

Allocation of Criminal Adjudicative Power Between Judges and Assessors in China: A Legal Dogmatics Perspective

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Abstract

The reform of the assessor system constitutes a crucial component of the overall reform of China's criminal trial system. The model for allocating adjudicative power between professional judges and assessors in criminal cases directly impacts the effectiveness of this reform. Article 20 of the People's Assessors Law imposes on the presiding judge the obligation to provide instruction and prompting to assessors. However, this provision still exhibits several shortcomings, which may lead to an imbalance and deviation in the allocation of criminal adjudicative power, as well as confusion in defining the relationship between judges and assessors. A potentially viable path for reform involves adopting a restrictive interpretation of this provision at the judicial level, while redefining the "judge-assessor" relationship; at the legislative level, it would be necessary to clarify the legal effect of the "judicial instruction clause" and establish corresponding remedial procedures.

Keywords

assessors; reform of China's criminal trial system; Criminal Adjudicative Power

1 Introduction

The people's assessors system, as an institutional embodiment of incorporating people's democracy into the judiciary, plays a significant role in advancing judicial democracy, promoting judicial justice, and enhancing judicial credibility. However, there is a prevailing consensus in academia that the intended utility of the people's assessors system has not been fully realized. The role of people's assessors in the processes of fact-finding or application of law remains relatively limited, with prominent issues such as their "passive participation in hearings," "insufficient deliberation in collegiate panels," and "failure to reach a final decision" in discussions. [1]

To address this issue, Article 20 of the Law of the People's Republic of China on People's Assessors (hereinafter referred to as the "People's Assessors Law"), also known as the "judicial instruction clause," stipulates the presiding judge's obligation to guide and prompt the people's assessors: "The presiding judge shall perform the obligation of guidance or prompt related to the trial of cases, but he or she may not obstruct people's assessors' independent judgment of cases. In the deliberation of a case by a collegial panel, the presiding judge shall



make necessary interpretations and explanations to people's assessors on the fact-finding, rules of evidence, legal provisions and other matters, and issues to which attention should be paid." This clause aims, to a certain extent, to compensate for the obstacles to participation arising from the people's assessors' lack of legal knowledge, thereby enabling them to substantively engage in criminal trials, actively express their opinions on fact-finding and application of law in cases, exercise their voting rights substantively, and participate in the deliberations of the collegial panel.

However, the provisions of the "judicial instruction clause" are rather general, and its corresponding supporting measures are still lacking. If improperly applied, it may negatively impact the reasonable distribution of criminal adjudicative power, leading to a series of judicial issues. In countries or regions with more advanced systems of judicial instruction, "it is not uncommon for judgments to be overturned by appellate courts due to improper judicial instruction to the assessors, which may affect a fair verdict." [2]

Therefore, it is necessary to conduct an in-depth analysis of the potential impact of the "judicial instruction clause" on the distribution of criminal adjudicative power, and to propose possible improvements for its institutional shortcomings. The goal is to promote the substantive participation of people's assessors in trials and, as much as possible, realize the ideal utility and institutional expectations of the people's assessors system.

2 An Analysis of Judicial Power and Its Allocation Models in the Context of the Criminal Court Trial

Criminal trial constitutes one of the stages in criminal procedure. It encompasses pre-trial procedures (such as pretrial conferences), trial proceedings (such as court investigation, court debate, the defendant's final statement, and pronouncement of judgment), as well as the collegial panel deliberation process after the court hearing (including fact-finding and application of law). Although fact-finding and application of law are among the most critical components of the criminal trial process, they occur only during parts of the trial proceedings and the collegial panel deliberation. They do not fully encompass the entirety of the criminal trial, and they pertain solely to the resolution of substantive issues of the case, not including procedural powers exercised during the adjudicative process. Therefore, it is improper to equate the adjudicative power over fact-finding and the adjudicative power over application of law with the entire connotation of criminal adjudicative power. The conceptual scope of criminal adjudicative power should encompass the entire criminal trial procedure and should accord equal importance to both substantive and procedural aspects. Consequently, the author posits that criminal adjudicative power should be defined as follows: during the criminal trial process, the substantive power vested in judicial officers to adjudicate matters such as fact-finding and application of law in accordance with the law for the purpose of ascertaining the truth of a case, along with the procedural powers necessary to legally effectuate such adjudication.

2.1 The Allocation Model of Criminal Judicial Power in the United States

The jury system is regarded as one of the three pillars underpinning the traditional American evidence law

system and has laid a solid foundation for the traditional Anglo-American fact-finding model. [3] Criminal trials in the United States adopt the jury system, utilizing trial by jury. American juries possess the power of fact-finding entirely independent of judges, supported by institutional safeguards designed to prevent improper judicial interference in the jury's fact-finding process. These safeguards include, for example, restrictions on the form of judicial instructions and the conferral of the power of "jury nullification" upon the jury. [4] As articulated by the U.S. Supreme Court, the right to a trial by jury entitles the defendant to a safeguard "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." [5]

However, professional judges can influence convictions through rulings on the admissibility of evidence and by issuing judicial instructions to the jury. The power of sentencing, in principle, resides with professional judges, except in some federal states where juries retain sentencing authority in felony cases. [6]

2.2 The Allocation Model of Criminal Judicial Power in Germany

Germany's jury system was significantly influenced by the French jury model. However, during the Weimar Republic era, the system faced considerable criticism due to the evident trend of "elitism" and "stratification" in the selection mechanism for jurors. [7] Following reforms introduced by the "Emminger Decree," German criminal procedure incorporated both the jury system and the lay judge system (Schöffengericht) as modes of citizen participation. The lay judge system gradually gained prominence, and with the enactment of the Unification Restoration Act in 1950, the jury system in Germany was essentially abolished. [8]

Modern Germany, as a representative of the civil law tradition, now adopts the lay judge system. Section 30(1) of the German Courts Constitution Act (Gerichtsverfassungsgesetz) stipulates: "(1) Unless otherwise provided by law, the lay judges shall exercise the office of judge in full during the main hearing and with the same voting rights as the career judges." In other words, all functions of criminal adjudicative power are exercised jointly by judges and lay judges. Scholars have summarized this model of distributing criminal adjudicative power as the "sharing model." [9]

2.3 The Allocation Model of Criminal Judicial Power in South Korea

The jury system was introduced in South Korea in 2008. [10] However, South Korea's jury system exhibits unique characteristics distinct from jury systems in other jurisdictions. Korean juries not only deliberate in secret on the issue of conviction but also participate in sentencing deliberations alongside judges, with each juror expressing an individual opinion on sentencing—rather than determining the sentence through a vote. This design stems from the recognition that sentencing involves a high degree of technicality, requiring guidance from the presiding judge. Furthermore, as public distrust in the criminal justice system in South Korea often centers on sentencing issues, citizen participation in sentencing deliberations is considered necessary. [11] Another major feature of the South Korean jury system is that the jury's verdict is merely advisory and lacks legally binding force, which differs from jury systems in both civil law and common law traditions. Scholars have categorized this model of distributing criminal adjudicative power as the "advisory model," meaning that jurors may offer opinions on how the case should be decided, "but their opinions are for the judge's reference only, and the final decision rests entirely with the judge."



Simultaneously, South Korean jurors also receive guidance from professional judges on understanding the basic principles of criminal trials, legal concepts, and conducting sentencing deliberations. Moreover, "a majority of jurors find the judge's instructions to the jury helpful." [12]

2.4 The Allocation Model of Criminal Judicial Power in China

At the level of substantive criminal adjudicative power, China's people's assessors system employs issues of fact and issues of law as the criteria for distributing adjudicative authority. According to Articles 21 and 22 of the People's Assessors Law, in a three-judge collegial panel, people's assessors may independently express opinions on both fact-finding and application of law, enjoying adjudicative power equal to that of professional judges and participating jointly in the vote. In a seven-judge collegial panel, they may independently express opinions and vote on fact-finding, but they do not have the right to vote on issues regarding the application of law, being limited to expressing opinions only.

Regarding procedural criminal adjudicative power, based on the identical litigation status of people's assessors and judges as judicial officers, the distribution model under China's assessor system should theoretically also follow a "sharing model," where both professional judges and people's assessors possess certain procedural criminal adjudicative power. However, in substance, the procedural criminal adjudicative power vested in people's assessors is inadequately guaranteed, or it could even be said that they are not effectively endowed with such power. Procedural criminal adjudicative power refers to the procedural authority necessary for judicial officers to fulfill their adjudicative functions. In essence, it is a controlling power over the trial proceedings, including but not limited to declaring the opening of a court session, announcing the commencement and conclusion of court investigation and court debate stages, and adjourning the court. These procedural powers are almost exclusively exercised by professional judges, while the procedural criminal adjudicative power of people's assessors is largely absent.

Furthermore, the presiding judge's obligation to guide and prompt the people's assessors, as stipulated in Article 20 of the People's Assessors Law, can be distorted into a form of criminal adjudicative power under the influence of various factors such as case quality control requirements, the professional competence of the presiding judge, and pressures to enhance case handling efficiency. In order to ascertain the truth of a case, the presiding judge may, through guidance and prompts, seek to eliminate obstacles hindering the assessors' judgment on fact-finding and application of law. Once this distorted form of adjudicative power emerges, it becomes unidirectional and lacks constraints. It can imperceptibly influence the independent judgment of the people's assessors, thereby impairing the effectiveness of their participation in the trial.

3 The Dual Dilemma Induced by the "Judicial Instruction Clause" in the Context of the Criminal Court Trial

The judicial instruction system originated in the common law jury system. It refers to the instructions given by judges to the jury. The purpose of establishing this system is to compensate for the jurors' lack of legal knowledge, enabling them to perform their duties effectively, thereby safeguarding the fairness of

judicial outcomes. However, within the context of criminal trials in China, the provisions of the "judicial instruction clause" are excessively general and lack corresponding restraint and remedy mechanisms. Against the backdrop of an inherently imperfect people's assessors system, this may give rise to a series of judicial issues.

3.1 The Imbalance and Anomaly in the Allocation of Criminal Judicial Power

As previously discussed, the author categorizes criminal adjudicative power into substantive and procedural adjudicative power. At the level of substantive criminal adjudicative power, the "fact-finding vs. application of law" distinction standard adopted by China's people's assessors system is highly ambiguous, posing a risk of irregularity in the distribution of such power. In the common law jury system, "conviction" and "sentencing" are largely separate processes, with each encompassing both factual and legal issues. Therefore, during the conviction phase, judicial instructions to the jury are necessary to compensate for the jurors' lack of legal knowledge required for a just verdict. However, China's people's assessors system does not use "conviction" and "sentencing" as the criteria for dividing adjudicative power, but rather employs fact-finding and application of law directly as the dividing line. The inherent problem is that fact-finding and application of law are often intertwined and difficult to disentangle. [13]

Although the Supreme People's Court has adopted a relatively pragmatic stance towards distinguishing between issues of fact and issues of law, it remains undeniable that the boundary between the two is inherently vague. This inevitably introduces subjective judgment when judges, presiding over trials, delineate factual from legal issues. Consequently, the substantive criminal adjudicative power of people's assessors exists in an unstable state, with its scope of application perpetually vulnerable to encroachment by the adjudicative power of professional judges.

At the level of procedural criminal adjudicative power, as mentioned earlier, people's assessors possess almost no such power. They are not only subject to a trial process dominated and directed by judges, but also must "endure" the unilateral exercise of judicial instruction power when the "obligation to instruct" morphs into an "instruction power." The content and limits of this instruction power are defined solely by the judges themselves, leading to an imbalance in criminal adjudicative power between judges and assessors.

Once this procedural imbalance occurs, it grants judges greater control and a more expansive interpretative authority over the substantive distinction standard, thereby further blurring the line between fact-finding and application of law. In cases involving guilty pleas and acceptance of punishment, this cascading effect becomes more pronounced. It severely constricts the space for people's assessors to normally exercise their adjudicative power, ultimately weakening their adjudicative capacity. [14]

3.2 The Intensification of Role Positioning Deviation in the "Judge-Assessor" Relationship

The institutional dilemma of "serving as mere observers without substantive adjudication" faced by people's assessors under the assessor system stems significantly from a skewed positioning of the "judge-assessor" relationship. The "judicial instruction clause" precisely exacerbates this skew. Within the assessor



system, people's assessors, out of "deference" to judicial authority, often become mere "foils" to the judge. [15] Furthermore, "disciplined" by the gap in professional knowledge between the two, assessors frequently acquiesce to this subsidiary role, simply echoing the judge's opinions.[16] The "judicial instruction clause" serves as one of the most direct manifestations of this knowledge gap. When judges guide and prompt the assessors, they inevitably reinforce their own authority, leading assessors—consciously or unconsciously—to retreat into a self-perception as "assistants" or even "subordinates," rather than as "collaborators" or "checks and balances."As concluded by scholars through field research, this "principal-foil" or even "principal-subordinate" relational dynamic between judges and assessors directly undermines both the assessors' capacity for substantive participation and their initiative during deliberations. [17]

4 Approaches to Improving the Allocation of Criminal Judicial Power under the Background of the Substantiation of the Criminal Court Trial

The renowned German jurist Gustav Radbruch noted, "Law is the foundation of all rule of law. It cannot be subject to constant changes, as this would leave people without guidance and predictability." [18] The stability of law is "a fundamental component of the universal idea of law." By establishing legal stability, diverse interests and utilitarian principles can maintain necessary order and predictability in the pursuit of justice. The reform of the distribution model of criminal adjudicative power within the people's assessors system should likewise ensure the stability of law, prioritize a judicial perspective, utilize law as the primary analytical tool, refrain from hastily criticizing or advocating for legislative amendments, and avoid proposing legal revisions before the interpretive potential of existing law is exhausted. Therefore, this article will first discuss the optimization of the criminal adjudicative power distribution model from a judicial perspective, followed by an analysis of legislative aspects. It will point out the current legislative shortcomings in the distribution model and propose corresponding improvement measures.

4.1 A Judicial Perspective: Restrictive Interpretation and Conceptual Correction

4.1.1 A Restrictive Interpretation of the "Judicial Instruction Clause"

Given the excessively general formulation of the "judicial instruction clause," applying a restrictive interpretation to it constitutes the primary and utmost effort required at the judicial level. It is also key to preventing the "judicial instruction obligation" from being distorted into a "judicial instruction power."

First, a strict restrictive interpretation should be applied to the conditions for invoking the "judicial instruction clause." Whether in a three-judge or a seven-judge collegial panel, people's assessors possess the independent right to express opinions and vote on fact-finding. The adjudicative power over fact-finding represents their core participatory function. The proviso in the latter part of Paragraph 1, Article 20 of the People's Assessors Law—"but he or she may not obstruct people's assessors' independent judgment of cases"—implies that the judge's instruction obligation should be confined to matters concerning the application of law. Consequently, the phrase "guidance or prompt related to the trial of cases" in the first part of Paragraph 1, Article 20 should be interpreted as "guidance or prompt related to the application of law required

for the trial." This interpretation aligns with the subsequent reference in Paragraph 2 to "the fact-finding, rules of evidence, legal provisions and other matters, and issues to which attention should be paid." Specifically, considering the inevitable overlap between issues of fact and issues of law, "guidance or prompt related to the application of law required for the trial" should be restrictively interpreted to encompass the following four categories:

(1) "Fundamental Legal Principles," such as providing guidance and explanation to assessors on basic legal principles like the "presumption of innocence" and the "principle of leniency for pleading guilty and accepting punishment";

(2) "Evidentiary Issues Related to Fact-Finding," such as offering guidance and prompts regarding the standard of proof, the existence of evidence admissibility/competence, and the methodology for evaluating corroboration;

(3) "Substantive Law Issues Related to Fact-Finding," i.e., substantive legal matters pertaining to criminal liability, such as the basic principles and general provisions of criminal law, and the criteria for distinguishing between different crimes;

(4) "Other Procedural Law Issues," such as the basic flow of court proceedings.

Second, regarding the occasion for applying the "judicial instruction clause," it should be strictly limited to the collegial panel deliberation. Article 20, Paragraph 1 of the People's Assessors Law stipulates that the judge "may not obstruct people's assessors' independent judgment of cases." Safeguarding the independent judgment of people's assessors necessitates protecting, as much as possible, the integrity, continuity, and independence of their judgment. As the investigation of facts and evidence takes place in court, and defense concerning conviction and sentencing is conducted in court, [19] the inner conviction autonomously formed by assessors must be derived directly from the court proceedings, not shaped through interference by the judge. This is also a key requirement for substantiating court trials.

4.1.2 Conceptual Correction: Repositioning the Dialectical Relationship Between Judges and Assessors

We posits that, in terms of legislative intent, the creation of the "judicial instruction clause" reflects a form of "legislative hesitation." Legislators aimed to introduce people's assessors into criminal trials to realize their political value in manifesting democracy and their judicial value in reflecting societal conditions and public sentiment in judgments. Simultaneously, legislators were concerned that assessors, as "laypersons" with insufficient legal knowledge, might adversely affect the fair adjudication of cases. Therefore, they envisioned the "judicial instruction system" as a means for judges to compensate for this knowledge gap. This "legislative hesitation" renders the positioning of assessors relative to judges contradictory, oscillating between "collaborators" and "subordinates." To fully realize the intended institutional utility of people's assessors, it is necessary to dialectically clarify the relationship between judges and assessors.

First, the "judge-assessor" relationship is one of collaborators. People's assessors can bring general common sense, prevailing sentiments, and principles of reasonableness, as well as public opinion, into the criminal adjudication process. [20] This not only strengthens judicial credibility but also "introduces an addi-



tional method for reaching conclusions," which is conducive to the fair adjudication of cases. Concurrently, the method for selecting people's assessors should be appropriately reformed. For cases requiring specific expertise, experts in the relevant fields could be selected to leverage their professional strengths. This approach can not only promote fair case adjudication but also help mitigate the "self-disciplining" mindset assessors may develop due to the gap in legal professionalism compared to career judges. It encourages their substantive participation and active engagement in collegial panel deliberations.

Second, the functional positioning of the "judge-assessor" relationship as one of mutual checks and balances should be emphasized. On one hand, career judges possess the power to direct court proceedings and, through the "judicial instruction clause," can guide and supervise assessors, striving to eliminate irrational factors and steer them towards fair judgments. On the other hand, people's assessors can also supervise and check career judges. Japanese scholar Taguchi Morikazu argued that "the challenge of the lay judge system is actually not the 'ability of the lay judges,' but the 'ability of the judges.'"^[21] The fact-finding capability of assessors essentially reflects that of the judge. From this perspective, assessors can play a supervisory role over judges. During deliberations, based on their duty to explain, judges externalize their inner conviction process or conclusions to the assessors. The assessors can then evaluate these against general reasonableness and affirm or question them accordingly. If supported by corresponding institutional mechanisms that enable assessors to actively exercise their rights to express opinions and vote, this relationship of checks and balances would become more pronounced.

4.2 A Legislative Perspective: Clarifying Legal Effect and Constructing Remedial Measures

4.2.1 Clarifying the Legal Effect of "Judicial Instructions"

When the content of the instruction given by the judge falls within the category of mandatory legal norms—such as statutory rules concerning the qualification of evidence, the allocation of the burden of proof, or conditions for evidence corroboration—then such instruction inherently possesses mandatory force. All parties involved in the litigation must strictly comply with it.

In contrast, if the content of the judicial instruction merely constitutes the judge's personal opinion formed based on trial experience—such as their assessment of the potential risk of perjury during the trial, or insights gained from long-term practice regarding the examination and evaluation of specific types of evidence—or if the instruction originates from discretionary provisions within legal texts, such as suggestive or guiding clauses regarding evidence examination provided in judicial interpretations, then the instruction is of a discretionary nature.

In short, the hierarchical authority of a judicial instruction depends on the legally prescribed force inherent to the content it conveys. For instructions of a discretionary nature, although assessors should give them due consideration in performing their duties and carefully weigh the reasonable factors contained therein, they are not required to adhere to them rigidly or mechanically. Furthermore, from the perspective of rational institutional design in criminal procedure, it is not appropriate to create additional external coercive mechanisms to compel assessors to dogmatically follow such discretionary instructions.

4.2.2 Constructing Remedial Measures for "Judicial Instructions"

Improper judicial instructions urgently necessitate procedural remedies. [22] This is a significant issue highlighted in practice and represents a key aspect of reforming the balance of criminal adjudicative power between judges and assessors. (Remedial procedures can safeguard the substantive participation and deliberation of assessors and should therefore be regarded as a component of their procedural criminal adjudicative power.) Furthermore, it serves as a proactive measure to protect the procedural and substantive rights and interests of both the prosecution and the defense, particularly the defense.

Firstly, the prosecution and the defense should be granted the right to be informed about judicial instructions and the right to object to them. Secondly, defense counsel may submit proposals regarding relevant legal instructions before trial. These proposals, upon review by the presiding judge, can be provided to the assessors, thereby enhancing defense counsel's supervisory role. Thirdly, assessors should be granted the right to request legal instructions and the right to object to them. In situations where a judge is negligent in providing instructions or provides excessive instructions during proceedings, assessors may request the presiding judge to provide clarification or a reasonable explanation. Simultaneously, if an erroneous instruction is discovered by assessors only during the deliberation stage, they may apply for re-deliberation. To ensure efficiency and maintain the solemnity of deliberations, such applications should be limited to one instance. Fourthly, a mechanism for procedural review of the content of judicial instructions should be established within the criminal remedy framework.

5 Conclusion

The "judicial instruction clause" is designed to facilitate the substantive participation of people's assessors in court proceedings. However, its current broad formulation and the absence of supporting measures pose significant challenges to the distribution of criminal adjudicative power and the "judge-assessor" relationship. As analyzed in this article, at the judicial level, applying a restrictive interpretation to this clause and clarifying its conditions and occasions for application can effectively prevent the distortion of power, thereby safeguarding the core adjudicative functions and independent judgment of the assessors. Simultaneously, redefining the relationship between judges and assessors as one of collaboration and mutual checks is conducive to realizing the multifaceted value of the people's assessors system. At the legislative level, clarifying the legal effect of judicial instructions and constructing remedial measures—including granting corresponding rights to both the prosecution and the defense, as well as to the assessors—is crucial for balancing criminal adjudicative power and protecting the interests of all parties.

However, the implementation of these proposed improvements requires continuous exploration and refinement in judicial practice. Judicial authorities should actively promote the formulation of relevant judicial interpretations and case-handling guidelines to ensure that theoretical advancements can be effectively implemented. Concurrently, the academic legal community should maintain its focus and conduct in-depth research in this field, providing intellectual support for the further refinement of the system. Only through such concerted efforts can the institutional expectations of Article 20 of the People's Assessors Law be truly



realized. This will enable the people's assessors system to play a greater role in criminal trials, drive more significant progress in the reform to substantiate court hearings, and achieve comprehensive enhancement of judicial democracy, fairness, and credibility, thereby infusing new vitality into the development of China's criminal justice system.

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