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Assessors or Popular Jury? Variations around Citizen Participation in the Chinese Justice System

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'*There is nothing in Chinese institutions or ethical customs which can be developed into the Anglo-American jury system*' (Pound, 1948: 752). This observation by a prominent American jurist who was a former advisor to the government of the Republic of China (1911–1949) could be considered in reverse with reference to Western legal systems. Is it possible to implant juries in China when one realizes the extent to which they are linked with the history of the West? Historians have pointed out the association of the jury with the justice of God: the word of truth of the twelve, the verdict, derives ultimately from divine judgement (Jacob, 1991). Over the course of Chinese history, it is true, an overlapping of law and religion has also existed. Such overlapping has moreover been observable in the ideology of justice, marked by the popular belief in retribution, but also in an ultimate reckoning of justice in the World Beyond, a belief often arising out of situations where the justice of the State has failed (Katz, 2009). On the other hand, in China, religion has never played in relation to law and justice as marked a role as in the West. For example, for almost a thousand years, judge Bao, one of the chief officials of the Northern Song dynasty (960–1127), has continued to be the emblematic figure of probity, purity and impartiality in Chinese literature (Idema, 2010). Even today, the popular image of judge Bao continues to inspire the ethic of the judge. Despite Bao's broad powers and heavy responsibilities, he remained on the same human level as his fellow men, and he would not have been expected to have any particular communication with the beyond. 'For administrators as for those under their administration, the art of the judge represented the essence of good government' (Bourgon, 1995). However, even if popular beliefs, and not religion in the strict sense, were able to fit in with the justice of the State in past history, one can find no trace of this in the judicial institutions of contemporary China. The system of people's courts is made up of the Supreme People's Court, local people's courts, and special people's courts. The local people's courts are organized for specific territorial constituencies and have jurisdiction over the whole range of disputes and offences (civil, commercial, administrative and penal); they have three levels, corresponding to the different levels of territorial administration, being: local people's courts at the county or district level, intermediate people's courts at the

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prefecture level, and higher people's courts on the level of the province. Decisions rendered can be appealed to the immediately higher jurisdiction.

The idea of citizen participation in justice must thus be understood in terms of this 'profane' notion of justice. Whether it takes the form of assessors sitting alongside professional judges in the judging of disputes, a function institutionalized by the law and adjusted by practice, or that of the introduction on an experimental basis of a people's jury in local courts, the participation of citizens in the justice system does not alter what is fundamentally at the heart of Chinese governance, where the 'autonomization of the legal system' with respect to the political authority remains incomplete (Balme, 2007: 586). This absence of legal autonomy is contained in the ideal of a 'governance by the law' where the latter is reduced to an instrument at the disposal of the government. But, if the legal system continues to correspond to a strictly instrumental conception, its users have become diverse: to the government, which had a monopoly over it, have been added citizens who no longer hesitate to make concrete use of law and have recourse to the courts; whence the new dimension now given to the idea of 'governance by the law'. The key question is whether the reform aiming to increase citizen participation in justice will cause a radical reworking of the concept of governance by the law and establish a completely new relationship between law, society, and State in the Chinese context.

The political root of citizen participation in the Chinese justice system

To underline the political nature of the jury does not cause a shock in the Chinese context. From the very start, the participation of citizens in the justice system was understood as part of the process of constructing the institutions of a modern state in China. The first appearance of the jury in China goes back to the beginning of the twentieth century, when the importation of Western legal processes formed part of efforts to modernize the nation (Delmas-Marty, 2007). Its main objective was nevertheless the replacement of the extraterritorial jurisdictions that the Western powers had imposed on China since the middle of the nineteenth century. Even before the end of the revolution of 1911, the provisional government in Shanghai established a modern court, consisting of three highly qualified judges, two of whom had been trained in the United Kingdom. In the same court there sat for the first time a jury composed of jurors drawn by lot from a list of citizens. However, the result of the first court sitting was such that questions were asked as to whether China was ready for the introduction of juries (Capen, 1913). Alongside this failure of Western-style juries in the judicial system of the Republic of China, the 'people's jury' made its appearance in the territories occupied by the armies of the Chinese Communist Party. This system of public assessors was introduced so that the 'line of the masses' should be represented with the object of ensuring the support of the people for the revolution being led by the Party. The assessors were elected by the unions of workers and peasants, as well as by the soldiers of the Red Army for military courts. These representatives sat in the court sessions by turns; their expected purpose was to raise political consciousness, to improve the quality of the court procedures under the surveillance of the people, and to act as the conduit for political propaganda (Leng, 1967). This system of people's justice, largely inspired by Soviet procedures, was set up from the formation of a government on the Soviet model by the Chinese Red Army in the province of Jiangxi and was further employed during the Yan'an period within the liberated zones.

Popular participation of this sort in the Chinese justice system could not however be assimilated to the equivalent of a common law jury, which was considered by Soviet jurists as a bourgeois invention, contrary to socialist legality (Pashin, 2001). It was institutionalized by the arrival in power of the Chinese Communist Party. The 1954 law on the organization of people's courts laid

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down that the assessors should participate in all first-level court hearings, excluding minor civil cases, criminal cases, and those specifically foreseen by other laws. That law indicated that the assessors should have the same powers and assume the same responsibilities as the people's assessors allowed justice to be declared to be truly popular, but still without modifying in any way the procedure followed by the courts. From the moment when the acknowledged final objective of the Revolution was the foundation of a new government based on the masses, no autonomy could be conceded to justice, as is the case by contrast in the West. The institutionalization of the assessors pursued a double objective: to broaden the role of the workers in government by having them participate in judicial investigations and deliberations on one hand, and on the other, to ensure the permeability of the courts to public sensibility, so that they should not diverge too far from 'common sense' (Lee, 1962). This popular participation reinforced the legitimacy of the judicial system, and through it, of the regime. That is why it must be analysed from a political point of view rather than a juridical one.

The political nature of this concrete reform of citizen participation in justice is to be found in the juridical order and in the manner justice is practised. On the juridical level, this participation is inevitably subject to political direction, called 'the line of the masses'. Indeed, Mao already assessed in 1943 that the activity of the masses, if it is not appropriately organized by a sufficiently strong directing group, cannot be maintained for long nor develop in a proper direction (Mao, 1961). On the political level, therefore, this popular participation has been considered as an instrument of government, a function confirmed by the successive reforms of the status of assessors.

The juridical reworkings of the assessor system

Although not formally laid down in constitutional terms, the participation of assessors in trials is framed by several pieces of legislation, of which the most important is the law on the organization of people's courts, promulgated in 1979 and revised in 1983 and in 2006. This law, prior to its first modification in 1983, established that the participation of assessors in lower courts was the basic principle for both criminal and civil cases, apart from the exceptions foreseen by the same law. Since this principle was established by a law concerning judicial organization, it did not relate to recognizing any particular right of citizens to be judged by their peers, but to a right of citizens to participate in the administration of justice. However, the 1983 revision replaced this regime of assessor participation with an option between an assessment body made up exclusively of professional judges and a mixed body, made up of professional judges and civilian assessors. The various court jurisdictions thus saw themselves accorded a broad discretion in deciding on the presence or not of assessors. This possibility was picked up by the law on civil procedures (art. 10) and the law on criminal procedures (art. 147). Although all the texts unequivocally reaffirmed that the assessors retained the same powers as the professional judges, in practice they came to be restricted to a minor role, to such an extent that they came to be referred to as 'deaf ears' (Yue, 2001).

The overall significance of their participation consequently depends on the extent of the prior control exercised by the professional judges who authorized or did not authorize the participation of assessors in the judgement of cases. But, when they do take part, their presence is not always simply a token one. For example, they can play a more substantial and active role in cases where the rights and interests of women are directly involved, in particular those of divorce or family violence. It has been observed, as a proof of the good use of this provision, that in cases where female assessors have been involved in the judgement, the rates of appeal and recourse to 'Letters and Visits' (*xinfang,* 信访) by women appellants has been very much lower than it is for judgements that did not involve women assessors (Liu and Song, 2011). Sometimes in fact assessors will have particular specific knowledge, notably in scientific and technological fields, and are designated

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by professional judges in 'technical' disputes, such as in relation to law on intellectual property or financial transactions. In many cases in practice, the participation of expert assessors has allowed the courts to avoid summoning expert professional witnesses, and consequently to speed up the procedure and reduce the cost of justice. In this particular case, the figure of the assessor is much closer to what has been described as 'an unrobed judge' (Zhang, 2005).

Without altering the law, the National People's Congress in 2004 adopted a decision which aimed to enhance the prevailing assessor regime. This decision comprised more precise rules concerning the assignment of assessors and their status in the legal order, along with the way their functions should be exercised. In practice, the lower and intermediate courts, which can both hear primary-level cases, continue to play a significant role in assigning assessors, for these latter are appointed by the local popular assemblies at the proposition of the tribunals and courts of the same level, in conformity with the conditions laid down in the decision of the National People's Congress. But the new element introduced by this decision was to recognize to the accused in criminal cases, to the litigant parties in civil cases, or to a complainant in a dispute with an official administrative body the right to request (for the first-level hearing) that assessors should sit alongside professional judges in a proportion that may not be less than one-third. The power of the various local jurisdictions to determine the composition of a court's judging panel was thus reduced.

In 2009, the Supreme People's Court, in an interpretive opinion, again specified the conditions of this participation by laying down that such assessor participation would be henceforth obligatory when the interests of particular groups or the public in general are involved, if the matter seizes the attention of the public or if the outcome that would be reached risks having repercussions on the whole of society. To facilitate the exercise of the right to request the participation of assessors, the same Supreme Court opinion required the courts to inform the parties to a case of this right. The assessors for a particular court must be freely chosen from a pre-established list, while the courts can draw up a separate list of assessors who have a particular expertise from which they can select according to the specific case. As far as the procedure of assessors' participation is concerned, the 2009 interpretive opinion indicated that at the beginning of the deliberation the reporting judge must first explain the rules of law and the rules of evidence, that thereafter both the assessors and the professional judges must present their opinions, before finally the presiding judge expresses his determinative opinion arising out of these deliberations. When there are divergent opinions between the professional judges and the assessors, the latter may demand that the case be submitted to the panel of judges empowered, within each jurisdiction, to decide the most complex or the most important cases. Of course, for this situation not to be just a hypothetical opportunity, the assessors would need to fully exercise their functions by maintaining a distance from the professional judges.

Through these innovations, the interpretive opinion reveals the concern of the highest jurisdiction to counterbalance the prerogatives of the professional judges in the lower-level jurisdictions. The professional judges are often criticized for their unpredictability, their arbitrariness, or indeed their corruptness. The increased resort to the 'administration of Letters and Visits' as the preferred means of various individuals and groups to denounce an injustice, a malpractice, or the incomplete application of a procedure (Thireau and Hua, 2010), highlights the problems of effectiveness and efficacy of the formal justice process. In the face of a generalized doubt about the impartiality of judges, it has been thought that assessors could exercise a surveillance function over the professional judges. Such popular discontent has led the government to cushion in this manner any potential head-on opposition between government and society (Rocca, 2010). Reinforcing in this way

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the participation of assessors in judicial procedures is intended to restore legitimacy to the exercise of judicial power by making it more participatory and more transparent.[1]

Whereas in Europe the adjective 'popular' quickly takes on a pejorative slant, especially if it is applied to justice (Slama, 2011), its connotation is positive in the Chinese context where it is understood as restoring the credibility of the justice system. It is in this perspective that popular (people's) juries have recently been introduced on an experimental basis and at the local level, to try to remediate the dysfunctional aspects of the assessor regime.

The popular jury in the Chinese context

The introduction of a people's jury in Henan, one of the most populous provinces of China, goes back to 2009: the jury is composed of 9 to 13 persons freely selected from a list of at least 500 potential jurors, itself established by the local court on the basis of the residents of its jurisdiction. So is this a sign of evolution in a democratic direction, as has been thought in France (Rousseau, 2011)? Two aspects temper such optimism. Firstly, the court retains discretionary power over whether a jury is convoked, which means that the parties to a case do not enjoy a *right* to be judged by a jury. The jury remains an instrument in the service of the professional judges. Secondly, when a jury takes part in a civil or criminal trial, whether at the initial hearing or at appeal, it decides neither on the facts nor on the law: its opinion is simply a consultative one. Professional judges justify the introduction of the jury through pragmatic reasons: the presence of freely designated jurors (which guarantees their autonomy and their independence) provides a certain shelter for justice from the power and pressure of interpersonal relations. By voluntarily accepting the opinion of the jury, the professional judges thus protect their own power; by taking the jury's opinion into account in their decision, they can equally take into consideration the social expectations with regard to a given case. Briefly speaking, the taking into account of the jury's opinion is a means of enabling substantial justice to prevail over procedural justice (Qu, 2010).

The specificity of the Chinese situation is starkly apparent: this type of jury upsets neither the balance of the judicial organization, nor the court procedure, nor the powers of the professional judges. The jury's presence is simply a means of having the voice of the people heard by the judges, or at least those who are willing to hear it. In this regard, the status of the jurors is much inferior to that of assessors. It is paradoxical that the popular jury, conceived as a remedy for the inaction of assessors, sees itself nevertheless deprived of at least equivalent prerogatives in the reaching of decisions. The Chinese terms for the jury and the assessors clearly show their common nature: 'jury' translates as *pei shen tuan*, 陪审团, and 'assessor' as *pei shen yuan*, 陪审员. The common root is made up of *pei shen*, 陪审, which literally designates the activity of accompanying the trial. Thus, jurors and assessors are the 'accompanying personnel' of judges who remain the principal actors of the trial. The language clearly reveals the subordinate role of the jury with regard to the professional side of justice. However, the term '*tuan*', 团, designates a collective body, thus distinguishing jurors from assessors who sit as individuals beside the professional judges. Chinese legal doctrine views the body of the jury as the indication of an evolution in the function of judgement (Tang, 2011): even if the jury's opinion is only consultative, it assures the link between the professional judges and the body of the people; implicit in this is the principle that it is the people who are the source of all legal constraint.

Even though the same framework of procedural rules applies, jurors, like assessors, do not judge in the same way as the professional judges. The latter judge in law, the former identify as the public or as spectators of the legal scene. Furthermore, unless guided by the rules of evidence, jurors can trust solely their own reason, or even perhaps their intuition. The separateness of the

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jury from the professional judge is equally affirmed by the language: the term for 'judge' translates as 'the officer of law' (法官, *fa guan*), which is based on the opposition between the official (官) and the citizen (民) or the distinction between governor and governed. The appreciation of this distinction – and this distance – could justify the fact that the popular jury gives only a consultative opinion. The experience of judicial procedures in French juvenile courts may be instructive in terms of the relation between professional judges and citizen-participants. Indeed, 'at the moment of deliberation, the margin for autonomy of the assessors remains very narrow, with the balance of powers between the professional judges and the assessors depending largely on the interpersonal relationships between them and the confidence which derives from this' (Lorvellec, 2008: 143). On the procedural level and in concrete cases, the impact of the popular jury on the outcome of the trial would be even more delicate.

Ensuring the impartiality of judicial decisions through the introduction of a popular jury remains the principal objective of the tentative reform. In such a way, in France or in Belgium for nearly two centuries an English process of trial by jury has been used which rests upon the impartiality of the professional judge as guarantor of fair procedure (Schaffhauser, 2011). The Chinese reform seeks to use the same institution but in the opposite sense: in the hope that the jury will make the judge more impartial! It is only through fieldwork surveys that any precise evaluation of how this is functioning in reality will be able to be drawn up, but what is already apparent is the link between the popular jury and democracy, which without doubt constitutes one of the major arguments for judicial reform, in China as elsewhere.

Democratization though citizen participation in justice: between the ideal and the manipulated

The participation of citizens in the justice system often projects a strong political dimension, but this differs on each occasion according to the context. In France, 'the jury, more than just a creation of the Revolution, was a symbol of it' (Schnapper, 1989: 149). In Russia, the popular jury was reintroduced to replace the Soviet judicial procedures (Pashin, 2001). In China, it may be understood in relation to an effort of democratization via the periphery. Since the central government remains very prudent concerning the central institutions, reform takes on downstream shapes. Thus, citizen participation in the justice system is considered as a democratic advance, with popular justice being a decentralized form of the institutions of the State. As democratization comes up against strong resistance on the political level, it is sought on the juridical level. The popular jury is cast as the first stage on the way towards democratization, since the sphere of law leads necessarily to that of politics. For the optimists, 'China is condemned to democratize. The more pertinent question is rather to know under what political, economic, cultural and social conditions … a country [can] finally achieve its democratization' (Zhang, 2007: 546). The introduction of the popular jury does seem to be one of the measures which create the conditions for such democratization to occur.

The reality, however, is more stubborn: the Chinese experience shows that, far from diminishing the power of the professional judges, assessors and the popular jury remain subordinated to it: they are the shop-front for the 'wise' judges who manipulate them at will. The contrast with the American jury described by de Tocqueville is only more striking. For the latter, the jury is above all a political institution; it 'is [the] most energetic means of making the people rule, [and] is also the most efficacious means of teaching it to rule well' (Tocqueville, 2013: 275). The Chinese popular jury could also aid in the education of the people, but the difference is in the lesson, as attested by this testimony of a juror:

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> I feel particularly happy to see that the opinion of the jury of which I am a member commanded the attention of the judges and that it was accepted by them. At the same time as feeling pleased about this, I have become aware of the weight of responsibility that I bear. From now on I will need seriously to learn the laws in order to faultlessly fulfil my mission, by ensuring the severity and impartiality of the decisions taken by the court. (Zheng and Li, 2010)

According to de Tocqueville, the jury in America teaches each person how not to recoil before the responsibility of his or her own acts; in this manner it augments the natural intelligence of the people and counters the egoism of the individual by having all citizens feel that they have duties to fulfil towards society. It is difficult to imagine equivalent virtues in respect of the Chinese popular jury. Yet this 'expatriate' type of jury could provide a remedy for the crisis of morality (Ci, 2009) and the crisis of education and religion (Ji, 2011) that some diagnose in contemporary Chinese society. The principal obstacle comes from the judges who, as we have seen, continue to have the controlling hand over the justice system. In the same manner they become the main impediment to democratization by manipulating the participation of citizens in justice. That is why the different set-ups put in place up to the present are somewhat demagogic: they rather serve as a screen for the power of the judges to protect them from criticism. Nevertheless Chinese citizens, along with the parties involved in trials, are not duped by such arrangements. Once the limits of the practical utility of assessors and jurors become apparent, the constant question of the relationship between the people and judicial authority will inevitably be posed anew. And the reply to this question will be even more pressing, since it will no longer be possible to use the same subterfuges. That is why citizen participation in justice is so crucial in a China in search of democracy.

But is there not a certain contradiction between modernization and democratization? If modernization consists of substituting specialist entities for malfunctioning institutions (Gregg, 1993), citizen participation is taking the journey in the opposite direction. Does not intensifying the participation of citizens in the justice system, which blurs the difference between professional competence and common sense, run the risk of obstructing the modernization of its law?

Juridical science and citizen participation in justice

In the West, the generalization of the use of juries was a direct outcome of constitutional revolutions. In England, the most spectacular change in common law procedure came towards the end of the seventeenth century, when proof on the basis of witness evidence became integrated into it. By recognizing that reasonable people could come to different conclusions on what was true, the legal culture adopted a relativist conception of truth (Berman, 2003). It was out of this conception that the jury was instituted to reach decisions on the facts. But such a conception would seem more difficult to admit in contemporary China, where truth is considered as the outcome of juridical science. The reform fits here within a series of attempts to build a harmonious relationship between the judicial institutions and the people. Thus, citizen participation in justice is conceived as an instrument towards achieving a predetermined political goal. The issue is to bring the justice system closer to ordinary folk who, whether rightly or wrongly, often doubt the probity and impartiality of the professional judges. The presence of assessors and jurors at hearings is expected to be capable of exercising a moral pressure on judges and in the process of having a bearing on their decisions, making them less arbitrary. But this will perhaps never go so far as according the jury the power of judging the truth of a matter, which remains the prerogative of the professional judges. One might well wonder whether the judicial reform, despite its purely instrumental character, may eventuate in a genuine system of trial before a jury. Between the truth of the facts and juridical truth, the distinction (or the choice) is not solely political: juridical knowledge also plays a major role in it.

China has introduced the jury on an experimental basis, but she is resisting allowing its relation to the processes of determining truth to evolve, which is nevertheless consubstantial with the participation of citizens in the justice system. However, this resistance is unlikely to be long-lasting in a society where justice is becoming more and more reported by the media. The ongoing evolution of digital devices cannot but intensify the commentaries, debates, and even criticisms of high-profile cases that have already been judged or which are before the courts. There exists even a phenomenon of the 'thirst for truth', which expresses the eagerness of ordinary people for the search for factual truth and not simply for juridical truth. It seems that, in some cases, truth recognized solely by professional judges no longer has either juridical or moral authority. This is borne out by the celebrated case of *Peng Yu v. Xu Shoulan*, in which the judge relied on his own personal conscience to decide on the facts, but in doing so aroused vigorous criticism (Xu and Wang, 2012).

Despite that, it is not certain that accumulated mistrust concerning the work of the professional judges will end up by shifting the power of judging on evidence to the jury. For in many cases, different opinions on the same affair can divide the public. In the West, the relativist conception of truth is the substrate of trial by jury: in China, the popular representation of the idea of truth seems quite different. It is not analysed within the context of the opposition between the relative and the absolute, but is embedded within the Chinese idea of justice: the purpose of the justice system is not to search for the truth, but to re-establish the social order so as to contribute to peace, prosperity, and harmony (Jacob, 2013: 148). Consequently, the pursuit of truth is secondary in relation to the outcomes to be reached by judicial activities. Because of this, the distinction between jurors and professional judges with respect to the facts treated in trials is unlikely to find solid grounding in the Chinese context. Besides, the idea of an harmonious social order that the judges are putatively charged with guaranteeing seems to be repugnant to the relativist conception of truth, for harmony, as conceived in China, necessarily reposes on consensus: consensus on the facts, on the rules of law, and on the outcome of the application of these rules by judicial decisions. In the pursuit of harmony, one must strive to avoid relativism as being the source of divergence. As a result, it is possible to wonder whether it is the absence of political will which explains the difficulty in having the jury definitively established or whether, on the contrary, it is not rather the absence of any relativist sense in the Chinese representation of truth which explains the political resistance to allowing the power of judgement to be shared. All of which invites a more in-depth analysis of this question.

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Translated from the French by Colin Anderson

Note

1. A similar concern to reinforce transparency lies behind the reform recently enacted by the Supreme State Prosecutor's Office concerning the oversight of decisions taken by prosecutors' offices in the procedure of criminal review; see the official document of the Supreme State Prosecutor's Office adopted on 29 December 2011.

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