay judges.

35 Present Reality, *supra* note 20, 8.

36 *Id.*, 9.

37 *Id.*, 15.

Within the period of nine months, from May 1, 2005 to February 1, 2006, eight lay judges participated in over 100 cases.

3 Have Lay Judges Been Competent?

The judge survey questionnaire asked judges whether they felt satisfied with the competence of lay judges. The responses were fairly positive, albeit only 2% of them presented a completely positive answer: "satisfactory." The overwhelming majority (73.5%) came up with a moderately positive answer: "somewhat satisfactory," while only 12.3% delivered negative evaluations by answering "somewhat unsatisfactory" (8.2%), or "unsatisfactory" (4.1%).

To further probe the competence of lay judges, the judge questionnaire asked them to provide their observations with regard to the frequency that lay judges had difficulty in tackling factual, evidentiary, and legal issues during deliberations. To cross-check the judges' reports, another set of questions asked the lay judges to report their own views on the frequency that they encountered difficulties in understanding factual, evidentiary and legal questions of their cases.

The results show that the lay judges themselves were quite confident in their fact-finding competence: 9.6% admitted that they "occasionally" confronted difficulties in understanding fact-related questions, 51.9% reported "rarely," and 38.5% claimed "never." In contrast, the responses from the judges were more negative, although over 80% of the judges reported a relatively low number of times that their lay colleagues had difficulty in understanding the factual issues of a case (70.8% and 12.4%, claiming "occasionally" and "rarely" respectively), and 8.3% of them claimed that the lay judges were "often" unable to understand factual issues of cases.

In examining the frequency with which the lay judges confronted difficulties in comprehending the evidentiary issues of cases, 12.6% confessed that they "often" had problems in this regard, while 56.3% claimed "occasionally" and 31.1% reported "rarely." The evaluation of professional judges seems more negative: almost double the proportion of judges (25%) claimed that their lay colleagues "often" had difficulty in understanding evidential issues, followed by 47.9% and 18.8% reporting "occasionally" and "rarely" respectively.

In examining whether or not the lay judges were properly able to apply the law in a given case, 16.3% admitted that they "often" face problems in applying the law. In contrast to only 9.6% reporting that they "occasionally" have difficulty in comprehending the facts of a case, this percentage rose sharply to 41.3% when inquiring about difficulties in applying the law. Over 90% claimed that they "rarely" or "never" have problems grasping case facts; only slightly over 40% reported the same low frequencies in terms of legal application.

Responses from professional judges were more negative: 25% reported that their lay fellows "often" became confused about law application, 54.2% claimed that this happened "occasionally," and only 10.4% said that it happened "rarely."

The LJA 2004 expects to substantially improve the competence of lay judges by enhancing their educational eligibility and providing them with fragmentary training. It seems that these two measures have not successfully transformed lay judges into adjudicators as competent as professional judges, especially in terms of their ability to evaluate evidence and resolve legal problems. The judge questionnaire further inquired whether they found the competence of the lay judges with higher education better than those without it. Remarkably, over half (56.3%) gave a negative answer by saying "not apparently" (12.5%), or "not very apparently" (43.8%). Slightly over one-third presented a more positive view by stating "somewhat apparently" (35.4%) and "apparently" (2.1%). The educational eligibility has excluded over 95% of the Chinese people from participating in the administration of justice, though the practical ramifications of this reform seemed to be far from convincing.

4 Have the Lay Judges Participated Effectively in Decision Making?

The lay judge questionnaire asked them to report the frequency with which they presented arguments in general, with regard to a defendant's conviction and/or the defendant's penalty during deliberations. In order to crosscheck the lay judges' self-reports, professional judges filled out the questionnaire to report their observations with regard to these aspects.

The survey found that only 14.6% of professional judges said that their lay colleagues "often" contributed a different voice; 45.8% answered "occasionally"; and 39.6% reported "rarely." Self-evaluations from the lay judges themselves were not positive in this regard either: only 3.8% claimed that they "often" expressed dissent, though 71.2% claimed "occasionally," while 20.2% said "rarely," and 4.8% answered "never."

The analysis of whether the lay judges ever proposed different penalties from the judges' revealed that remarkably, over one-third (36.9%) of lay judges stated that they had "never" or "rarely" done so, while 43.8% of the judges reported the same. With respect to the question of whether or not the lay judges ever dissented, nearly three-quarters of the lay judges denied that they had ever done so, while about one-half of professional judges claimed that they had never seen their lay colleagues dissent before.

The limited contribution of lay judges to the decision making process was also verified by the internal survey conducted by the Intermediate Court. That report revealed that "it was widely admitted by the judges participating in our interviews that the lay judges [of the 21 courts] in most cases repeated the

judges' opinions, especially the presiding judges' opinions, rather than presenting their own dissent."³⁸

It appears that the dominant status of professional judges in mixed tribunals might prevent lay voices from being heard. Our survey asked the lay judges whether they agreed with the opinion that "lay judges should defer to judges' opinions during deliberations since the latter has better legal knowledge and professional skills." The majority of them expressed the opposite thought and replied "disagree" (57.7%), and 3.8% answered "strongly disagree." In contrast, more than one in five lay judges approved of this proposition by responding "strongly agree" (4.8%) and "agree" (16.3%), with 17.3% stating "uncertain." Driven by this deference to judges, lay judges may feel reluctant to present and defend their opinions, in spite of "theoretically possessing rights and powers equal to those of the judge."³⁹

Article 3 of the LJA 2004 stipulated the minority position of lay judges by articulating that "the proportion of lay judges in a mixed tribunal shall not be less than one third." According to current criminal procedural law in China, a collegial tribunal adjudicating criminal cases is normally composed of three members.⁴⁰ Where a mixed court is composed of only one lay judge and two professional judges, the lay minority has to confront the professional majority. Under this circumstance, it would be unlikely for a single lay judge to become a "popular counterforce" to challenge the professional members with technical, psychological and more importantly, quantitative issues.⁴¹

To further verify these ideas, the lay judge survey asked them whether or not they would feel more encouraged to participate in deliberations if they obtained a numerical dominance in the mixed tribunal. Less than one-quarter (24.5%) stated "disagree" to this, while over a half stated "agree" (52.0%), followed by 20.6% claiming "not sure" and 2.9% saying "strongly agree." It is possible that having a majority of lay judges during deliberation in a mixed tribunal would encourage greater lay participation.

5 Have Judges Supported the Revived Mixed Tribunal System?

When asked about lay participation in the mixed tribunal, the majority of professional judges supported the lay participation system (70.9%). The majority of professional judges also agreed with the proposition that "one of the most

³⁸ *Id.*, 8–9.

³⁹ Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia," *Stanford Journal of International Law* 31 (1995): 67.

⁴⁰ See Article 147, the 1996 Act of Criminal Procedure.

⁴¹ Thaman, *supra* note 39.

important values of lay judges is that they will alleviate the shortage of professional judges" (12.2% and 55.1% for "strongly agree" and "agree" respectively). With respect to the proposition that "it is desirable that lay judges have a diploma or a degree in law," surprisingly, 83.7% of professional judges presented a favorable opinion (10.2% and 73.5% for "strongly agree" and "agree" respectively).

The survey also asked professional judges whether they would prefer all collegial tribunals to exclude lay judges. Most of the professional judges supported the participation of lay judges in deliberative processes (only 14.6% opposed the preservation of the mixed tribunal system). At the same time, 42.9% of professional judges agreed that lay judges should be excluded from courtrooms when lay judges failed to alleviate the potential shortage of professional judges.

6 Do Judges Prefer the Lay Judges' Minority Position?

The LJA 2004 stipulates the minority position of lay judges in mixed tribunals. In other words, it is lawful for a mixed tribunal to be composed of two professional judges and only one lay judge. To further explore to what extent professional judges support lay participation, the survey found that professional judges agreed that lay judges should outnumber them in mixed tribunals (70.9%). The survey also found that many judges welcomed lay judges, only for the more utilitarian and self-interested consideration that lay participants are able to increase the number of court staff and thus alleviate judges' caseloads. The finding also suggests that the majority of professional judges lend their support on the condition that lay participation does not threaten their control over the courtroom.

Professional judges may also prefer lay judges who are competent at working efficiently and independently, rather than those who may trouble the judges, ask them to spend more time instructing them, and hence slow down the progress of trials. With this perception in mind, many judges may prefer lay judges with a diploma or degree in law. As revealed by the survey findings, over one-third of the lay judges who participated in the survey were law school graduates, suggesting that professional judges lean more toward law graduates and those with legal knowledge.

7 Attitudes of Lay Judges Towards Their Tenure and Caseload

According to the LJA 2004, the tenure of a lay judge is set to five years and there is no provision to limit his/her maximum workload. A critical concern is whether the lengthy tenure and unlimited workload will undermine lay judges' working enthusiasm. The lay judge questionnaire therefore explored their attitudes towards their tenure and caseload.

The overwhelming majority (88.9%) of them had served for two or three years up until May 2007 when the survey was conducted. The survey also inquired whether the lay judges were willing to continue their court service, and only 4.8% showed a resistance to their court duty. In contrast, the overwhelming majority (92.3%) expressed their enthusiasm for lay participation. Another question further explored the lay judges' attitudes towards their five-year tenure. Again, lay judges responded with very favorable replies: only 5.8% of the lay judges complained that the length of the tenure was "too long"; 71.2% held that it was "reasonable," while 10.6% thought that it was "short."

Between May 2005 and May 2007, the overwhelming majority (75%) of the lay judges had participated in over 10 cases: 22.1% had participated in 10 to 20 cases, 21.1% had taken part in 20 to 50 cases, and 31.7% had even served in more than 50 cases. However, when the lay judges were asked about their caseloads, only 2.9% complained that their caseloads were "heavy" (1.9%) or "somewhat heavy" (1%); 65.4% rated their caseloads as "reasonable"; and 26.0% and 5.8% respectively opined that their caseloads were "somewhat easy" and "easy."

V Personal Interviews of Professional and Lay Judges in 2013

It is practically impossible to have direct contact with lay judges and/or professional judges who serve on lay judge trials and to individually inquire about their experiences and attitudes toward lay participation in the Chinese justice system.

The opportunity to conduct such rare interviews came in March 2013. With the special arrangement with the district court in Chengdu, China, we were allowed to observe the proceeding of a civil lay judge trial in one of the district courts in Chengdu. In-person interviews were also conducted with two lay judges and a presiding judge who served in the same civil trial. The two lay participants are: (1) Ms. Chang, 58 years of age; and (2) Mr. Wu, 71 years of age.

A *Ms. Chang's Views on Lay Judge Trials and Experience with Lay Participation*

Ms. Chang was a professor of educational psychology at a local university for ten years. She also worked in the regional People's Congress in her district for five years. After her retirement in 2001, she nominated herself to serve as a lay judge. She then became one of the first full-time lay judges in her district.

Ms. Chang stated that she really enjoyed her duty as a lay judge. Her happiest moment was when her opinion was sought by a professional judge during

the deliberation and was adopted into the final ruling. Her positive experience as a lay judge was further reinforced because it was a difficult case.

She also indicated that she worked with delinquent youths for five years in the juvenile division of the district court. Ms. Chang also often talks with people involved in lay judge trials, including defendants and their parents. Ms. Chang stated that they "always tried to speak and situate me into their circumstances, using my multiple identities as a mother, a lay judge, a social worker, and a teacher. I always tried to interact with them with all of my perspectives and identities that I have in a comprehensive manner."

When asked about the most difficult moment in serving as a lay judge, Ms. Chang spoke about a trial that she found particularly challenging. Two poor mothers who came from rural areas were unable to send their children to school because they could not afford tuition. The mothers saw rusted decommissioned military tanks in one of the storage buildings where they were employed as guards. Since they did not understand the law, they decided to sell them and use the money to pay for their children's education. Someone reported the theft, and it became known that these decommissioned tanks were worth 30 k RMB. The military, however, did not see any financial damages because the tanks were insured and the insurance company had already compensated for the theft. The two women faced a minimum sentence of ten years because the theft of military equipment in China was considered a felony. One of the mothers was divorced and one of her children was merely eight years old, meaning that her incarceration would leave the child without a proper guardian.

Ms. Chang was determined to find a way to implement some form of probation for the mothers so that the court could probate their sentences, considering the circumstances surrounding the case, in which the military had already recovered their losses through the insurance company, and two children would be left without parents if the 10 year sentence were sustained, etc. She expended a lot of energy to try and help these two families. This case was eventually reported to the Intermediate Law Court, which is the higher court of the first-instance regional court. The court told Ms. Chang that quite regretfully, there was no other way, and they still received their minimum sentence of imprisonment for 10 years and 6 months, which was already lower than the prosecutor's request of 15-year imprisonment. The court did not allow the sentence for this case to go below the minimum threshold. The two mothers ended up with their 10-year imprisonment with nobody to take care of their children.

When the severe sentence came down, Ms. Chang tried to argue with the Intermediate Law Court, telling them: "Look, these kids have no dads and are

stuck with their moms here in Chengdu, who's going to look after them if you sentence their moms to 10 years in prison? What you're doing is putting more burdens on them and on society by doing this, even though the country sustained no financial damage. These two individuals were not only first time offenders, meaning that they were simply ignorant and had no understanding of the law, and did not commit the crimes with full understanding of the legal consequences behind their actions."

Ms. Chang followed that she "became depressed and felt that the law itself is very cruel. And so this is one instance where I felt being a lay judge was very difficult – when human emotions and the law come into conflict in application."

Ms. Chang also said that her experience and knowledge was important for her to effectively serve as a lay judge. She stated that "I feel that, having worked as a lay judge for 10 years, especially with people like us who have worked for so long, we can go outside of the immediate legal codes and draw from our knowledge, experience, and social understanding to provide and supplement the [professional] judges' own understanding of the cases. For example, I have been on some family and marital related cases with judges [who are] in their 20s, who haven't even been married yet! They have no idea how to mediate or where to even begin. This is when they have me come to mediate for them, and I can do it very easily." Ms. Chang followed, "the judge ends up being very grateful that we [lay judges] can have such a big impact in reaching an agreeable outcome for the plaintiffs and defendants. Why? Because we have a lot of life experiences. Of course the success of our mediation in these family cases is also contingent upon the basic foundation of the marriage, and the emotional state of the individuals involved. For cases that involve children, I can take on the role of a mother and provide perspective for the parties to help them reach a more amicable outcome."

Ms. Chang also gave another example of a lay judge trial in which she served, involving economic issues. Ms. Chang has "worked in the government during the period of reform and [has] good intimate knowledge of the various improvements to the regulations of economic institutions that the government was trying to create at the time." Ms. Chang followed, "the judges, however, have no idea about the context of these cases [being essentially a byproduct of these various changes in economic arrangements], having no experience and knowledge of what was [happening] in the early 90s to economic regulations and laws in China. So I told the judges, about the context of these cases, of how to understand the various details, to let them know about the string of policies that the government instituted that led to cases like these and how to look at them with fairness and objectivity."

Today's judges in China in the district courts are mostly in their 20s and 30s, and Ms. Chang emphasized the importance of her input and suggestion in the deliberation. Ms. Chang stated, "[young professional judges] have no idea about [...] what the situation was like for the sake of development – and indeed things were definitely imperfect and lackluster. So I end up explaining things to them, and then they go 'ah, so that's how it is'. Lay judges can approach things from outside the confines of law and legal knowledge because they have so much experience and knowledge." "As a result, trial decisions can be more equitable, fair, and objective," Ms. Chang concluded.

B *Mr. Wu's Views on Lay Judge Trials and Experience with Lay Participation*

Mr. Wu is a 71-year-old pensioner and formerly worked as a senior engineer in a local chemical research institute. He served in the same civil trial with Ms. Chang at a district court in Chengdu. He served as a lay judge since 2005. According to his own calculation, he participated in over 2,000 cases between 2005–2011.

He stated that there are 60 lay judges in the district court and "we are grouped into different task panels, work on rotations, and assigned for different types of cases." When asked about any memorable trial experiences, Mr. Wu stated, "last year, at the end of the civil trial, I made a special request to the presiding judge to listen to my ideas on a civil monetary compensation from the defendant. Initially, the judge refused, but I asked the judge to give me 15 minutes to interact and mediate between the plaintiff and defendant. Because if we only put the defendant in jail without any civil compensation to the victim, [then justice could not be restored]. In the process of consultation with the defendant and plaintiff, I offered a new solution for a more equitable sentence, [and] the victim agreed to lower his civil compensation request from 70 K RMB to 35 k RMB and the monetary compensation was paid off by the defendant on the same day." Mr. Wu stated, "I was very happy that things worked out for everybody. I really enjoyed that I can provide suggestions to the presiding judge about how to reach an equitable solution to the cases because lay judges have a better understanding of legal conventions and trial procedures so that they can help the individuals in court to reach more amicable solutions."

Mr. Wu also presided over mediation very often and successfully mediated over thirty cases. He is quite satisfied with his role as an effective mediator in civil cases because he "often called litigants after the working hours such as at night even at 10 or 11 p.m. when these litigants were off work." He finally concluded that he loves his lay judge job very much and feels very proud of his achievement.

As our lay judge survey result indicated, lay judges found a great satisfaction when their opinions and suggestions were incorporated in the deliberative process and reflected in the final judgment.

C *Chief Judge Director's Views and Experience with Lay Judges*

The Chief Judge Director who also served in the same civil trial was interviewed. He stated "the time span within which our lay judges work is usually pretty long and the process is very open. The structure of our lay judge system also incorporates different types of judges – some are part-timers and have their own professions. Many of them are pensioners who have retired at the mandatory retirement age of 55–6 and are working here almost as fulltime [lay judges]." The judge also pointed out that many of the Chinese judges in district courts are young legal specialists. He suggested, "if you look at the current Chinese judicial system, there are many 20 to 30 year olds who work as judges, whose life experiences and perspectives are not as rich as our lay judges." According to him, "they are better at sympathizing with and understanding the cases and thus can provide better suggestions to produce better outcomes."

VI Conclusion

Our studies suggest that the opportunity to participate in the justice system is far from the reach of most Chinese citizens. The educational eligibility imposed by the LJA 2004 created a sharply skewed lay judge representation. In addition, another practice that has seriously compounded this representation problem is that Chinese courts, in an effort to ensure the political accountability of lay judges, have preferentially recruited government employees and CCP members during the process of selecting lay judges, leaving the lay judge pool dominated by these political activists, legally educated participants, and government pensioners. Meanwhile, the use of lay judges to handle the overloaded docket has given rise to distorted practices such as specifically recruiting law graduates to serve as lay judges in order to enhance working efficiency, and turning them to full-time lay judges.

Our survey and interviews examined whether the passiveness of lay judges during deliberations has been completely eliminated by the revised system. The survey found that the lay judges have neither vigorously participated in deliberations, nor affected decision-making. This is likely due to their incompetence, psychological obedience to judges, and their minority position in the court. On the other hand, our interviews revealed different dimensions of lay participants' contribution to the deliberation and mediation, especially in civil

trials. Despite the fact that lay judges lack specific legal knowledge and expertise, they often provide helpful input in deliberation because many professional presiding judges are quite young and inexperienced, so lay judges' life experiences, wisdom, and deep understanding of how the Chinese institutions operate allow them to contribute additional perspectives to the deliberative process. The professional judges themselves also acknowledged the important contribution of lay judges' wisdom and input of suggestions in the mediation cases.

Our surveys and interviews also found that lay judges have a positive experience in regard to their input and participation in the decision-making process. We found that lay judges themselves, irrespective of their lengthy tenure, heavy workload, and unsatisfactory benefits, manifest their clear-cut appreciation of their court duty, which verifies the claim that "laymen are far more enthusiastic about citizen participation, suggesting that democratic stirrings may be making some headway among the populace but are not being warmly embraced by professionals."⁴²

To sum up, one cannot expect the revised institution to mark a turning point and bring about sweeping changes to China's legal system. A series of observable problems that impacted the old system have yet to be eliminated successfully through the new regulations. While there are still some notable problems with the lay judge system, today's lay judges are making a very important contribution to the democratization of China's once-closed judicial system.

42 Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy," *Law & Policy* 25 (2003): 175.