The comparison of Jury system in the US and in China

A thesis submitted to the Bucerius/WHU Master of Law and Business Program in partial fulfillment of the requirements for the award of the Master of Law and Business (“MLB”) Degree

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July 22, 2011

12,500 words (excluding footnotes)

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I.  Introduction

Among the different jury systems in the world, there are mainly two systems. One is usually referred to as the jury system, which, originating from England, exists foremost in the common law countries. The other system is often referred to as the “assessor system” and exists mainly in the civil law countries such as Germany. The major difference is the whether the juror or the assessor has the right to decide on the matter of law.

While China is, to a large extent, a civil law country, the jury system shares many similarities with the assessor system. However, the form of the government in China is different than the western tradition of the separation of the three powers. Therefore, a tailor-made legal system had to be designed to adapt to this environment. Accordingly, China introduced the system of the “People’s Assessor”.

For reasons of comparison and simplification, and since both of the systems in the US and in China involve the ordinary citizens in the judiciary process, we will only use the term “jury system” when referring to the different systems in the US and in China, instead of specifically referring to the “jury” and “People’s Assessor”.

The purpose of this paper is mainly to examine the jury system in China through the comparison with the well-known and well-established jury system in the US. Although China has recently been experiencing important and rapid development in legal areas, it still faces numerous problems, for which the experiences from the developed western jurisdictions are of great importance in order to find their own solutions.

The jury system in China is a good example. Because of the rapid development of the legal field in China, after an important law regulating the procedure of the jury trial came into force in May 2005, 644,723 cases were tried by jury within 2 years. This accounted for 20% of the total cases, while each juror heard 13.82 cases in average.

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1 Blackstone.
2 The decision, which will be introduced in Section III.
3 See 陈永辉.
Since there is little literature to be found in western languages about the jury system in China, the purpose of this paper is mainly to introduce the jury system in China through the comparison with the well-known and well-established jury system in the US, and hence to facilitate the further exchange of the knowledge in this field.

In Section II, we will have a brief look at the history, to how the modern systems develop from their ancestors, and to better understand why the jury systems in the two countries are different today.

In Section III, we will compare current situation of the jury systems in the two countries. First, we introduce the general legal foundation of the jury system. Then we will have a detail look at the procedure of the selection of the jurors and the composition of the jury before the trial. Finally we will compare the process of jury sentencing and how they come to the decision.

In Section IV we will analyze the function of the jury system in a society. It is based on the idea that each system serves the social environment with its function. Therefore, to further analyze the system, we need to see their role in the society where they exist. In the first part of this section, we discuss the value of civic participation in judiciary. And in the second part, we provide a picture of the criticisms and problems that jury system face in each country.

The paper ends with the conclusion in Section V.

II.  The history of jury system in the United States and in China

A.  The United States

The jury system in the US can be traced back to medieval England, which in turn has its roots in ancient Greece. In Solon’s reform in 6th century BC in Greece, he introduced a court that consisted of lay people chosen from all of the citizens.\(^4\) This court is called Heliaea of the Thesmothetae, which means “the assembly as a court”. The jurors were randomly selected from around 6000 members of the court,\(^5\) while

\(^4\) Aristotle, 1274a 3, 1274a 15.
\(^5\) Fornara, 209.
it was not an obligation for all the citizens to be a juror. Although there was still a lower class of Athens, Thetes, who were probably not included in the group of citizens, it was still the important step towards democracy to involve common people directly into the court.

The modern jury system in the US can find its direct origin in Anglo-Saxon England. After the Norman Conquest in 1066, the jury system was also brought into the country. The function of the jury system at that time was only to investigate crimes and to find out facts, while the jury was usually composed of 6 or 12 men. Inspired by the jury system that already existed in different parts of the country, Henry II made a great contribution to the development of the jury system during his rule from 1154 to 1189. By enacting the Assize of Clarendon in 1166, Henry II systematically adopted the jury system throughout the country. The jury system he introduced is what we know today as a “grand jury”, also called juries of presentment. It was similar to the institute of Germanic tribes, where the jury only investigated facts without having the right to decide on guilt or innocence.

One important characteristic of the jury system at that time was that jurors were self-informing. They were expected to have extended knowledge about the case even before they went to the court. There was little evidence or testimony presented in the court itself. Therefore, the jurors were usually from the locality of the dispute in question. As such, they often brought in first-hand information regarding the case, as well as the rumor and hearsay.

While the function of a grand jury function is only to investigate the facts, the petit jury has the right to decide whether an accused is guilty or not. It is believed that the petit jury began during the rule of Henry III. Under Henry IV, the petit jury was integrated into the trying body, while it was considered being a panel of witnesses before.

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6 Aristophanes, 662.
7 Hignett, 117-118.
8 Klerman, 123.
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The importance of the jury was strengthened and became the safeguard of the criminally accused after the rule of Henry III. The Roman Catholic Church abolished the sanction in form of ordeal in 1215: The suspects no longer need to be tested by God with molten metal. Instead, the jury panel was there to determine guilt or innocence. Correspondingly, by the 15th century, the heard evidence at trial became the primary source of information for the jury. Contrary to the self-informing characteristic, the new role of the jury system was considered to provide better fairness by making the fact finding process more reliable.

The jury system was later exported to the American colonies as England began its expansion into an empire. In 1635, the first grand jury in America was established in the Massachusetts Bay Colony.

It is to mention that there was a highly publicized and discussed case in that period, which was the trial of newspaperman John Peter Zenger. While there was much resistance to the “unjust” British law in the background, this case was considered to “impress thousands of Americans with the importance of the right to a jury as a bulwark against official oppression”. In 1734, Zenger was charged with the crime of seditious libel for mocking the Royal Governor Cosby in the New Your Weekly Journal. The jury acquitted Zenger to show its support of the freedom of press.

Furthermore, British Crown attempted to deny the American colonists the right to trial by jury. By enacting the Navigation Acts, the British wanted to control the economy of the colonists including America. While the colonial juries often freed the businessmen that violated these acts, the British Crown set up special admiralty courts to prosecute American colonists for their violations. Trials for treason were to be conducted in England, removing them entirely from the scrutiny or participation of other colonists. Therefore, Thomas Jefferson stated in the Declaration of

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9 Alschuler/Deiss, 876. In the half-century between the Zenger’s trial and the ratification of the Sixth Amendment, a pamphlet account of the trial was reprinted fourteen times. More than any formal law book, it became the American primer on the role and duties of jurors.
10 Guinther, 30.
12 King, The American Criminal Jury, 94.
13 See Alschuler/Deiss.
Independence that one of the reasons requiring separation from England was Britain’s conduct “depriving us, in many cases, of the benefits of Trial by Jury”.  

The American people realized the important role that jury played during the colonial era. They believed both the right to a jury trial and the performance of juror service as necessary to preserve individual freedom. Not surprisingly, after the independence of the United States, the right to a jury trial was granted by the Constitution, while establishing and limiting the power of the federal government.  

The constitution was to be sent for ratification in 1787. The issue was that the Constitution only preserved the right to trial by jury in criminal cases, while it didn’t mention civil cases. The main consideration was the observation that juries in civil cases had shown a tendency to favor local litigants. Some argue that this favoritism may have negative effects on the economic relations between the states. Because there was no guarantee for the right to trial by jury, it became the major issue that was widely disputed by the opposition. However, the Constitution was eventually ratified. Furthermore, the individual rights, including right to trial by jury in criminal and civil cases, are guaranteed in the Sixth and Seventh Amendments.

A special issue for America is the discrimination among groups. Initially, only white men had the right and the obligation to serve on the jury. While the fourteenth Amendment to the Constitution was ratified in 1868, all the citizens of the United States were granted equal protection of the laws, the reality improved rather slowly. The exclusion of blacks from juries was common before the civil rights struggles of the 1960s. And the ability to serve on juries for women was finally ensured after 1975, while theoretically women gained equal rights as men in the 1920s already.

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14 The United States Declaration of Independence, para. 20.
15 Vidmar, 94.
16 In Virginia v. Rives (1880), the Court held that a right to be considered for jury service was not the same as a right to serve on a jury. Practically, blacks were routinely excluded from actual service on juries.
17 Ritter, 75.
B. China

In China, the earliest system comparable to a jury system can be found in “Zhouli • Qiuguan • Xiaosikou” (《周礼 • 秋官 • 小司寇》)\(^\text{18}\). The system is called Sanci (三刺), which literally means “to ask three times” before making a judgment: firstly, the judge should ask the ministers about the decision; secondly, he should ask the government officials; lastly, he should ask all the citizens.\(^\text{19}\)

Some authors believe that the jury system is the result of the idea of democracy from ancient times in the western countries. However, only dictatorship existed in both the slavery society and feudal society in the 5000 years of Chinese history. Therefore, this difference results in the fact that there was no need and environment for the development of jury system in the Chinese history.\(^\text{20}\)

The first time a jury system is described in the legal literature in China was in the “criminal and civil procedure law of Qing dynasty” (《大清刑事民事诉讼法》) in the early 20\(^\text{th}\) century. Jiaben Shen\(^\text{21}\) and Tinfang Wu made great contributions to the construction of the jury system with the provisions 208 to 234 in the “Draft of the criminal and civil procedure law” (《大清刑事民事诉讼法草案》) in 1906. The 208\(^\text{th}\) provision states:

“All the jurors should be helpful the procedure in court. In the criminal cases, the jury should enable the accused to express without pressure. In the civil cases, the jury should make sure the judgment is fair.”\(^\text{22}\)

In the rest of the provisions, there were rules for the applicable criminal and civil cases, the criteria and selection of the juror, as well as the procedure of jury trial.

\(^{18}\) “Zhouli”, also named “the Rites of Zhou”, is an important work that records ancient rituals among the classics of Confucianism. The book is generally thought to be finished in the Xizhou Dynasty, which was from 1100 BC to 771 BC.

\(^{19}\) 一曰讯群巨， 二曰讯群吏， 三曰讯万民。

\(^{20}\) See 刘萍, 44.

\(^{21}\) Jiaben Shen (沈家本) was an important minister of the legal reform department in the Qing Dynasty. His idea of reform of law was to learn from the western but after revision to suit the local society.

\(^{22}\) 沈家本、伍廷芳，《大清刑事民事诉讼法草案》, quoted from 尤志安.
Interestingly, the “Draft of the criminal and civil procedure law” was very similar to
the jury system of Great Britain at that time. This shows that Jiaben Shen saw the
feasibility of the jury system in China. However, the conservative side of the
government opposed the implementation of this law, because the law introduced
some democratic procedure for the bourgeoisie from the capital society,\textsuperscript{23} such as
public trial and adversary system. Thus, the jury system was never realized as well.

The first time in the history, the term of Peishen (陪审)\textsuperscript{24} is used in Chinese in 1868.
After the failure of the First China Opium War\textsuperscript{25} in China, the invading western
countries forced the Qing Government to set up Semi-colonial judicial institution,
especially in the important ports. One of the typical examples is The Shanghai Mixed
Court,\textsuperscript{26} which appeared in the 1960s. The establishment of the Shanghai Mixed
Court had a written legal base, a law called “The Present Procedure of the Mixed
Court” (henceforth, the Procedure).\textsuperscript{27} It stated in rule 6, literally translated, that “if
neither the British consul nor the other foreign representatives are present, the
Weiyuan decides, with a foreign officer being the jury (Peishen).”\textsuperscript{28} Unlike the “Draft
of the criminal and civil procedure law”, the Procedure was not drafted by the
Chinese legislator and enacted national wide. However, this is not only the first time
the term “jury” is used, but also the first time in the history, that a jury system with
specific jurors (foreign officials) existed in special regions of China (concession).

After the People’s Republic of China was founded in 1949, the development of the
jury system in China can be segmented into three phases. The first phase is the time

\textsuperscript{23} See 许培阳.
\textsuperscript{24} “Peishen” is the translation of the jury system commonly used in modern Chinese legal texts.
\textsuperscript{25} The United Kingdom won the First Opium War (1839—1842), also called the First Anglo-Chinese
War. As a result, the Treaty of Nanking was signed and five ports were opened for trade, including
Shanghai. In the following Sino-British “five trade charter,” extraterritoriality was given to the United
Kingdom.
\textsuperscript{26} At that time, there were mixed courts not only in Shanghai, but also in other cities like Xiamen and
Hanko.
\textsuperscript{27} See Foreign Office Records, National Archives of United Kingdom, FO 233/96. “The Present
Procedure of the Mixed Court” (洋泾浜设官会审章程) was drafted in 1864.
\textsuperscript{28} Interestingly, in the English version of the agreement, the counterpart is not “jury”, but instead
states only “the provision that two consular officers shall successfully sit as appraisers on these cases
has been disregarded”. However, the Chinese version is drafted by the Shanghai local government,
and approved by the national authority. See Kotenev, 313.
before the Cultural Revolution.\textsuperscript{29} During this time, the jury system was recognized in law as a basic principle of law.\textsuperscript{30} However, there were no specific rules set to implement and regulate it. As stated in the first Chinese constitution of 1954, the jury system should be implemented in the court. Further detail and exceptions were described “The organic law of the People’s Court” in the same year. At this point, jury system became officially a basic judicial principle.\textsuperscript{31}

The second phase is from the end of the Cultural Revolution until the beginning of the 1980s. During the 10 year destruction of the Cultural Revolution, almost all legal systems, including the jury system, were abandoned. In 1979, National People’s Congress (henceforth, NPC) restored jury system by issuing the new organic law of the People’s Court and the new criminal procedure law. The two laws confirmed the jury trial as a judicial principle. According to it, there should be one judge for the first instance in all the basic People’s Courts and intermediate courts, forming a collegial panel with two jurors, with exception of lesser criminal cases.\textsuperscript{32}

However, after the revision of the organic law of the People’s Court in 1983\textsuperscript{33}, the 9\textsuperscript{th} provision in the organic law of the People’s Court was deleted. Therefore, the jury trial again failed to exist as a judicial principle in written law. Noticeably, this version of the laws continues to be valid until today.

Although there was no clear reason for the revision, some argue that there were difficulties finding enough jurors to fulfill the requirement for all the cases in the first instance, especially since educated jurors with certain legal knowledge were even harder to find.\textsuperscript{34}

\textsuperscript{29} The Cultural Revolution lasted from 1966 through 1976.
\textsuperscript{30} The jury system was mentioned in the “the initial comments on the procedure law from the legal department of the Zhongnan military and government committee”(《中南军政委员会司法部关于诉讼程序与审判方式的初步意见》) in 1950, and in “the provisional Organic rules of the People’s Courts” (《人民法院暂行组织条例》) in 1951.
\textsuperscript{31} See 林东云.
\textsuperscript{32} See 王丽英、赵颖.
\textsuperscript{33} The second session of the sixth NPC passed the revision of the organic law of the People’s Court.
\textsuperscript{34} See 许培阳.
On the other hand, some try to explain with the still fresh memory of the Cultural Revolution at that time. To some extent, jury system may facilitate a tyranny of the majority. This is supported by the fact of mass movement and kangaroo courts during the Cultural Revolution. In that special period of time, the advantages of a jury system can hardly overcome the potential harm to the social stability. Therefore, the legislative intentionally weakened the jury system.

In the third phase, there were several important changes that formed the legal framework today. The administrative procedural law came into force in 1990. The description of jury system simply repeated the one from the civil procedure law. However, there was a revision of the criminal procedure law in 1996. After that, the court has the right to choose whether to implement a jury system, instead of the principle of jury trial in general with exceptions. In reality, the implementation does vary a lot in courts for different reasons. From the legal perspective, the jury system is once again weakened.

III. The comparative analysis of current law in the United States and in China regarding jury system

In this Section, we will compare current legal situation of the jury systems in the two countries. We will first set up the legal foundation of the jury system. Then we will consider the procedure of selection of the jury. Finally we will analyze the process of jury sentencing.

A. Legal foundation of trial by jury

1. The United States

As we discussed in the history of the jury system in the US, the Constitution of the United States and its amendments compose the most important legal foundation of the jury system. In the US, a person accused of any kind of crime except in cases of impeachment, has the right to have a trial by jury. And such Trial shall be held in the

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35 See 高山.
36 吴玉章, 《陪审制度在中国的兴衰》, 载《读书》.
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State where the said Crimes have supposedly been committed.\(^{37}\) The right to a criminal jury trial is reassured and expanded in the Sixth Amendment to the Constitution. It states that the accused shall enjoy the right to a speedy and public trial of the State and district wherein the crime supposedly has been committed. While both the Constitution and the Sixth Amendment require the criminal jury trial,\(^ {38}\) the Fourteenth Amendment made this mandate applicable to all the states. For the lesser criminal cases, the states have the choice to permit or forbid right to jury trial. This result is based on the case of District of Columbia v. Clawans, in which the Supreme Court has ruled that jury trial is not required if imprisonment is for six months or less. However, the Federal Rules of Criminal Procedure also grants the right to the defendant to waive his right to a jury trial.\(^ {39}\)

Although the right to a criminal jury trial is guaranteed in the Constitution and its Amendments, the right to a civil jury trial is not mentioned in the initial draft of the Constitution. After the ratification of the Seventh Amendment, the civil jury trial is required in cases where the value in dispute is greater than twenty dollars.\(^ {40}\) However, the Seventh Amendment only grants a right to a civil jury trial under federal jurisdiction, while it strictly remains a matter of state law.\(^ {41}\)

Regarding the selection of the juror, the United States Jury Selection and Service Act of 1968, and Title 28 of the United States Code (U.S.C.) § 1861 et seq, provide the main structure of the selecting procedure for the federal juries. In 1970, a Uniform Jury Selection and Service Act was approved by the National Conference of Commissioners on Uniform State Laws. It is to large extent modeled after the Federal Selection and Service Act of 1968.

Moreover, another characteristic of the jury system in the US is the preservation of separated system of grand jury and petit jury. While petit jury is considered the normal jury that hears the evidence and forms a verdict, grand jury is applied to

\(^{37}\) Art. III, Section 2 of the Constitution of the United States.
\(^{38}\) King, The American Criminal Jury, 41.
\(^{40}\) Landsman, 285.
\(^{41}\) Amor, 81-118.
determine in a criminal trial whether the evidence presented is enough and the jury then issues the indictment, or it is applied to investigate the crime and the jury then issues the presentment. By enacting the Fifth Amendment to the Constitution, the right to have trial by a grand jury is granted under federal jurisdiction. It is stated in the Fifth Amendment that charges regarding capital or infamous crimes under federal jurisdiction must be presented to grand jury. According to Federal Rules of Criminal Procedure, a grand jury must be ordered by the court if the public interest so requires. It is considered that the function of the grand jury system is not only to investigate crimes and to initiate criminal prosecution, but also to protect the citizens from unfounded criminal charges.\textsuperscript{42}

2. China

Before discussing the legal foundation of the jury system, it is important to mention the form of government in China. Different than the separation of three powers in the US, the form of government in China has been the people’s congress system, which is also the form of the regime of people's democratic dictatorship\textsuperscript{43}. Under this system, executive, judiciary and procuratorate are all elected from the NPC; they are all responsible for the NPC; and they are all subjective to the supervision of the NPC. This structure raises interesting questions regarding the jury system: one is about the value of jury system for democracy, the other one is for the group of people who are the deputies to the National People's Congress. Since they are elected to supervise the judiciary, it is questionable whether they should be members of the jury and thus be part of the judiciary. This issue will be discussed in the section III.B.2.

Furthermore, in contrast to the US, jury trial is not a right of the citizens granted by the constitution. Instead, jury system exists mainly in procedure law in China, in addition to the organic law of the People’s Court. Beside them, the most important legal source is the “Decision of the Standing Committee of the National People’s

\textsuperscript{42} USAM, Sec. 9-11.000. The United States Attorneys’ Manual (USAM) was comprehensively revised in 1997.

\textsuperscript{43} “People’s democratic dictatorship” is a phrase invented by Mao. The state may use dictatorial powers against reactionary forces. However, the state does act on behalf of the people, so the notion represents “democracy”.
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Congress on Improving the System of People’s Assessors” (henceforth, Decision). The draft of the Decision was submitted by the Supreme People’s Court in 2004, and the Decision was adopted at the 11th Meeting of the Standing Committee of the Tenth NPC in 2004, while it came into force since May 1, 2005. The Standing Committee of the NPC has the legislative power granted by Art. 8 of the Constitution. Therefore, the Decision has the status of a procedural law. The Decision refined many issues about the jury system, such as the responsibility of the juror, the criteria and the selection of jury, the scope of jury trial and the jury pay.

Interestingly, it states that the purpose of the adoption of the Decision is “to improve the jury system, to ensure citizens to participate in judicial activities according to law and to promote judicial justice.” All the legal text is from the perspective of the citizen. It is actually based on the assumption that all the citizens are willing to participate in the judiciary. This is the opposite case in the US, where being juror is a duty and avoiding jury service is an issue that is commonly observed. Furthermore, the Constitution of the US starts from the perspective of the defendant, while in China, the defendant has no choice about whether to have jury trial. Without granting the right of waiver, the Chinese law also assumes that every professional judge needs to be supervised, instead of only in the controversial cases. However, the legal system in China is largely a civil law system. Compared to the US, the judges theoretically have less influence on the substantive law in China. The need for such a wide range of supervision may reflect the fact that generally people lack confidence in the judiciary in China.

44沈德咏就全国人大《关于完善人民陪审员制度的决定》答记者问 人民法院报 2004-09-01.
45Art. 20 of the Decision.
46秦强, 改革人大与人大常委会的职权关系，《人大研究》2010年第12期.
47Although Art. 8 of the Decision mentions that being a juror is an obligation for citizens, it is not so realistic regarding the procedure of the selection of jurors.
B. Criteria for the suitability of the jurors

1. The United States

Jurors in many states are selected through voter registration and drivers’ license lists,\textsuperscript{48} while some states have gone further by using lists of customers for utilities or even welfare recipients.\textsuperscript{49} A form is sent to prospective jurors to pre-qualify them by asking the recipient to answer questions about citizenship, disabilities, ability to understand the English language, and whether they have any conditions that would excuse them from being a juror. If they are deemed qualified, a summons is issued.

Traditionally, there are exemptions of jury duty for certain professionals that are thought valuable to society, such as physicians, and special exemptions from federal jury duty for police and public officials.\textsuperscript{50} Because of the legal knowledge that may result in noticeable influence during the deliberation, lawyers are generally exempted from the duty of jury service too. However, the recent tendency is to eliminate all these exemptions from the choosing process of jury duty.

According to the Sixth Amendment of the Constitution, the jury should be constructed in a way to ensure its impartiality. The obligation and right to be included in the jury pool does not differ among races, national origins, genders, religious beliefs or levels of income. As mentioned in the history of the jury system in America, the reality of discrimination among the groups was a serious issue for a long time. Meanwhile, the U.S. Supreme Court has repeatedly ruled that a jury needs to be comprised of a “fair cross section of the community” in order to assure the trial right with impartial jury. A well diversified jury pool serves better the purpose of the jury to give wisdom from non-elite group. At the same time, an impartial jury should possess high representativeness of the composition of the local population, in terms of race, gender, ethnic groups and etc. Therefore, most states adopt rules and design various methods to ensure the procedural fairness when establishing the jury pool.

\textsuperscript{48} Originally, voter registration lists were used as the source of jury pool candidates. However, less than 50\% of the population in the US is registered to vote. Therefore, most jurisdictions use both. See \textit{Burnham}, 89.

\textsuperscript{49} \textit{Shepard}.

\textsuperscript{50} 28 U.S.C.A § 1863 (b) (5)
However, even if the procedure is fairly followed, the jury pool may still not be representative. One of the typical issues is the non-response and undeliverable rates for jury summonses that are sent especially to the minority communities. Statistics show that the non-deliverable rate was 5.8% in wealthier towns, compared to 18.4% in towns with substantial minority populations, and the non-response rate was 23% in minority communities and only 7.6% in more wealthy areas.\(^{51}\) To improve the situation, some courts ordered to send a new summons to the same zip code as that of the undeliverable or no-response-summons. Nevertheless, this plan was disapproved by the appellate court.\(^{52}\)

Beside the diversity requirement of the jury pool as a whole, there is little requirement about the educational level of individual jurors. Therefore, a well-educated professor may seat next to a high-school dropout. However, there is a bias towards more educated citizens in reality. Take Alameda County in California as an example, statistics implies that the distribution of the educational level of the jury is not perfectly represents the educational level of the citizens. Among 62 jurors, 17.7% of them and 76.9% of the population nationwide have elementary or secondary education, 56.4% of the jurors and 11.2% of the population nationwide have at least a college degree.\(^{53}\)

2. China

Art. 4 of the Decision describes the general requirements of a juror. A citizen needs to support the Constitution, needs to be at least 23 years old, and needs to be in good health.

Art. 4 of the Decision also states that a citizen who is suitable to become a juror shall generally have reached at least a university or college degree. Furthermore, Art. 2 of the “Notice of the Supreme People’s Court and the Ministry of Justice on Issuing the

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\(^{51}\) *Burnham*, 90.


\(^{53}\) It is a study published in the *UCLA Law Review*, vol. 20, 1973, which compares the demographic characteristics of jurors with the general population to examine if the jury was representative.
Opinions on the Work of Appointing, Training and Appraising People's Assessors states: if there are difficulties in the situation, and for the citizen is older or with higher prestige, the educational requirement to become a juror may be relaxed.

The educational requirement for the juror in China is literally much higher than in the US. However, the educational level of the citizens in the two countries does not correspond to their requirements. To the opposite, it is apparent, that the educational requirement sets a very high barrier for the citizen in China. Additionally, the qualifications of citizens are not evenly distributed. For example, around 900 million of the 1.3 billion population are farmers, while only 0.52 % among them have at least a college degree. In contrast, for some states in the US that rely on automobile as their main form of transportation, 95 % of the population may be covered using driver’s license list alone. Moreover, even in a well-developed country like the US, requiring at least a college degree will result in a much smaller group than a driver’s license.

On the one hand, unlike the US, the jury in China decides not only about the issue of fact, but also of law. This requires some level of education so that the jury is able to understand the legal knowledge with reasonable effort. On the other hand, the high requirement may also show the intention of the Chinese legislator, who assumes that the more educated people are more qualified to serve as juror, because they possess more knowledge, which in turn should lead to wiser decisions. However, the value of civic participation in the judiciary lies not in adding another elite with a high level of rationality into the collegial panel. To the contrary, the jury system is designed to prevent the judgment to be biased towards the way of thinking of only the highly educated group. Just as stated in Art. 4 (3) of the Decision, instead higher legal knowledge and knowledge in general, it is more important for a qualified juror to be of good conduct, to be impartial and upright, and he should bring experiences and opinions as a normal citizen. Therefore, the educational requirement of at least

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Footnotes:

54 It is adopted by the Supreme People’s Court and Ministry of Justice in 2004.
55 李莉，2006：《农民收入水平与受教育状况相关性分析》，《广西社会科学》, 第7期.
56 Burnham, 89
57 See footnote 53.
college degree actually deprived the right of many citizens to participate in judiciary, while this contradicts the purpose stated in the Decision and other laws regarding the jury system.

Art. 5 contains exceptions in regard to certain professions, which are not allowed to be jurors. Beside lawyers and the employees of the People’s Court, a People’s Procuratorate, a public security organ, a State security organ or a judicial administrative organ, the members from the Standing Committee of NPC are covered by a special exception that does not exist in similar form in the US. Similarly, it is arguable whether the deputy of the People’s congress, except for the ones from the Standing Committee, is suitable to become a juror.

Art. 8 of the Decision states that after the application of the candidates, the Standing Committee of the People's Congress at the same level will appoint the jurors. While the Standing Committee of the People's Congress has the obligation to supervise the juror it appointed, the members of the Standing Committee are selected and should be supervised by the deputy of the People’s Congress from the same level. The result is unreasonable because the deputies elect the Standing Committee to appoint themselves. Furthermore, a deputy of the People’s Congress has the power of legislative and supervision. While being a juror that legally equal to a judge during the trial, he has the power of judiciary as well. Moreover, since a deputy of the People’s Congress has the obligation to monitor the judiciary, he needs to monitor himself by having both identities. Therefore the centralization of the power contradicts the form of government in China.

While the tendency in the US is to eliminate all the exceptions to the duty of jury, the main reason is that all the professions should be treated as citizens equally. However, the empirical evidence shows that large amount of jurors in China are deputies of the People’s Congress. The reason is that they are believed to be righteous and with better reputation, instead they are just granted right as normal

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58 According to Art. 11 of the Decision, jurors have the right to decide on the establishment of facts and the application of law.
59 See 陈畅.
citizen to participate in the judiciary. In the meantime, the mainstream scholars support an exemption from the right to be a juror for the deputies of the People’s Congress.

C. Selection of jurors and jury composition

1. The United States

   a) Selection of jurors

   According the Constitution, each state set its own rules to establish a well diversified jury pool. From the jury pool, 20 to 30 perspective jurors are randomly selected. They need to face the questioning in court by judges and attorneys. This process is called “voir dire”. The French phrase means to see to speak. The purpose of the voir dire is to reveal the biased perspective juror before the trial. If the perspective jurors possess knowledge of the facts in advance, or he has acquaintance with any of the parties, or his profession may lead to bias, the ability of the jurors to make fair decision may be considered to be influenced.

   After the voir dire, to both the defense and prosecution have a specific number of unconditional peremptory challenges. The original purpose of such challenges is to ensure the jury selected is impartial, while in reality this process gives the parties the possibility to influence the configuration of the jury to favor them. For example, the defendant party usually excludes jurors who have similar background of the victim, or instead considering the jurors’ relation to the cases, some attorneys strategically look for jurors who have potential to be emotionally swayed. These refer to the scientific jury selection, which become popular since the 1970s.

   While a peremptory challenge does not need an explicit reason, there is another form of challenge of jury that requires an explanation. This is called a challenge for cause. During the jury selection phase, attorneys have the right to remove infinite perspective jurors if they can provide reasons for doing so.

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60 See 李珊.
61 See 吴丹红.
62 Landsman, 285.
Some people question if the intensive questioning of potential jurors looks not just for inherent bias but for a potential to be emotionally swayed.

Beside the ways of challenge mentioned above, there is another occasion where the jurors are not randomly chosen. The issue arises from the reality that the cases become more and more complex in the recent years. Even the general composition of the jury pool is more educated than the average educational level in the country, it is still claimed that not every juror is able to understand the complicated cases. Therefore, “blue ribbon” jury is suggested, which is the jury composed only of college graduates. However, this possibility is highly controversial and there are doubts about its constitutionality.\(^{63}\)

\textbf{b) The jury composition}

As mentioned in Section III.A, there are two types of juries in the US, which are grand jury and petit jury. The separation of the two juries can be traced back to the English jury, while England has already abandoned grand jury to adopt the preliminary hearing in 1933.

By enacting the Fifth Amendment to the Constitution, the US preserves the right to have trial by a grand jury. It is stated in the Fifth Amendment that charges regarding capital or infamous crimes under federal jurisdiction must be presented to grand jury. According to Federal Rules of Criminal Procedure, a grand jury must be ordered by the court if the public interest so requires. And a grand jury must consist of sixteen to twenty three jurors.\(^{64}\) While a grand jury must serve until the court discharges, grand jurors may have to serve for a term of several months according to the cases. In special cases, the court may grant an extension for no more than 6 months after 18 months of jury service. Therefore, a grand jury may exist for maximum 24 months.\(^{65}\)

\(^{63}\) Sutton, Legal Forum 575.
\(^{64}\) Federal Rules of Criminal Procedure, III. Rule 6, (a)(1).
\(^{65}\) Federal Rules of Criminal Procedure, III. Rule 6, (g).
It is used in civil and criminal trials. A petit jury usually consists of 12 persons. However, the Federal Rules of Criminal Procedure also provides exception for a smaller jury, if the parties agree in writing before the verdict.\textsuperscript{66}

2. China

\textit{a) Selection of jurors}

Contrary to the simplicity of the selection of jurors in the US, the procedure in China is much more disputable regarding the selection of jurors from the great amount of citizens that fulfill the requirements discussed in section III.B.2.

According to the Organic Law of the People’s Court, the People’s Congress should appoint the jurors on the basis of election, from all the citizens that have the right to vote and to stand for election.\textsuperscript{67} This sounds literally similar to the criteria in the US. However, this approach has not been realized in practice. Especially after the Decision came into force, the procedure became even more rigid.

Art. 8 of the Decision states, that a candidate may be recommended by an employer or the grass-roots organization (基层组织) to the basic People’s Court, or he needs to apply and to be examined by the basic People’s Court together with the judicial administration organ of the government at the same level. The Standing Committee of the People’s Court subsequently appoints the jurors from the list that the president of the basic People’s Court has submitted.

By adopting this standardized procedure, the majority of the jurors selected are from the elite group. For example, the statistics shows the distribution of the professions of the jurors from the basic court in Wuhou, Sichuan Province: from the 54 jurors in total, 33.3\% one third are employees of government agencies or public institutions, 38.9\% two fifths are teachers and experts in special fields, and 15 \% are retired.\textsuperscript{68} However, there is not one juror coming from an agricultural background, while 70 \% of the Chinese population are farmers. More extreme than in the US, the statistics about the educational level of the same court also supports the statement that, in

\textsuperscript{66} Federal Rules of Criminal Procedure, VI. Rule 23, (b).
\textsuperscript{67} See Art. 38 of the Organic Law of the People’s Court.
\textsuperscript{68} See 陈畅.
reality, a jury is mainly composed of elite groups: from the same 54 jurors as above mentioned, over 80 % have a university degree, 22 % have a master degree, and 4 % have a doctorate degree. Although such high standard of qualification is not stated in the Decision, such procedure in fact sets great difficulties for normal citizens to become jurors.

Unlike in the US, a chosen juror in China is not only appointed for a single case. Art. 9 of the Decision states that the term for a juror shall be five years. The reason is that the jury in trial also needs to decide on issues of law, while the jury in the US only decides on the establishment of facts. Therefore, the basic People’s Court, together with the judicial administration organs of the People’s Government at the same level, shall provide training for the jurors, mainly to enhance their legal knowledge.

While the professional judge in China has a term of five years too, the reality becomes that the elected jurors to have similar function and power as professional judges. It means that the jurors are in charge of the judicial power, while this fact in effect deprives the vast majority of people of their opportunity to participate in hearing and deciding the cases.

From the practical point of view, the tenure system has actually helped to solve the problem of too much workload for the court. Some courts even choose the unemployed jurors continuously for long term. It is facilitated by Art. 7 of the Decision that a basic People’s Court has the right to make a request to the standing committee of the People’s Congress about the number of the jurors, according to the need for jury trial. This would be unrealistic under the rules in the US. Dan Tan, spokeswoman of the Statistics Office of the Supreme People’s Court, also agrees that “the vitality of the jury exists in its generation with randomness and universality”.

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69 See 陈畅. University of Xinan Politics and Law conducted a 2-year survey with the cooperation of the Wuhou District Court to research the behavior of the jurors.
70 Art. 15 of the Decision.
71 See 高山.
She believes that it should be avoided to give judicial power to the limited number of jurors for a long term, for the reason of relieving the workload of the court.\(^72\)

Regarding the fact that the workload of the court will keep increasing in both the US and in China, it is highly probable that only the tenure system in China will continue to transform the juror to some not qualified judge. Such unqualified judge will have neither enough knowledge of law, nor the perspective of a normal citizen. This is contrary to the intention of introducing the jury system.

\textit{b) The jury composition}

The jury composition in China shares similarities with the composition of a grand jury in the US, while it is more flexible regarding the size of the jury. Art. 3 of the Decision states only that in a collegial panel, the number of jurors shall be not less than one-third of the total number of panel members. The Criminal Procedural Law furthermore gives a more detailed requirement for the composition of the jury. Art. 147 states that in the Higher People’s Court and the Supreme People’s Court of First Instance, a collegial panel should be composed of three to seven professional judges and jurors in total. However, there is no such rule for the basic People’s Court or Intermediate People’s Court of First Instance.

Similar to the US, the selection of jurors should be chosen randomly from a name list in a basic People’s Court. Furthermore, for the intermediate People’s Court or a higher People’s Court, the jurors in a collegial panel are still randomly chosen from the name list of the local basic People’s Court.\(^73\) On the other hand, it is not allowed to challenge the jury as in the US. Moreover, there is no such system as specially qualified jury or educated jury for specially complicated cases, although the general educational level of the jury in China is already high.
D. Jury in trial and jury sentencing

1. The United States

In this section, we mainly discuss the procedure of jury trial and jury sentencing of the petit jury in the US.

Because the US pursues the adversary system in as a common law country, the parties and their attorneys play the most active role in the litigation. On the contrary, the function of the judge is to ensure the procedural rightness, while the role of jury is even more passive. The jurors are selected in a way that tries to empanel the jury who does not have pre-existing knowledge,\(^7\) so that they use only the information given in the court to make impartial decisions.\(^5\) During the trial, the jury is required to hear the debate and the evidence presented by the parties from a neutral perspective. The jurors are not allowed to question the parties, while for most jurisdictions, it is not allowed for the jury to record anything. Moreover, the jurors are not permitted to talk to each other about the case until the deliberation phase.

Since the jurors should only receive information about the case from the court, the publicity of the crime and the criminals may influence the opinions of the jurors and it may even threaten their impartiality when making decision. In the US, the fear of the influence of publicity on verdicts is much pronounced than in other countries. However, the law in the US cannot restrict the press from reporting the case, because the First Amendment protects the freedom of speech.\(^6\) The jurors need to carry the burden to keep away from the untested information outside of the court. To protect jurors from the influence of the media, the judge has the right to prohibit the press from approaching hesitant jurors and pressing them for information after the trial.\(^7\)

After the hearing of the evidence, the judge will provide the jury instructions on the applicable laws to the case, especially the relevant substantive laws. The result is that the jurors do not know which part of the evidence is important for deciding until

\(^7\) See King, Juror Delinquency in Criminal Trials in America, 2679-81, see also Strauss, Sequestration.
\(^7\) See Strauss.
the hearing is over. While some physiological research shows that this sequence may hinder the comprehension of the jurors, there are doubts about this procedure.

To achieve a verdict, the deliberation will take place after the trial. Traditionally, the jury needs to come to an agreement unanimously. However, until 1999, over thirty states allow nonunanimity in civil cases, while only Oregon and Louisiana also make the allowance for criminal cases.

In a verdict, there is simply the conclusion the jury reached during the deliberation. Because the jury in the US is only required to decide on the matter of facts instead of the matter of law, in a criminal case, for example, in a verdict it will state whether the jury finds the defendant is guilty or not guilty, without giving any explanation about the decision. In a special case, a jury acquittal may contradict the law instructed by the judge, for the reason that there is clear evidence that the accused should be guilty. This refers to the jury nullification. While the jury does not have the right to decide on the matter of law, here the jury actually has the power to nullify the existing law.

2. **China**

During the trial, the role that the jury plays is quite differently in China. On the one hand, adversary procedure is adopted in common law countries such as the US. This procedure emphasize on the separation of the active function to investigate and the passive function to consider the evidence and to decide. Therefore the jury in the trial should also be the passive listener and observer, while no participation allowed in the debate of the parties.

On the other hand, in a civil law country such as China, the inquisitorial system is adopted. Each juror possesses the same power just as the judge. The jury not only decides on the facts, but also decides on the applicable law. As members of the collegial panel, jurors discuss the case together with the judge together in the

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78 See Munsterman/Hannaford/Whitehead.
79 Landsman, 285.
80 Burnham, 87.
81 See 钱雄伟.
deliberation phase, and the opinions of the jurors are also recorded. While a juror has the equal voting right as the judge, the collegial panel comes to the conclusion through voting. Unlike the unanimity required in the US, the majority rule, the so-called principle of “the minority yields to the majority”, is used to come to the final decision.

It is to mention that an important difference in the two jury systems is that in China, each juror participates on an individual basis in the collegial panel, while in the jury system in the US, the twelve jurors in the jury perform collectively. The jury as a whole issues a verdict vis-à-vis the judgment.

Assumed to play an active role, the jurors in China, the jurors are allowed and are encouraged to question the parties in the trial, to exercise the equal judicial power just as a judge. However, a survey in Wuhou district court shows that only 26.3% of the jurors often ask question during the trial. From the jurors that do not often questions in the trial, 31.5% consider the reason as not understanding the applicable laws, and 50% declare that they simply agree with the judge’s opinion. This result shows that most of the jurors perform on the basis of their consideration about the applicable laws instead of the matter of facts.

Furthermore, one of the purposes to involve ordinary citizens into the judicial process is to add the experiences of daily life to correct the potentially biased opinion made solely by the judge. However, in practice, the jurors seldom play the same role as the judge. A survey in the Higher People’s Court in Shanghai shows that among the jurors, 11.3% make their decision based on the evidences and facts, 54.8% make their decision based on the applicable laws, and 34% consider both facts and applicable laws. It again shows the unwanted reality that the majority of collegial panel decides on the issue of applicable laws, while it may potentially harm the fairness of the decision regarding the matter of law. Therefore, some even argue

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82 See Art. 11 of the Decision.
83 See 陈畅.
84 See 陈畅.
that China should abolish the current jury system but to adopt the system in the US, in order to change the unsatisfactory situation in the jury trial in China.\footnote{See \textit{Sui Zhengjun}.}

IV. Comparative analysis of the function of the jury system

A. The value of civic participation in judiciary

1. General functions of jury system

   a) Jury's effect on judicial fairness and judicial democracy

   In the US today, almost every citizen has the right and the equal chance to be chosen for jury duty. Except for a few professions, there is no discrimination by ethnic group, race, property, or occupation. Alexis de Tocqueville agreed that “The institution of the jury places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government.”\footnote{Tocqueville/Reeve, Chapter XVI.,}

   Comparing the indirect participation of citizens in the executive and legislative powers, a jury system grants the ordinary citizens the right to directly exercise their judicial power. The procedure of randomly choosing jurors also ensures judicial fairness. The essence of the jury system is to ensure democratic participation, separation of powers and judicial supervision. Therefore, to facilitate the sharing of judicial power for the ordinary citizens is of significant importance to the judicial democratic and judicial fairness.

   b) Jury's effect on judicial independence

   As one of the well developed countries, the US is considered to be an example with a high level of judicial independence. There is little doubt that the jury system makes a noticeable contribution to it. Under the jury system in the US, a jury is randomly established, and immediately dissolved after the case. There is little interdependence with the outside world. Moreover, the jurors do not need to take any responsibility for their decision. In the extreme case, such as nullification, the jury may even decide in a way that is not in accordance with the current law. The jurors will disappear from the public attention right after the decision of the case,
that is, there is actually little pressure from the public. Therefore, the jurors are able to make decisions solely based on their own opinion about the case, instead being influenced by any other institutions or individuals.

This characteristic is of great importance to the situation in China, where the society is highly dependent on the personal network known as Guanxi. The conventional way to deal with issues is always to give advantages to the people from the Guanxi. The obvious result regarding the judiciary is the unfair treatment of the parties. Therefore, if a well-designed jury system may break through the twisted personal network within the judicial system, it can prevent the interference from other organs of the society. Moreover, it may also ease up the antagonism of the accused towards the judiciary. Therefore, the jury system may effectively protect the independence of the judiciary by reducing the political risks and social pressure that judges face.

c) Jury's effect on inhibition of corruption in judiciary

History shows that many persons invested with power are apt to abuse it, and to carry their authority as far as it will go. To prevent the abuse of power, it is necessary to implement an effective supervision system. The jury system is one important way of democratic supervision to the judiciary. By sharing the judicial power, the jury system in effect can reduce the opportunities of judges to abuse their power or to be corrupted. Therefore, it also increases the credibility of the judiciary.

In the US, especially for the criminal cases, the jurors are often randomly selected from the area where the crime took place. This makes it very difficult for the defendant to commit bribery, because of the short time to the trial. Furthermore, the costs and risks of bribery are also very high, since the jury is composed of 12 or 23 jurors, who are usually from various backgrounds.

For the more severe criminal and civil cases, the judge may decide to isolate the jurors in a separate hotel before the case is closed. Without the permission of the judge, the jurors are not allowed to leave that place. Meanwhile, the bribery of

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87 Secondat, Ch. 4.
jurers is a severe violation of the constitutional rights of citizens, which may result in 15 years of penalty.\textsuperscript{88} To some extent, these related regulations reduce the risk of corruption in the judiciary. Therefore, the jury, which seems to restrict the rights of the judiciary, in fact consolidates its power.\textsuperscript{89}

China employs another approach to fight corruption. There are provisions in the Decision about the penalties for the jurors, especially if they are corrupted. Instead of chasing after the party who committed bribery like in the US, the jurors can be held criminally responsible for their behavior.\textsuperscript{90} This may be resulted from the fact that the level of corruption in China is noticeably higher.\textsuperscript{91}

\begin{itemize}
  \item[d)] \textbf{Jury’s effect on legal education of the citizens}
  
  The jury system may function as a school that teaches the citizens legal knowledge free of charge. The experience gained through participation in the judiciary may help citizens understand the substantive and procedural law. Moreover, the jury system also serves to communicate the legal spirit to the minds of the citizens during their interaction.\textsuperscript{92} This can further build the trust of the citizens in law. The educational function is especially essential in developing countries such as China. China adopted the principle of rule of law only 60 years ago. As it is deeply rooted in the culture, morality plays a very essential role for most people. At times, the court decisions give results contradicting to morality, which the ordinary citizens still have problems understanding. However, the understanding and support of the citizens towards the judiciary is fundamental for further development and improvement of the legal condition in China. On the other hand, the educational function of jury duty is hardly noticeable in the US, because of the general high level of legal knowledge of the citizens. The relatively longer history of its modern legal system may be one of the reasons to explain this.
\end{itemize}

\textsuperscript{88} Public Corruption Prosecution Improvements Act of 2011.
\textsuperscript{89} \textit{Tocqueville/Reeve}, Chapter XVI.
\textsuperscript{90} Art. 17 of the Decision.
\textsuperscript{92} \textit{Tocqueville/Reeve}, Chapter XVI.
2. **Civic participation and judicial professionalization**

In this section, we will analyze the value of civic participation, from the perspective of different levels of judicial professionalism in the US and in China. We will show that professionalism is an important factor to the success of the developed jurisdictions. Therefore the function of the jury system is to correct the elite way of thinking of the judges resulted from the high level of professionalism of the judiciary.

One of the goals of the judiciary is to ensure justice to the maximum extent, including both substantive justice and procedural justice. However, few cases are regulated specifically and undisputedly in the law, and people have different conception of fairness. The consequence is that substantive justice is hard to define and realize.\(^93\) Therefore, in the developed jurisdictions, especially in the common law countries such as the US, we observe that the procedural justice is much more emphasized, while some argue that the emphasis on the procedural justice is over on the substantive justice in the US. To the contrary, the conception of procedural justice is not well known by the citizens even in the modern time. It can be explained by the several thousand years of history in China, where ordinary citizens had little influence on the composition of the judiciary. Therefore, until now there is a noticeable preference of substantive over procedural justice in the culture in China.

The procedural justice refers to the fairness of the process of resolving disputes. To ensure procedural justice, on the one hand, this idea should reflect in the procedural law; on the other hand, it requires the judiciary to strictly follow the procedures set by the law when exercising judicial power.\(^94\) In China, the level of professionalism of the judiciary while exercising their power is especially important. In reality, there are at times biased opinions spread though media about cases for different reasons, and there is evidence that is obtained through unusual means. These phenomenon can be very influential because of the Guanxi in the society. Therefore, the judiciary should be well trained to keep rationality while making decisions. The professionalism is a necessity for the judiciary to not be influenced by these factors and to ensure procedural justice.

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\(^93\) See 陈瑞华, p. 1.
\(^94\) See 潘小军.
Realizing the importance to improve the professionalism of the judiciary, we observe a variety of measure to achieve this goal, especially in the developed judiciaries such as the US. One measure is to set a high barrier for the legal career. First and foremost, if someone wants to be part of the judiciary, he must complete long years of education specifically in law, pass difficult exams, and then get trained in practice for a long period.

There are also other means to distance the judges from other part of the society. For example, there are special rules about judicial court dress. Judges need to wear a robe or even a wig in the trial, as symbols of authority. In the US, the court dress is mainly in black, which is largely affected by the English tradition. Interestingly, the Chinese judges also wear a special dress to convey an image of authority. However, their dress looks much alike a military uniform, which may also imply an image of absolute power, instead of justice and fairness.

Another phenomenon is that the income of the judiciary, mainly judges are relatively high. This may also help the judges to be able to concentrate on justice by reducing their incentive to be corrupted. In 2004, the average yearly income of a district court judge in the US is 158.100 USD, while some district court judge in Henan Province in China earns only around 2.400 USD a year (1600 RMB monthly). This helps to explain the high rate of corruption in judiciary in China. Furthermore, the system of appointing judges and life tenure also reduce the political influence on the judiciary.

However, the high degree of professionalism of judiciary also has drawbacks. On the one hand, the high degree of professionalism as prerequisite to participate in the judiciary results in its exclusiveness to the elite, making it difficult for the ordinary citizens to take part in the judicial process. This reality contradicts the principle of democracy. Therefore, the jury system is designed to overcome this drawback by increasing the involvement of the citizens in the judiciary.

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96 See 杨明、张海林.
As mentioned above, to ensure the procedural justice, the judiciary should strictly follow both the substantive law and the procedural law. However, substantive justice is also not to be neglected. The more controversial cases often require the judges to consider the situation from the perspective of an ordinary person, such as their experiences and emotions. While a high level of professionalism of judges may limit their ability to think as an ordinary person after some years, there is a potential risk that judges alone will not be able to make decisions that ensure the substantive justice. Therefore, one of the most important functions of a jury is to give input in regard to such experiences from their perspectives as ordinary citizens.

However, the analysis above also shows that the high degree of professionalism of the judiciary is the prerequisite for a jury system functioning in the way it was designed to. This statement raises the question about whether the jury system should be implemented in China at present at all. In fact, the degree of professionalism of the judiciary in China is not high. To the contrary, for a long time, the trend in the Chinese judiciary is to focus on the acceptance of result by the majority of the citizens. The implementation of the so-called “Xiwu Ma’s way of trial” is encouraged since 1944. Xiwu Ma’s way of trial is to advocate the idea that the judgment of the trial is to convince the majority of citizens. Only then can ordinary citizens accept the result and learn lessons from the disputes. Such guidelines in effect deviate from the idea that the judiciary should possess legal professionalism. Although there are judicial reforms in recent years that show the trend to professionalize the judiciary, such as the introduction of the bar exam and the court dress, the professionalism of the judiciary in China is still improvable. While the drawbacks of the professionalism of the judiciary are also not eminent, the value of the civic participation in form of the jury system can hardly be realized.

B. Criticism and problems of the jury system

Just as any other system in the world, both jury systems in the US and in China have their own advantages and disadvantages. In this section, we will discuss the criticism

97 See 吴丹红.
98 《马锡五同志的审判方式》was reported in the front page in 1944, March 13 in the newspaper of 《解放日报》. It is a case regarding family law.
voiced towards the two jury systems. Although the jury system in the US is still very controversial, it is a well-established system from the legal perspective. On the contrary, the jury system in China is still in its early stages. It is facing a lot of problems and it is open to the possibilities of change in many aspects. Therefore, in this section, we will briefly discuss the situation in the US, while we will put our focus on the Chinese jury system.

1. The United States
The criticism about the jury system in the US is mainly the inefficiency and the expense of the jury. First of all, the selection of neutral perspective jurors is a hard task. The selection system is designed to have diversity and representativeness, but it still cannot ensure that the selected jurors will bring substantive justice to the trial. When the perspective jurors are fairly selected from the pool, they need to face the challenges from the judge or the attorneys. It adds more complicity to the formation of the jury.

Furthermore, the rule of unanimity results in a long time deliberation. If the jurors cannot reach an agreement, the case will be heard by a new jury, which needs to go through the time-consuming process of formation. That is the reason that trials with juries take about 40% longer than bench trials.  

In addition, it is also said that the jury is incompetent to determine many of the issues. The jurors may have limited education, or they are unfamiliar with the procedure, or they can be easily influenced with emotion. With these alleged inabilitys, the jury actually has the right to bend the law.

While most of the critics point either to the high cost of the jury trial or the ability of the jury to decide properly, these disadvantages are inherent in the jury system in the US. Someone may always consider these disadvantages as the necessary cost of a free and democratic system.

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99 See Burnham, 121.
100 See Sparks.
101 See Jonakait, pp. 384.
102 See Frank.
2. The problems of the jury system in China

After analyzing the problems regarding the jury system in the developed jurisdiction such as the US, in this section, we will discuss the problems of the jury system in China. Comparing to the US, the jury system in China has a relatively short history. Therefore, many problems are regarding legislative, while there is also great potential to improve the implementation of the existing laws.

a) The Problems regarding the legal foundation of the jury system

(1) Lack of constitutional basis

While the right to have jury trial is guaranteed by the Constitution in the US, this is no longer the case in China. As a constitutional principle, the jury system was removed from the Constitution through the revision of the Constitution in 1982. That is to say, the current jury system lost its constitutional basis and only exists in the organic law of the People’s Court, the civil procedural law, the criminal procedural law and the administrative procedural law. Because there is lack of constitutional basis, some even argue about the constitutionality of the jury system. According to Art. 126 of the Constitution, the People’s Courts exercise judicial power independently, and not subject to interference by any administrative organ, public organization or individual. Therefore, the main argument is whether the jury system belongs to the interference by individuals.

Beside the constitution and the procedural laws, as one of the most important legal source for the jury system, the Decision was introduced in 2004 and came into force in 2005. It is the first specific law regarding the jury system in the Chinese history. Although the Decision provides much detailed provisions regarding different aspects of the jury system, the lack of support from the fundamental constitution still hinders the law from being widely implemented. In reality, the People’s Court may treat the implementation of the jury system as optional, while not caring much

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103 See 申君贵 and 邵军.
104 See 藤祥.
whether justice can be realized through the necessary participation of the ordinary citizens in the judiciary.\textsuperscript{105}

\textbf{(2) Contradiction to other laws}

As the latest revision of the Organic Law of the People’s Court took place at different time than the latest revision of the Criminal, Civil, and Administrative Procedural law, there are several aspects that contradict each other and may lead to confusion. The first point is regarding the status of the jury system in the procedural laws. In the Criminal Procedural Law, the jury system is considered as a basic principle of the procedural law. Unlike in the US, the reason for such partial absence in the procedure laws is not clear. However, the jury system is not mentioned in either the Civil Procedural Law or the Administrative Procedural Law. However, neither civil cases nor administrative cases are excluded in the Decision.\textsuperscript{106}

Furthermore, there are also disputes regarding the judicial power of the juror. In both the Organic Law of the People’s Court and the Criminal Procedural Law, there are provisions stating that the jurors shall enjoy equal rights with the judges when performing their function in the People’s Courts.\textsuperscript{107} However, according to the Civil Procedure Law,\textsuperscript{108} jurors shall have equal rights only when carrying out their duties as jurors, but not when they are carrying out other functions in the People’s Court. What’s more, in the Civil Procedure Law, the jurors also have the same obligations as the judges, which are not mentioned in the other two laws.

\textbf{b) The problems regarding the jury in trial}

\textbf{(1) Unguaranteed right of the jury}

It is stated in Art. 1 of the Decision that the jurors shall take part in the trial activities of People’s Courts, and enjoy equal rights with the judges except serving as the presiding judge. Therefore, we can conclude that generally, the jurors are not considered separately. They perform together with the judge as a whole, by hearing the evidence together, analyzing the cases together, and discussing the judgment

\textsuperscript{105} See 錦琴.
\textsuperscript{106} Art. 2 of the Decision.
\textsuperscript{108} Art. 40.
together. However, the jurors are chosen from the ordinary citizens that often don’t have a formal legal education, let aside judicial experiences. Because the high level of specialization in the work of the judiciary, it is rarely possible for the jurors to exercise judicial power alone. That is to say, the professionalism sets a high barrier for the jurors. Therefore they will always only play a minor role in the judiciary, without being competent enough to exercise the equal rights as a professional judge. In practice, the judge in trial often assigns some symbolic work to the jurors, such reading out the procedures in the court. Even when the jurors are participating in the judiciary, they often choose to vote for the opinion of the judge, because of their trust in the expertise of the judges. Therefore, the value of the jury that the legislator wished for cannot be realized in reality. Instead, it is often to observe the phenomenon that the jurors play a especially passive role during the hearing and the deliberation.  

(2) Unclear scope of jury trial

Art. 2 of the Decision regulates the scope of jury trial, which are the “criminal, civil and administrative cases with the relatively great impact on the society, and cases heard by a collegial panel with the participation of jurors as requested by the defendant of a criminal case, the plaintiff or defendant of a civil case, or the plaintiff of an administrative case.” Comparing to the Organic Law of the People’s Court and the major procedure laws, this is a provision that provides much more detailed description about the cases that should have jury trial. However, the court has the right to decide whether the cases are of great impact on the society. In essence, the court decide whether and how frequently to implement the jury system.

In practice, some courts have jury trial quite often, but for the purpose of reducing workload, instead of considering the impact of the cases on society.  

According to the Criminal Procedure Law, in the higher People’s Court and the Supreme People’s Court of First Instance, a collegial panel should be composed of three to seven professional judges and jurors in total. If the jurors are often involved just to satisfy this requirement, the reality is the judge may exercise a great power in the trial. This

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109 See 胡加祥、樊春玲、单衍岭.
110 See 苏力.
indeed harmed the image of the jury system for the ordinary citizens. The statistics also support this statement. It shows that from 2005 to 2007, only 8‰ of the jury trials were because of the application by the plaintiff or the defendant.\footnote{See 袁定波.}

\textbf{c) The problems of the administration of the jurors}

\begin{enumerate}
\item \textbf{Selection, training and evaluation of the jurors}

According to the Notice of the Supreme People’s Court and the Ministry of Justice on Issuing the Opinions on the Work of Appointing, Training and Appraising Jurors (henceforth, “the Notice”),\footnote{Art. 11, 15, 17.} it is the obligation of the grassroots People’s Courts together with the administrative department of justice of the People’s Government at the corresponding level to conduct the selection, the training and the evaluation of the jurors. These provisions are questionable. Because the jurors are selected from the ordinary citizens, they are not employees of the court. More importantly, one of the functions of the jury system is to monitor the judiciary. However, the supervisor needs to be trained and evaluated by the institution which he is supposed to supervise. The function of the jury has a high possibility to be compromised. In addition, there are considerations regarding the involvement of the administrative organ. While the rights and obligations of the jurors are essentially the same, as well as the function in the judiciary, there is little connection to the administrative organ. Therefore, it is believed to be unnecessary to entail the judicial administrative organs into the jury system.

\item \textbf{Fact of corruption, control and punishment}

It is noticeable that there are provisions about the measure for the corrupted behavior of the jurors in all laws regarding the jury system in China. While the punishment for the juror for an untrue verdict is ended effectively by Bushell’s Case in England in 1670, this is not the case in China. Regarding the fact that corruption is common in China, there are in fact few disputes about whether there should be a disciplinary system to control the conduct of the jurors. To reduce the level of corruption, measures can be adopted from two sides. Firstly is the prevention of the corruption, for example by establishing special institutions to monitor and educate
the jurors. Another way is to set up a post-disciplinary system to punish the corrupted behavior. While there are no specific laws regarding the first aspect, there are limited provisions for the latter aspect. In Art. 17 of the Decision, it states that a juror should be removed from the juror list if he “violates the relevant laws and regulations pertinent to the trial work, plays favoritism and commits irregularities and results in an faulty judgment or causes any other serious consequences”. The Notice provides additional provisions that the court may advise the employer of the juror to punish him. While there are little doubts about the strict rules to regulate the behavior of the jurors, some even argue that there should be more detailed provisions regarding the kind of punishment the employer should give, and measurements for the farmers and business people who don’t have an employer.\footnote{See 陈克刚.}

V. Conclusion

In this paper, we compared the jury system in the US and in China from both an historical and a contemporary angle. From the comparative analysis of the functions of the jury system, we realize that China and the US differ in a lot of aspects, and so do the jury systems in the two countries. While the two countries adopt different legal systems, there are still lessons that they can learn from each other.

On the one hand, the US is one of the most successful common law countries that implemented the modern legal system for relatively long, while its jury system is well-established, too. Despite the common criticisms, it plays an important role for its democracy that can be traced back in the history, since then the right to have jury trial is granted to limit the power of the government.

On the other hand, China is a young country regarding the short history of being under the rule of law. Similar the US, measures to supervise the judiciary are implemented. The Chinese legislator designed the jury system, largely influenced by the Soviet Union, in a way mainly based on the lay judge systems in the civil law countries. However, this system focuses on the right of the citizens to participate in the judiciary, instead of on the right of the defendant to have a jury trial for a higher
guarantee of substantive justice like in the US. This results in reality in a mechanism of competition that selects only the highly educated citizens to be jurors. As one of the important lessons, the rules for the selection procedure in the US to ensure the diversity and the representativeness of the perspective jurors are essential to realize the value of the civic participation.

In summary, by introducing and analyzing the current jury system in China, we show that this system is still facing a lot of problems. However, we also see the potential to solve many of them and to improve the condition of the implementation of the jury system. Meanwhile, there are many discussions in the Chinese legal societies about the development of the jury system in China. Some argue that the unsatisfactory condition of the jury system is a deadlock. They suggest to introduce the jury system from the common law countries such as the US and abolishing the current one.\(^ {114}\) Some support the current jury system, while they argue that the low educational level in average is the main reason for the imperfection.\(^ {115}\) There are also aggressive opinions that assert the complete opposition to any form of the jury system in China, because the current social and economical environment is not suitable for such system.\(^ {116}\) Many of these discussions are interesting and innovative. It is worth further researching about these opinions regarding individual aspects of jury and the judicial process.

\(^{114}\) See 苏正军 and 廖永安、李旭.
\(^{115}\) See 徐静村.
\(^{116}\) See 刘兴树.
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