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JUDICIAL REFORM IN CHINA: NEW REGULATIONS FOR A LAY ASSESSOR SYSTEM

Di Jiang

Abstract: After a long history of the “rule of social rituals” and the “rule under man,” China is reforming its legal structures, trying to achieve the rule of law. To realize this goal, China needs a more effective judicial deliberative body. To help define a system that is compatible with China’s practical needs and promotes its social modernization, this Article examines the western jury and assessor systems and compares them to China’s lay assessor system.

I. INTRODUCTION

Student: Ao is the Minister in charge of law. Shuen is the king. If King Shuen’s father committed murder, what happens?

Mencius: Ao has to arrest Shuen’s father.

Student: Can Shuen stop Ao?

Mencius: No. Ao is given the position to control legal affairs. He has the right to arrest people who commit crimes.

Student: Of course Shuen cannot interfere with Ao’s authority in law. But would Shuen do something else for his father?

Mencius: Shuen would abandon his kingdom and flee with his father. Shuen will be happy thereafter, forgetting about the kingdom.¹

Confucian ethics has dominated both law and legal philosophy in China for thousands of years. The Confucian emphasis on social rituals² (Li) demonstrates a fundamental suspicion of the written law (Fa). Comparing Mencius’ theory on King Shuen’s fleeing with his father to Socrates’ insistence on obeying the law under penalty of death,³ one may

¹ Mencius lived between 372 B.C. and 289 B.C. This conversation was translated by the author from one section of the book *MENCIUS*, which documents the teachings and thoughts of Mencius. For the Chinese text and an alternative English translation, see *MENCIUS VOLUME TWO*, 278-81 translated by D.C. Lau (Chinese University Press 1984).

² One of the fundamental and crucial rituals for a traditional Chinese person is his or her responsibility and obedience towards the parents.

³ See CEDRIC T. HOU, *A VIRTUAL DIALOGUE BETWEEN SOCRATES AND MENCIOUS—THE VARIATIONS OF CHINESE AND WESTERN JURISPRUDENCE IN PURSUIT OF AN IDEAL STATE OF LAW* 43-49 (1998) (discussing the difference between China and the West regarding the concept that law is

wonder whether China, carrying grave social rituals, will ever perceive and exercise law in the same sense as the West.⁴

Fortunately, China's legal system has progressed despite strong historical inertia and speculation from the rest of the world. Since 1978, sweeping judicial reforms have been inaugurated to confirm that law is essential for "socialist modernization."⁵ At its Fifteenth National Representatives Meeting in 1997, the Chinese Communist Party advocated for the rule of law and its determination to establish China as a country under the rule of law. Beginning in December 1998, the general public was given free access to all courts in Beijing except cases involving privacy, minors, or State secrets.⁶ As China moves towards a more complete modern legal system, it also faces many challenges, such as the more efficient and rigorous use of the lay assessors.

This Article discusses the reform of the assessor system in China. China does not have a jury system like common law countries. The Chinese legal system is largely based upon the German model,⁷ and the law provides lay assessors who decide cases with professional judges.⁸ However, China's assessor system has not been well practiced and received little attention until recently.⁹ In 1998, China's Supreme People's Court began drafting laws to improve the lay assessor system.¹⁰ In addition, some Chinese scholars have suggested that China experiment with juries.

Currently common law countries such as the United States use juries, while civil law countries such as Germany and France use assessors (lay judges). In reforming its legal system, China will inevitably learn from both common law and civil law countries. However, the success of China's own assessor or jury system may depend upon whether the reform is adapted to

above all). Although Socrates had opportunities to escape after being arrested for heresy, he stayed in jail for the death penalty. *Id.* at 43.

⁴ See Matthew H. Hurlock, Book Note, *Social Harmony and Individual Rights in China*, 93 COL. L. REV. 1318 (1993) (analyzing historical interaction of Western legal concepts with traditional Chinese view of social order and suggesting that economic advancement or the use of Western laws may not alter Chinese attitudes towards an individual's role in society).

⁵ See CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING—LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 10 (1995).

⁶ *Judicial Reform Outlined*, CHINA DAILY, Dec. 3, 1998, available in LEXIS, Asia Intelligence Wire [hereinafter *Judicial Reform*].

⁷ Jack B. Weinstein, *Some First Impressions of the Legal System in Three Chinese Cities*, 24 BROOK. J. INT'L L. 221, 222 (1998).

⁸ See Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhifa [The Organic Law of the People's Courts of the People's Republic of China] (adopted July 1, 1979, amended Sept. 2, 1983) [hereinafter *Organic Law of the People's Courts*] art. 10, translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986 39 (1987).

⁹ *Foundation for Reform of Assessor Function Set*, CHINA DAILY, Dec. 4, 1998, available in LEXIS, Asia Intelligence Wire [hereinafter *Foundation for Reform*].

¹⁰ *Foundation for Reform*, *supra* note 9.

the Chinese legal system as a whole. Part II of this Article introduces traditional Chinese legal concepts and the nation's modern legal reforms. Part III describes the U.S. jury system and its developing history, in addition to addressing some current issues regarding the American jury. Part IV discusses the civil law countries' assessor systems and their advantages. Finally, Part V analyzes the assessor system in China and proposes regulations regarding the selection and functions of lay assessors in China, based on examples from both the U.S. jury system and the civil law countries' assessor systems.

II. THE JUDICIAL SYSTEM IN CHINA

China has a long history under the rule of man (Ren Zhi). Although China had its legal code as early as the 7th century AD (the Tang Code), it was actually social rituals that directed people's behavior while the legal code only signaled state punishment.¹¹ Thus, the law in Imperial China barely distinguished between criminal and civil cases, approaching both categories from the same penal point of view.¹²

There seemed to be no public participation in the adjudicative process in Imperial China. Traditional China was a "disciplinary" society where hierarchy and elitist authority were preserved through personal sacrifices and the pursuit of harmony.¹³ Under traditional Chinese value systems, "the administration of justice was for the interests of the state and its security."¹⁴ The judicial system in Imperial China functioned as part of the administrative obligation of the central government, and no private legal

¹¹ Traditional Chinese law comprised two concepts: the latent sense and the strict sense. HYUNG I. KIM, *FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST, A COMPARATIVE STUDY 2* (1981). The broad, latent sense of law set models or standards for human conduct, including ethical precepts and rules as expressed in the Confucian concept of Li. The strict sense of law (Fa) was defined by the Legalists and had to be in writing, promulgated, unified, and sustained through rewards and punishments. *Id.* at 3-4. Confucianism stressed Li over Fa, since Li was a means to realize moral ideas, while law for the Legalists was simply a measure to reach political ends. *Id.* at 4. Thus, law in traditional China was moral and ethics oriented, while the strict sense of law was generally associated with state punishment. Compared to an industrial society, the legal system of China as a feudal society was neither the "law of confrontation" nor in place to "to establish the relationship between right and duty as opposed to each other," but was a system to sustain harmonious cooperation. *Id.* at 18.

¹² THOMAS CHIU ET AL., *LEGAL SYSTEMS OF THE PRC 19* (1991).

¹³ See Dan Fenno Henderson, *Foreword* to THOMAS B. STEPHENS, *ORDER AND DISCIPLINE IN CHINA, THE SHANGHAI MIXED COURT 1911-27*, viii (Univ. Washington Press 1992) (stating that "Chinese thinking and governance have been based on Confucianistic, elitist authority, on hierarchy and inequality, and on orders, obedience, and duties.").

¹⁴ CHIU ET AL., *supra* note 12, at 19.

profession served the system in any significant capacity.¹⁵ Although the imperial dynasties did not have an independent judicial system, China began its journey towards judicial modernization as the term of the last dynasty came to an end.

A. *Modern Legal Reforms*

At the beginning of this century, when The Republic of China replaced the Qing dynasty (1644-1911), China began developing a modern judicial system served by a professional legal class.¹⁶ This early judicial system seemed to borrow heavily from the Japanese and German models, which later followed the Kuomintang to Taiwan.¹⁷ Between 1931 and 1934, Chinese communists also incorporated Soviet Russian and Mongolian legal rules into "traditional Ch'ing law, Republic of China legislation, and Japanese and European law and procedure, as well as innovations within the Chinese revolutionary movement itself."¹⁸ The extensive incorporation of different laws had a significant impact on subsequent legal developments in China.¹⁹

China drafted its first Constitution²⁰ and established a governmental framework after the communist party instituted the People's Republic of China ("PRC") in 1949. Within the new governmental framework, the PRC installed the People's Courts and drafted both a criminal and civil code.²¹ However, beginning in 1957 and worsening during the cultural revolution (1966-76), judicial development in China came to a halt as the nation became embroiled in political battle. China was left in economic, social, and political chaos for two decades without legal order.

In 1978, China condemned previous legal nihilism and stressed the importance of law for its "socialist modernization."²² Following Deng Xiaoping's leadership, China started economic and social reform, which

¹⁵ See *id.* at 17 (discussing the legal system of the Qing Dynasty). A magistracy with no special legal training had all the power at the lowest level of jurisdiction and treated cases as their administrative duties. *Id.*

¹⁶ Development of modern legal profession happened during the Republican period (1912-49). See Alison W. Conner, *Training China's Early Modern Lawyers: Soochow University Law School*, 8 J. CHINESE L. 1, 2-4 (1994) (asserting the contribution of Soochow University Law School to the emergence of a modern legal profession in China).

¹⁷ CHIU ET AL., *supra* note 12, at 20.

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ The First Constitution of the People's Republic of China ("PRC") was promulgated in 1954. *Id.* at 30.

²¹ *Id.* at 31. It was estimated that there were about 2,500 full-time lawyers in the new PRC by 1957, thus the country was clearly trying to establish a standard legal system. *Id.*

²² See generally LO, *supra* note 5, at 10-11.

inevitably led to the need for comprehensive laws and a stable legal system. The study of law and jurisprudence flourished under the inspiration of Deng, who sought to establish formal justice under a new "socialist legal system."²³ Numerous legal scholars, practitioners, and judges from China studied in the Western world.²⁴ During this time, China showed "a genuine and widespread legal awakening."²⁵

Since 1978, China has enacted numerous laws covering extensive areas in an attempt to establish social order and encourage economic development.²⁶ In 1997, the Communist Party reiterated its determination to build China under the rule of law (Fa Zhi).²⁷ For the past couple of decades, China has had legal reforms not only in substantive law areas but also on procedural issues. As one scholar commented, "[n]o one will be surprised to learn that China's legal system is not yet as developed as that of the United States. What may be surprising is the rapidity with which China's legal system has developed and is beginning, both in practice and on paper, to resemble more closely that of the United States."²⁸

B. Current Judicial System

The People's Courts in China are the "judicial organs of the state"²⁹ and carry the responsibility to administer justice. The Constitution of the

²³ *Id.* at 11.

²⁴ *See, e.g.*, Weinstein, *supra* note 7, at 222 (1998) (stating that many people in the Chinese judicial and academic systems are now influenced by American law).

²⁵ LO, *supra* note 5, at 11.

²⁶ There were ten new laws enacted in 1979 alone, including the Criminal Law of the PRC, the Criminal Procedure Law of the PRC, the Law of the PRC on Chinese-Foreign Equity Joint Ventures, and the Environmental Protection Law of the PRC. *See LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982* (1987) for a list and content of the laws enacted from 1979 to 1982. Subsequently, laws covering more areas have been enacted such as the Individual Income Tax Law of the PRC (1980), the Food Hygiene Law of the PRC (1982), the Law of the PRC on Economic Contracts Involving Foreign Interest (1985), The Patent Law of the PRC (1985), the Foreign Economic Contract Law of the PRC (1985), General Principles of the Civil Law of the PRC (1986), and the Foreign Trade Law of the PRC (1994). China's legislation on foreign trade contains terms that "U.S. and other foreign businesses find relatively familiar and fairly comfortable." Jacques Delisle, *Of Chinese Walls, Battering Rams, and Building Permits: Five Lessons About International Economic Law From Sino-U.S. Trade and Investment Relations*, 17 U. PA. J. INT'L ECON. L. 513, 522 (1996).

²⁷ At the Fifteenth National Meeting for the Chinese Communist Party in 1997, the Communist Party for the first time replaced the phrase "legal system" with "the rule of law" ("Legal system" (Fa Zhi) and "the rule of law" (Fa Zhi) have the same pronunciation in Chinese). HOU, *supra* note 3, at 157. The plan of building China under the rule of law was confirmed at the Ninth National Meeting for the People's Representatives in 1998. *Id.* at 158.

²⁸ Todd R. Benson, *Taking Security in China: Approaching U.S. Practices?*, 21 YALE J. INT'L L. 183, 187 (1996).

²⁹ Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] (adopted Dec. 4, 1982, amended Apr. 12, 1988, Mar. 29, 1993, March 15, 1999) art. 123 [hereinafter PRC

PRC provides that the People's Courts exercise judicial power independently from any administrative organ, public organization or individual.³⁰ However, the same constitution also instructs the People's Courts to be answerable to the corresponding state or national power that created the courts.³¹ The Presidents of the People's Courts are elected by the congresses at the corresponding level, and the standing committees of these congresses appoint the judges.³² The Constitution of the PRC provides that cases in the People's Courts are open to the public except in special circumstances specified by law.³³ The People's Courts can be categorized into three general groups: (1) local People's Courts at various levels; (2) special People's Courts; and (3) the Supreme People's Court.³⁴ The local People's Courts are further divided into the Basic People's Courts, the Intermediate People's Courts and the Higher People's Courts.³⁵ The Basic People's Courts are established in local government divisions to hear minor cases. The Intermediate People's Courts exist at the provincial level with the original jurisdiction to hear both criminal and civil matters and to review decisions from the Basic Courts. Intermediate People's Courts may decide serious criminal cases including death penalty cases. The Higher People's Courts have original jurisdiction over the most important cases within the province or region. The Higher People's Courts also review decisions from the Intermediate Courts. The special People's Courts are courts with special jurisdiction over matters such as the military.³⁶ The Supreme People's Court in Beijing, the highest court in the nation, has appellate jurisdiction for cases from the Higher Courts and the Special Courts, and it has original jurisdiction for cases of national significance.

Constitution], *reprinted and translated in* 1 CHINA L. FOR FOREIGN BUS. (CCH Austl. Ltd.) para. 4-500 (1997); Organic Law of the People's Courts, *supra* note 8, art. 1.

³⁰ PRC Constitution, *supra* note 29, art. 126; Organic Law of the People's Courts, *supra* note 8, art.4.

³¹ PRC Constitution, *supra* note 29, art. 128. Scholars also argue that the independent power of adjudication provided by the Constitution of the PRC is really vested in courts and not in judges; therefore, decisions of a panel can be interfered with by a court's president or division chief. CHENGUANG WANG & XIANCHU ZHANG, *INTRODUCTION TO CHINESE LAW* 25 (1997).

³² Organic Law of the People's Courts, *supra* note 8, art. 35.

³³ PRC Constitution, *supra* note 29, art. 125. Exceptions for public hearings include cases involving state secrets, private affairs of individuals and crimes by minors. Organic Law of the People's Courts, *supra* note 8, art. 7. All Chinese citizens have the right to use their native spoken and written languages in court proceedings, and "[i]n an area where people of a minority nationality live in a concentrated community or where a number of nationalities live together, court hearings should be conducted in the language or languages commonly used in the locality." *Id.* art. 134.

³⁴ Organic Law of the People's Courts, *supra* note 8, art. 2.

³⁵ *Id.*

³⁶ *See id.*

The People's Courts have the responsibility to try "criminal and civil cases" and to protect property that is legitimately owned.³⁷ The People's Courts deal with criminal and civil matters arising under the Criminal Law of the PRC or the Civil Law of the PRC.³⁸ The procedures for handling those cases are prescribed in the Criminal Procedure Law of the PRC³⁹ and the Civil Procedure Law of the PRC, respectively.⁴⁰

In a criminal case, one to three judges and two to four assessors form a collegiate bench.⁴¹ During the trial, the bench begins by questioning the defendant and the victim. The defense counsel then questions the defendant, witnesses for the prosecution, and defense witnesses. Before the court deliberates, the prosecutor, the victim, and the defendant have an opportunity to debate, and the defendant has the right to present a final statement.⁴²

Before a civil case begins, the law requires the People's Courts to attempt a reconciliation and avoid a trial, both before it starts and before a judgment is rendered.⁴³ The People's Courts conduct civil trials by first questioning the parties, witnesses, and expert witnesses, then by allowing the parties to present written evidence.⁴⁴ The parties may introduce new evidence and with the court's permission, ask questions of witnesses during trial.⁴⁵ Court debates between the parties start with the presentation of the plaintiff's case, followed by the response from the defense.⁴⁶ Since the People's Courts play an active role in questioning parties and witnesses, the procedural rules of the PRC indicate the inquisitorial character of the courts.

³⁷ Organic Law of the People's Courts, *supra* note 8, art. 3. The People's Courts have the obligation "to protect socialist property owned by the whole . . . and the legitimate private property of citizens . . . and [to] ensure the smooth progress of the socialist revolution and socialist construction in the country." *Id.*

³⁸ See CHIU ET AL., *supra* note 12, at 68-70 (dividing cases dealt by the People's Courts into criminal, civil, economic, and administrative matters).

³⁹ See generally Zhonghua Renmin Gongheguo Xingshi Susongfa [Criminal Procedure Law of the People's Republic of China] (adopted July 1, 1979, amended Mar. 17, 1996) [hereinafter *Crim. Pro. Law*], reprinted in ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], Apr. 18, 1996, 378-413. For an English translation of the CPL, see *PRC: Amended PRC Criminal Procedure Law*, BEIJING XINHUA DOMESTIC SERVICE, Mar. 23, 1996, translated in FBIS-CHI 96-069, Apr. 9, 1996.

⁴⁰ See generally Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law of the People's Republic of China] (adopted Apr. 9, 1991) [hereinafter *Civ. Pro. Law*], reprinted and translated in 4 CHINA L. FOR FOREIGN BUS. (CCH Austl. Ltd.) (1992).

⁴¹ *Crim. Pro. Law*, *supra* note 39, art. 105.

⁴² *Id.* art. 118.

⁴³ *Civ. Pro. Law*, *supra* note 40, arts. 97-102, 111. "Conciliation agreements must be based on the voluntariness of both parties; compulsion shall not be permitted." *Id.* art. 100. If the parties cannot reach agreement after conciliation effort before a trial starts, "the people's court shall proceed with a trial and not prolong the case with further conciliation efforts." *Id.* art. 102.

⁴⁴ *Id.* art. 107.

⁴⁵ *Id.* art. 108.

⁴⁶ *Id.* art. 110.

Unlike common law countries such as the United States, China does not have an independent jury; instead, it uses a collegial bench comprised of judges and lay assessors similar to those used in civil law countries.⁴⁷ Nevertheless, during its continued legal reform processes, China should compare the U.S. jury system to the civil law collegial bench system and adopt characteristics of both to satisfy its practical needs.

III. JURY SYSTEMS IN THE UNITED STATES

The United States inherited its jury system from English common law. Ironically, juries played a significant role in resisting English control in colonial America. As a result, the right to a jury in criminal cases was firmly supported by the framers of the U.S. Constitution and became one of the few individual rights constitutionally guaranteed by the Bill of Rights in 1789.⁴⁸ After two hundred years, the right to a jury continues to be a valued fundamental right of American people. Nonetheless, as the U.S. jury system has evolved, so has the role of the American jury. Because the legal condition of modern China bears some resemblance to that of early America, the historical development of the American jury may offer guidance to China's jury system reform.

A. *History of the American Jury*

The concept of jury trials accompanied the plan of English settlement to America.⁴⁹ The early settlers were promised all the rights enjoyed by Englishmen, including the right to a jury trial.⁵⁰ Before the Revolution, criminal juries were used to varying degrees throughout colonial America.⁵¹ Nevertheless, all of the states that enacted constitutions prior to the Constitutional Convention included the right to jury trials in criminal

⁴⁷ See *id.* art. 35. "Civil cases of first instance shall be tried in a people's court by a collegial panel consisting of both judges and assessors or of judges alone" in simple cases. *Id.*

⁴⁸ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the? Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-75 (1994) (discussing the background of the Sixth Amendment).

⁴⁹ The right to a jury trial in America was promised even before the first English settlement on the continent. Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 23, 24 (Rita James Simon ed., 1975).

⁵⁰ James I's Charter to the Virginia Company in 1606 promised jury trials, among all the other rights enjoyed by Englishmen, to colonists who would later settle Jamestown. *Id.*

⁵¹ See John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in *SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY* 152, 167-73 (David D. Hall et al. eds., 1984) (illustrating the different use of criminal juries in different colonies).

cases.⁵² At the Constitutional Convention, the framers “enthusiastic[ally]” supported the preservation of the jury system.⁵³

American juries before the Revolution used their judicial rights to oppose English controls. In a well-known case, John Peter Zenger, the editor and printer for *The New York Weekly Journal*, was charged with seditious libel, a criminal offense, for political criticism against the appointed royal Governor of New York.⁵⁴ Although the evidence was clear that Zenger made the accused criticism, three separate grand juries refused to indict him.⁵⁵ After New York’s Attorney General charged Zenger with libel by information, a jury panel acquitted Zenger.⁵⁶ The Zenger case represented the sympathy juries had towards libel defendants in many colonial cases. Juries thus demonstrated their effectiveness in resisting English law.⁵⁷

Despite the positive role the jury played for the Revolution, early juries were often selected from a narrow section of the population—white adult males owning property.⁵⁸ In addition, states could impose other requirements for jury service such as good character, intelligence, tax-paying, etc.⁵⁹ This practice continued until 1946, when the Supreme Court in *Thiel v. Southern Pac. Co.* struck down class-based juror qualifications.⁶⁰

⁵² Leonard W. Levy, *Bill of Rights*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 258, 269 (Leonard W. Levy, 2d ed. 1987).

⁵³ Alschuler & Deiss, *supra* note 48, at 871. Retaining the right to a jury trial for criminal defendants seemed to be the least argued point among the framers, either Federalists or Anti-Federalists. *Id.*

⁵⁴ JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL* 41-42 (2d ed. 1972). Zenger was first charged for seditious libel, a criminal conduct. However, three separate grand juries refused to indict him. As a result, New York’s Attorney General charged Zenger with libel based on information. *Id.* at 41-105.

⁵⁵ *Id.* at 101.

⁵⁶ *Id.* Zenger admitted printing the accused words, however his voluntary defense attorney Andrew Hamilton argued truth as a defense. Hamilton also argued that the jury had the right to determine both the law and the facts and should decide whether Zenger’s remarks were libelous. *Id.* at 78. Although the sitting judge instructed the jury that truth was not a defense for libel, he allowed the jury to return a general verdict, and Zenger was acquitted. *Id.* at 101.

⁵⁷ See JOHN PHILLIP REID, *IN A REBELLIOUS SPIRIT: THE ARGUMENT OF FACTS, THE LIBERTY RIOT, AND THE COMING OF THE AMERICAN REVOLUTION* 30-33 (1979).

⁵⁸ See Alschuler & Deiss, *supra* note 48, at 877 (summarizing that in the early days, “[e]very state limited jury service to men; every state except Vermont restrict jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists.”)

⁵⁹ *Id.* at 878 nn.57-58.

⁶⁰ *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). In *Thiel*, the plaintiff (“Thiel”), a passenger on a train run by Southern Pac. Co. (“Southern Pac”), jumped out of the window of the moving train. *Id.* at 218-19. Thiel filed a complaint in a California state court, alleging that Southern Pac’s agents knew about his mental condition but did not provide due care to prevent him from injuring himself. *Id.* at 219. The case was later removed to a federal district court based on diversity of citizenship. *Id.* After demanding a jury trial, Thiel tried to strike out the entire jury panel because “mostly business executives or those having the employer’s viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees

Finding that persons earning daily wages were deliberately excluded from the jury panel in *Thiel*,⁶¹ the Supreme Court asserted that, "Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month . . . a portion [of the community] . . . cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system."⁶² Just as economically underprivileged white males gained equal status to serve as jurors, women and minorities later received improved political status and the ability to serve on juries.⁶³ However, complete racial and gender equality in the jury system is an ongoing battle in the United States, just as it is elsewhere.⁶⁴

Early American juries had other features that distinguished them from juries in the United States today. Previously, jurors could hear a series of cases rather than just one case, and they could sometimes question witnesses during trial.⁶⁵ In addition, potential jurors were selected directly by government officials, rather than being summoned randomly like they are today.⁶⁶ Following the American Revolution, juries often decided matters of

and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service." *Id.* After the trial court denied Thiel's motion to strike out the jury panel and his other attempts to withdraw or challenge the jurors, the trial continued and the jury returned a verdict against Thiel. *Id.* The Ninth Circuit Court of Appeals affirmed. *Id.* at 220. The U. S. Supreme Court, with a divided panel, reversed. *Id.* at 225. The Supreme Court found that the clerk of the trial court and the jury commissioner deliberately left off the jury list people who worked for a daily wage. *Id.* at 221-22. The majority of the court held that the exclusion of a class of people from jury service was not justified by federal or state law. *Id.* at 222-24. As a result, the court ordered a new trial heard by "a jury drawn from a panel properly and fairly chosen" to safeguard the "high standards of jury selection." *Id.* at 225.

⁶¹ The court clerk and the jury commissioner testified that they excluded daily wage earners from the juror list because those people usually offered financial hardship as an excuse not to serve and were excused by the judge. *Id.* at 221-22.

⁶² *Id.* at 223-24. The court refused to "breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged." *Id.* at 224.

⁶³ The Civil Rights Act of 1875 prohibited exclusion of a person from jury service because of race. 18 U.S.C. § 243 (1988). As women finally got the right to vote, women in some states obtained the right to serve as jurors. Alschuler & Deiss, *supra* note 48, at 899 n.166. However, it was not until 1975 that the Supreme Court struck down a state provision which only allowed women to serve on juries if they took steps to register at the courthouse or volunteer. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

⁶⁴ Attorneys often use peremptory challenges to eliminate prospective jurors from service. However, in 1986, the Supreme Court held that the Equal Protection Clause forbade attorneys from using peremptory challenges to eliminate African-American jurors based on race. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). In 1994, the Supreme Court held that the Equal protection Clause also prohibited the use of peremptory challenges based on gender. *J. E. B. v. T. B.*, 511 U.S. 127 (1994). For a more recent analysis on discrimination in a state jury system, see generally Laura Logiudice, Comment, *The Never Ending Story of the Peremptory Challenge: Racial Discrimination in the New Jersey Jury System*, 7 SETON HALL CONST. L. J. 617 (1997).

⁶⁵ See Alschuler & Deiss, *supra* note 48, at 868-69 (presenting changes in the jury system that have not yet been written into books).

⁶⁶ See *id.* at 879-80 (citing public officials' "very extensive and very arbitrary" powers in jury selection).

fact as well as matters of law.⁶⁷ These early practices in the American jury system may mirror current legal conditions in other countries, however the American jury today is significantly different.

B. *The American Jury Today*

Today, all criminal defendants enjoy the right to a jury trial⁶⁸ that is guaranteed by the Sixth Amendment to the U. S. Constitution.⁶⁹ In federal court, the Seventh Amendment guarantees the right to a jury trial for common law causes of action and to statutory causes of action that are analogous to actions that were ordinarily decided in English courts in the late 18th century.⁷⁰ However, the Seventh Amendment right to a jury trial in civil cases does not apply to state courts.⁷¹ Jurors are chosen "at random from a fair cross section of the community" where the trial is conducted, and "all citizens shall have the opportunity to be considered for service" on juries.⁷²

In federal court, potential jurors are selected for each case at random from a master jury pool.⁷³ Each district court devises a jury selection plan and either a jury commission or the clerk of the court manages the selection process.⁷⁴ In general, "no person or class of persons" may be excluded or exempted from jury service.⁷⁵ However, a prospective juror may be excused or excluded under specified situations, such as a peremptory challenge or a challenge for cause.⁷⁶

Modern American juries are the exclusive fact finders and decide only issues of fact. They usually observe the proceedings and do not question witnesses directly. Although the role of U.S. juries today seems not to be as revolutionary as it once was, many advantages of the jury system have managed to be maintained.

⁶⁷ *Id.* at 903.

⁶⁸ Except where the defendant has committed a "petty" offense. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁶⁹ See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); *Duncan*, 391 U.S. at 149 ("the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

⁷⁰ See *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-10 (1999); U.S. CONST. amend. VII ("[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.")

⁷¹ See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974).

⁷² 28 U.S.C. § 1861 (1994).

⁷³ *Id.* § 1863.

⁷⁴ *Id.* § 1863(a), (b)(1).

⁷⁵ *Id.* § 1866(c).

⁷⁶ *Id.*

1. *Advantages of the Jury System*

The common law jury system provides an opportunity for the expression of “popular sovereignty” and a “barrier to governmental abuse.”⁷⁷ These advantages of the jury system were manifested by American juries during the colonial period,⁷⁸ and were presumably passed on to modern juries. Common law juries are selected from members of the community crossing all political, economic, and professional classes. Therefore, because the jury represents the society and not one specific group, its voice most directly represents the sovereignty of the people.⁷⁹ In addition to their democratic nature, juries can prevent governmental abuses of power by injecting public opinion into the adjudication of governmental defendants.⁸⁰ As a result, the jury system not only provides a political institution for the people’s participation in governing, it also adds legitimacy to the administration of law and increases public confidence in judicial results.⁸¹

Participation by ordinary citizens in the judicial process also presents opportunities to incorporate “common sense” into the adjudicative process⁸² and to educate citizens about the law. Common law courts are places where law and popular opinion interact and co-operate. Though jurors may not be more sensible or unbiased than judges, the jury system “keep[s] the administration of the law in accord with the wishes and feelings of the community.”⁸³ On the other hand, jurors learn the law from the trial, the arguments, the judge’s instructions and the deliberation process. Each juror learns to judge his neighbor as he would himself be judged.⁸⁴ Accordingly, one learns to shape his or her own conduct.

⁷⁷ Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 470-75 (1997).

⁷⁸ See *supra* notes 57-60 and accompanying text discussing the role of juries in resisting English authority in colonial America.

⁷⁹ See Smith, *supra* note 77, at 471-72 (illustrating that juries are a manifestation of America’s representative democracy).

⁸⁰ See *Duncan*, 391 U.S. at 156 (stating that juries provide “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”).

⁸¹ A jury verdict is likely to be seen as a decision by the community and may be accepted by the community even if it is unpopular. This prevents a community’s animosity towards a particular judge or the court and preserves public confidence in the legal system. Smith, *supra* note 77, at 482. In addition, the fact that the jury has less vested interest in the result of a case than the judge and lawyers adds legitimacy to their decision. *Id.*

⁸² *Id.* at 484.

⁸³ Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459-60 (1899).

⁸⁴ See generally 1 ALEX DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (ch. 16) (1945). However, a person’s experience with jury service may also teach him or her the negative aspects of the

The common law jury benefits the legal system by relieving judges of some of the decision-making responsibilities, separating binding precedent based on judgment of the law from jury-determined matters of fact, and pressing the judicial system to simplify the law. American juries today only determine issues of fact, leaving the judge to determine issues of law. *Stare decisis*, a principle that requires application of prior decisions to cases with substantially similar facts,⁸⁵ preserves a jury's fact finding and therefore, reduces the number of prior determinations that must be followed. Finally, the presence and participation of lay juries in the judicial system pushes the courts to simplify the proceedings and law.⁸⁶

2. *Current Debates in the American Jury System*

While the common law jury has numerous advantages, much current debate focuses on its disadvantages. American juries have been criticized for their incompetence in finding the facts and understanding the law.⁸⁷ In both civil and criminal cases, scholars have questioned the effectiveness of juries as fact-finders and decision-making bodies.⁸⁸ Some have even suggested abandoning the jury system in the civil context or reforming it in both civil and criminal cases.⁸⁹ Since a jury's understanding of the evidence and legal rules is fundamental in reaching a fair verdict, one wonders whether jury incompetence undermines the trial's purpose of administering justice. However, it is debatable whether jurors are less competent than judges as fact-finders.⁹⁰

Jurors are also criticized for being prejudiced and delivering erroneous verdicts.⁹¹ Cases that are considered wrongly decided shake the

legal system and may reduce the juror's confidence in the administration of law. Smith, *supra* note 77, at 481.

⁸⁵ BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

⁸⁶ Smith, *supra* note 77, at 489, n.141.

⁸⁷ *Id.* at 492.

⁸⁸ See Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483-84 (1956) (criticizing the functioning of juries in complex civil cases); Craig M. Bradley, *Reforming the Criminal Trial*, 68 IND. L.J. 659, 659 (1993) (criticizing the efficiency of criminal jury trials).

⁸⁹ See, e.g., Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 510-24 (1992) (discussing perspectives on altering the adversary system in the United States).

⁹⁰ Smith, *supra* note 77, at 494.

⁹¹ In 1955, the body of Emmett Till, a fourteen-year-old African-American boy, was found mangled in Money, Mississippi. An all-white jury acquitted the defendants, two white men who later sold their story telling how they "had" to kill the boy. Alschuler & Deiss, *supra* note 48, at 895-96 & n.146. In 1992, an all white jury acquitted the police defendants who were shown on a tape beating Rodney King. The acquittal of the Rodney King assailants ignited a public riot, leaving dozens of people dead and sections of Los Angeles in wreckage. See Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 77 (1994) (stating that the jury acquittal was "clearly the catalytic event" that resulted

public's confidence in the jury system as a fair channel for the administration of justice. However, it is not certain whether judges are less prejudiced than jurors. Moreover, jury prejudice could be the result of manipulation by lawyers through voir dire, peremptory challenges, and other trial techniques used for the purpose of influencing a jury.

The American jury system has led to prolonged and over-proceduralized trials. Jury trials often begin with extended jury selection, proceed with cumbersome rules of evidence, the repetitive direct- and cross-examinations of witnesses, battles between the parties' hired experts, and end with jury instructions that are difficult to comprehend.⁹² As a result, a trial can last weeks, months, or even years.⁹³ Lengthy trials are not only expensive but also affect the function and composition of the jury.⁹⁴

Debates about the American jury system focus on characteristics that could be considered either advantageous and disadvantageous. Jurors do not usually give reasons for their verdicts, and their decisions add uncertainty to the law.⁹⁵ On the other hand, jurors are insulated from public scrutiny and can decide a case without fear of vindication or criticism. The random selection of American jurors results in jurors' lack of experience, but also the legitimacy and democracy of the jury system. Whether comprised of benefits or drawbacks, the American jury system may be better appreciated or, perhaps denounced, when compared to the civil law assessor system.

IV. ASSESSOR SYSTEM IN CIVIL LAW COUNTRIES

Compared to the United States, trials in civil law countries are less dominated by procedural rules and arguments from lawyers.⁹⁶ Civil law countries such as Germany and France use lay judges or assessors to help professional judges decide a case.⁹⁷ Both the professional judges and the lay judges are more active than American judges or juries in finding evidence

in the riot). See Seth Mydans, *The Police Verdict: Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, April 30, 1992, at A1 (reporting the jury acquittal of the police defendants who were taped when beating Rodney King).

⁹² Alschuler & Deiss, *supra* note 48, at 926.

⁹³ The McMartin Preschool case had an 18 month preliminary hearing, and the trial lasted two years and nine months. *Id.* at 925. The jury in the McMartin Preschool case heard 124 witnesses on 65 claims against the defendants, and the case cost taxpayers more than \$14 million. *Id.*

⁹⁴ See Smith, *supra* note 77, at 491 (pointing out that the length of the trial can impair jurors' memory of all evidence and that less educated jurors are likely to serve on long trials).

⁹⁵ *Id.* at 495 & 497-98.

⁹⁶ Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 134 (1983); Van Kessel, *supra* note 89, at 421-22.

⁹⁷ See generally Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972).

and influencing each other. In general, civil law countries seem to adopt an "inquisitorial" trial method, rather than the adversarial model used in the United States.⁹⁸

A. Structure and Function of the Lay Judge System

Civil law countries do not use a separate jury to passively observe a trial and decide issues of fact according to a judge's instructions. Instead, a "mixed court" of both professional and lay judges hears and decides a case together.⁹⁹ More than one judge usually presides over cases of greater seriousness than petty crimes.¹⁰⁰ In such serious cases, both professional judges and lay judges sit side by side.¹⁰¹ Lay judges' votes carry the same weight as that of professional judges.¹⁰²

Lay judges in civil law countries are selected to hear cases for a fixed term, such as four years.¹⁰³ The preference for people with certain occupations, status, or social interests often leads to the selection of more educated individuals as lay judges.¹⁰⁴ Once selected, a lay judge can only be disqualified on the same grounds as a professional judge.¹⁰⁵ There are no peremptory challenges available to either the plaintiff or the defendant, thus allowing removal only for cause.¹⁰⁶

Lay judges decide issues of fact as well as issues of law. They also determine sentencing and guilt in criminal cases.¹⁰⁷ Like professional judges, lay judges may examine witnesses during the adjudicatory process.¹⁰⁸ Additionally, professional judges may comment on the evidence in front of the lay judges.¹⁰⁹ Because the lay judges and professional judges

⁹⁸ "The central idea behind the common-law trial is that of a party contest; the idea behind a criminal trial on the Continent is that of an official inquiry." Tomlinson, *supra* note 96, at 134.

⁹⁹ Van Kessel, *supra* note 89, at 422.

¹⁰⁰ "The Continental court usually consists of a single professional judge in minor cases and a mixed bench, usually one professional and two lay judges or, in more serious cases, three professional and two to nine lay judges." *Id.* In Germany, two lay judges and three professional judges sit for more serious criminal cases, while two lay judges and one professional judge sit for less serious criminal cases. Smith, *supra* note 77, at 461-62 & n.51. In France, a panel of nine lay judges and three professional judges hear the most serious criminal cases and in Italy, a panel of six lay judges and two professional judges would be used to decide criminal cases of the same severity. *Id.* at 462 & n.52, 53.

¹⁰¹ Casper & Zeisel, *supra* note 97, at 141.

¹⁰² Van Kessel, *supra* note 89, at 425.

¹⁰³ John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 206.

¹⁰⁴ *Id.* at 208.

¹⁰⁵ Casper & Zeisel, *supra* note 97, at 182.

¹⁰⁶ *Id.*

¹⁰⁷ Tomlinson, *supra* note 96, at 138.

¹⁰⁸ Casper & Zeisel, *supra* note 97, at 149.

¹⁰⁹ *Id.* at 150-51.

decide cases together, professional judges' opinions may influence the decisions of lay judges.¹¹⁰

Just like the American jury system, the mixed courts in civil law countries become institutions for expression of public beliefs by including lay persons in the adjudicatory process. The mixed court also provides an opportunity to educate the public regarding the law. However, the mixed court may not be as democratically representative as the American jury. Moreover, because professional judges can comment on the evidence during deliberation with lay judges, the lay judges may not be as independent as American juries. Nonetheless, the civil law mixed court does have certain benefits that are lacking in the American jury system.

B. Advantages of the Mixed Court

Lay judges in mixed courts are generally better educated and more experienced than modern American jurors.¹¹¹ Lay judges are chosen with a preference given to members of society having more education and certain interests.¹¹² Once selected, lay judges usually serve for a fixed period of time over a number of cases, thus gaining experience in the adjudicative process. As a result, the mixed court is usually composed of a better-educated and more experienced decision-making body.¹¹³

Trials under the continental mixed courts are generally less time consuming and less cumbersome than modern American trials. Civil law countries do not have the tradition of providing for extensive voir dire or peremptory challenges in the selection of lay participants.¹¹⁴ Additionally, there are no complex rules of evidence to prevent probative evidence from reaching the lay judges "for a fear of lay judge incompetence" or inexperience.¹¹⁵ Finally, there are no stringent rules of evidence to guard the line between issues of fact and issues of law or to limit the lay participants as exclusive fact-finders.¹¹⁶ Thus, the mixed courts in civil law countries seem to be more procedurally efficient.

¹¹⁰ See Smith, *supra* note 77, at 465 (explaining that professional judges may have control over lay judges due to their legal expertise and experience).

¹¹¹ See *id.* at 504-05 (stating that the modern jury selection process in the United States results in the selection of less-educated and less-experienced individuals as jurors).

¹¹² See *supra* notes 104-07 and accompanying text for the selection of lay judges in civil law countries.

¹¹³ Smith, *supra* note 77, at 504-05.

¹¹⁴ The process of voir dire is not known in civil law countries because lay judges are not selected to serve on a particular case. *Id.* at 511.

¹¹⁵ *Id.* at 463.

¹¹⁶ *Id.* at 551.

The inquisitorial trial style in civil law countries also results in the more active participation of lay persons in courts.¹¹⁷ Unlike American jurors who generally have passive roles during trial proceedings, continental lay judges may question witnesses and determine issues of fact and law. As a result, lay judges play a greater role in trials and likely gain a greater understanding of the law than American jurors. Based on a more inquisitorial rather than adversarial approach, the mixed courts in civil law countries have been used as a model by many countries, including China.

V. SUGGESTIONS FOR IMPROVING THE ASSESSOR SYSTEM IN CHINA

China instituted collegial benches including lay persons before 1949.¹¹⁸ China's first constitution, adopted in 1954, also contained provisions concerning such practice.¹¹⁹ However, it was not until recently when China reinstated its formal legal system that the assessor system started to receive due attention. The Organic Law of People's Courts of the PRC provides:

The people's courts shall adopt the collegial system in the administration of justice.

Cases of first instance in the people's courts shall be tried by a collegial panel of judges or of judges and people's assessors; simple civil cases, minor criminal cases and cases otherwise provided for by law may be tried by a single judge.

Appealed or contested cases in the people's courts are handled by a collegial panel of judges.¹²⁰

In addition, the law states that any citizen, who is at least twenty-three years old and who has the right to vote and stand for election, may be elected as an assessor, except those who have once been deprived of political rights.¹²¹ During their period of service, assessors are members of the court divisions in which they participate and enjoy equal rights with judges.¹²²

¹¹⁷ A more active jury has advantages such as "(1) the jury would better serve as a check on the power of judges and lawyers; (2) the accuracy of the decisionmaking process would be improved; (3) jury credibility would be increased; (4) jury decisions would be perceived as being more legitimate; and (5) a more active role for the jury would instill in jurors a better understanding of the importance of their responsibility." *Id.* at 549 & n.379.

¹¹⁸ *Foundation for Reform, supra* note 9.

¹¹⁹ *Id.*

¹²⁰ Organic Law of People's Court, *supra* note 8, art. 10.

¹²¹ *Id.* art. 38.

¹²² *Id.*

China has not vigorously used the assessor system despite the general provisions in the law.¹²³ Courts have used professionals as lay assessors in cases requiring professional expertise.¹²⁴ However, the extensive use of lay persons in the adjudicative process has not yet developed. The Supreme People's Court has proposed to the Standing Committee of the National People's Congress that it draft regulations for the assessor system, as well as issue new rules relating to the many detailed aspects of the assessor system.¹²⁵ The new Chinese assessor system is likely to benefit from existing legal structures such as the American jury system and the civil law lay judge system. On the other hand, China has a unique history of elite group control during Imperial times and chaotic popular justice during the Culture Revolution. Thus, the new assessor system must strike a balance in order to adjust to Chinese social and legal conditions. Methods of assessor selection and their functions will together define the system itself.

A. Selection

Democratic selection of assessors is imperative to the success of an assessor system in China. The law of the PRC dictates that "[t]he People's courts, in all their activities, [shall] educate citizens in loyalty to their socialist motherland and voluntary observance of the Constitution and the law."¹²⁶ This goal can be best achieved if citizens from all segments of society are given an opportunity to participate in the adjudicative process. Like the American jury system, which was described as a free school "in which each juror learns his rights,"¹²⁷ the Chinese assessor system can also serve as an institution to educate citizens, an expression of "popular sovereignty," and a "barrier to governmental abuse."¹²⁸ However, these goals will not be met if only government-friendly or other elite groups are selected to participate in court decisions.

A pool of lay assessors for criminal or civil cases must not be limited to people with certain educational levels, legal knowledge, or social status. Like the U.S. Supreme Court, the People's Courts in China should refuse to "breathe life into any latent tendencies to establish the jury as the instrument

¹²³ See *Foundation for Reform*, *supra* note 9 (stating that the assessor system has not received due attention even after the system was re-established in 1978).

¹²⁴ *Id.*

¹²⁵ See *Judicial Reform*, *supra* note 6; *Foundation for Reform*, *supra* note 9.

¹²⁶ Organic Law of the People's Courts, *supra* note 8, art. 3.

¹²⁷ See generally 1 DE TOCQUEVILLE, *supra* note 84, at (ch. 16).

¹²⁸ See *supra* notes 78-85 and accompanying text for a discussion on the advantages of the American jury.

of the economically and socially privileged."¹²⁹ A pool of assessors from all segments of society adds legitimacy to the judicial system. On the other hand, a second pool of assessors may be established to avoid the problems faced by American juries, who are often criticized for being uneducated and incompetent.¹³⁰

A second pool of assessors possessing professional experience or training could be established for certain cases requiring special knowledge. Like America in its early days, China is not been fully equipped with judges who have strong scholastic, legal backgrounds. In fact, the law of the PRC does not require legal training or background for becoming a judge or president of a court.¹³¹ A second pool of assessors, comprised of legal and other professionals, would increase the educational and professional level of a collegiate bench.

Thus, China should establish a hybrid jury/assessor system. Some members of a judicial panel would be selected randomly from a broad pool of citizens to hear a single case, while other panel members would be selected from a smaller pool of better-educated professionals who serve the courts for a fixed term. Currently, China faces an increasing number of court cases.¹³² Having both better-educated professionals and representation of the general public will not only help deal with increasing caseloads but will also add legitimacy and public influence to the adjudicative process.

China should not, however, adopt the extensive voir dire practices and peremptory challenges used in the United States, even if a number of assessors are randomly selected from the public. Peremptory challenges can be used by lawyers to select jurors more favorable to their case, the frequent use of which rarely results in the fair representation of all segments of society.¹³³ Extensive voir dire also prolongs pre-trial procedure and can be abused to "pre-instruct" the jury.¹³⁴ Thus, all lay assessors, after selected, should only be concisely questioned and should only be disqualified for cause, just like professional judges. During their fixed term, the assessors' functions may need to be further defined.

¹²⁹ See *supra* note 60 and accompanying text for the Supreme Court opinion in *Thiel*.

¹³⁰ See *supra* notes 88-89 for debate on the ineffectiveness of the American jury.

¹³¹ See Organic Law of the People's Courts, *supra* note 8, art. 34 for the requirements for judges, chief judges, and presidents of people's courts.

¹³² See *Courts to Handle More Cases*, CHINA DAILY, Feb. 8, 1999, available in LEXIS, Asia Intelligence Wire.

¹³³ Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156 (1989).

¹³⁴ Smith, *supra* note 77, at 510.

B. *Functions*

According to the current Organic Law of People's Courts of the PRC, lay assessors are afforded equal rights with the judges in a court.¹³⁵ Lay assessors can examine documents, question parties and witnesses during trial, and determine facts and evidence. The assessors also collaborate with the professional judge regarding the determination of final judgment and sentence. Thus, the law considers lay assessors to be on equal footing with the judges once they are selected.

The equal rights of lay assessors and judges reflect an effort to bring community participation to a high level in the formal adjudicative process. Two conflicting historical events, however, may influence the role lay assessors can ultimately play in the administration of justice. Under the hierarchical social order of Imperial China, justice is sought through elite authority without any participation by the general public. On the other hand, the disastrous Culture Revolution in this century contemplated absolute popular administration of justice with no formal legal boundaries.¹³⁶ Though these historical extremes are not likely to re-appear, China's modern legal reforms will benefit from acknowledging all historical possibilities.

The theoretical non-discrimination between lay assessors and judges is beneficial to the current legal system in two important ways. First, the avoidance of the fact and law dichotomy eliminates the time-consuming and complex procedural rules used in the United States. Second, the empowering of equal judicial rights in lay assessors can theoretically achieve the fullest public participation in the administration of justice. Thus, lay assessors, chosen from either a random public pool or a professional pool, can determine issues of fact as well as law, and judgment as well as sentencing, along with professional judges.¹³⁷ Although collegiate

¹³⁵ Organic Law of the People's Courts, *supra* note 8, art. 38.

¹³⁶ See LO, *supra* note 5, at 12 (commenting on Deng Xiaoping's leadership for formal justice compared to Mao Zedong's popular justice theory during the Culture Revolution).

¹³⁷ Like America in its early days, China has not been fully equipped with judges who have strong scholastic, legal backgrounds. In colonial America, there were few law-trained judges and few established law books. See Alschuler & Deiss, *supra* note 48, at 905 (documenting that the Vermont Supreme Court had its first lawyer justice in 1787, the Superior Court of New Hampshire in 1784 had one justice with any legal training among a clergyman and a physician, the highest court of Rhode Island had a blacksmith as a justice from 1814 to 1818, and the court's chief justice was a farmer from 1819 to 1826). As a result, juries seemed to be able to decide issues of both fact and law. *Id.* at 903-04. Juries might have decided both factual and legal issues because they did not know much less about the law than the judges. *Id.* Juries might also have had no other choice if multiple sitting judges offered conflicting opinions of the law. *Id.* at 905. When judges become members of a learned profession, the law is well-established by the legislatures and well-documented, and the role of the jury in deciding legal matters is reduced to diminishment. See *id.* at 917 (discussing other reasons for juries' diminishing role in deciding matters of law).

deliberation may allow judges to exert more control over lay assessors,¹³⁸ a democratic process of deliberation can be achieved by using a proper number of lay assessors and educating them about their legal rights.

To ensure free participation by lay assessors in the judicial process, the assessors should be granted certain privileges in addition to their obligations to be truthful to the law and facts. China could borrow the English principle of "noncoercion of jurors," which prohibits judges from punishing or threatening to punish jurors for their verdicts.¹³⁹ Furthermore, the court should grant assessors immunity for what they say or decide.¹⁴⁰ Since most cases are heard in public¹⁴¹ and assessors are allowed to question parties and witnesses, the court could establish provisions to protect the identities of assessors and the deliberation process. The success of assessor functions also depends upon how well the execution of those functions is protected.

New regulations for the assessor system should include provisions to ensure the democratic selection and active function of the lay assessors. Since assessor regulation is part of China's sweeping legal reform, the new rules will work if they are compatible to the Chinese legal system as a whole. In addition, the assessor system may breathe more life and justice into the adjudicative process in China.

In China, the president, vice-president, and judicial officers of each court are civil servants for the government. Traditionally, legal qualifications are not a formal requirement for the judicial officers. CHIU ET AL., *supra* note 12, at 75. However, the professional level of Chinese judges is increasing as the government sets up numerous training programs and encourages further education among judges. *See id.* (describing the training programs for Chinese judges). Thus, one may wonder whether the lay assessor's role will change in the future when the law in China becomes complicated and stuffed with precedents that only legal scholars can understand, similar to that which happened to juries in colonial America.

¹³⁸ *See* Langbein, *supra* note 103, at 199 (stating that professional judges in Germany often make arguments to lay judges based on their role as legal experts).

¹³⁹ The principle of noncoercion of jurors was established in England in 1671 by Chief Justice Vaughan in *Bushell's Case*. Alschuler & Deiss, *supra* note 48, at 912.

¹⁴⁰ *See Awareness of Laws, Legal Education Vital to System*, CHINA DAILY, Dec. 4, 1998, at 2, available in LEXIS, Asia Intelligence Wire (reporting Beijing University professor Chen Ruihua's suggestion of immunity for the lay assessors).

¹⁴¹ PRC Constitution, *supra* note 29, art. 125. Criminal and civil cases involving state secrets or the private affairs of individuals are not heard in public, nor are criminal cases involving minor defendants who are between the ages of 14 and 18. Crim. Pro. Law, *supra* note 39, art. 111; Civ. Pro. Law, *supra* note 40, art. 103. A divorce case may not be heard in public upon a party's request. Civ. Pro. Law, *supra* note 40, art. 103. Since December 1998, the general public can attend any court in Beijing with valid ID cards except cases involving privacy, minors or state secrets. *See Judicial Reform, supra* note 6.

VI. CONCLUSION

“A mature legal system must blend law and discretion, rights and care, and the professional and popular administration of justice.”¹⁴² Juries and lay assessors are the judicial organs that sustain this mature legal structure.

China has not vigorously practiced the assessor system in the past, yet it is now proposing new measures to achieve public participation in the administration of law. Throughout its legal reform, China has the benefit of reviewing the advantages and disadvantages of jury or assessor systems in other nations. By combining the advantages of the American jury and the civil law countries' lay judge systems, China may establish an assessor structure that allows people from all segments of society to serve on a single case, while educated lay professionals serve the courts for a fixed term. Enforcing the equal power between lay assessors and professional judges will theoretically ensure the fullest participation by the lay assessors in the adjudicative process. Finally, the protection of assessor functions is crucial for their free execution. As China develops a more mature legal system, the use of lay assessors will benefit its social modernization as a whole. Although a Chinese citizen may still wish King Shuen flee and stay with his father who committed a crime, this citizen would certainly not acquit Shuen's father as he or she executes a judicial duty in court.

¹⁴² Alschuler & Deiss, *supra* note 48, at 921.