

Of Judge Quota and Judicial Autonomy: An Enduring Professionalization Project in China

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Abstract

This article presents the findings of original research on “judge quota” reform. The reform’s agenda was essentially aimed at professionalization: by edging out a given percentage of judges, only the better qualified judges would be re-appointed to create a more professionalized judiciary. A key component of the reform was to reduce the level and the intensity of both political and bureaucratic control over judges in adjudication and to decentralize judicial power to the rank-and-file judges, restoring individualized judging while enhancing judicial accountability. This article critically examines the potential and limits of the judge quota reform in the context of incremental legal reform in a party-state.

Keywords: judicial reform; quota judge; legality; judicial autonomy; professionalism; China

On 3 July 2017, 367 judges of the Chinese Supreme People’s Court (SPC) took the judicial oath and were reconfirmed as “quota judges” (*yuan’e faguan* 员额法官).¹ That ceremony marked the end of a process of what is officially referred to as judge quota reform in the Chinese judiciary. The quota reform (*yuan’ezhi gaige* 员额制改革) was implemented between 2014 and 2017 and aimed to downsize the Chinese judiciary according to a formula determined by the Chinese Communist Party (CCP). The reform required all judges in China, regardless of seniority and rank, to re-apply for judgeship; only a percentage of them would requalify after a series of assessments to be re-appointed as judges. Literally, the party-state suspended the entire judiciary and then made new appointments according to a set of provincial criteria. Following the reform, 120,138 judges of the previously 211,990-strong judiciary were reconfirmed, effectively disqualifying about 90,000 judges in a short space of time.²

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1 Wang, Yijun 2017.

2 Zhou 2018.

The SPC had planned for quota reform since 1998 when it launched its first five-year judicial reforms. The ambition is to select the better-qualified judges from among the existing large pool of judges, and to give them the resources, power and autonomy to render justice. A perceived structural problem of adjudication in China concerned the fact that judges who actually tried cases were not allowed to make decisions. Instead, as a matter of routine, judges only prepared draft decisions for their respective leaders in the judicial bureaucracy to vet and endorse. That administrative capture of judicial power was seen as a fundamental structural defect that constrained the courts and judges from realizing their full potential. A guiding principle of quota reform is to select better-qualified judges and let the judges judge while holding them accountable for their decisions. The aim is for a court to make binding, collective decisions in far fewer categories of cases, and for judges to have significantly more space to make decisions on their own, leading to the rise of individualized judging.

The recent round of reform initiated an unprecedented degree of structural change, with the clear intention to enhance the decision-making powers of individual judges, the financial autonomy and capacity of the courts, judicial transparency, rule-based decision-making and, above all, the trial-centric judicial process – all hallmarks of the type of judiciary not strongly associated with an authoritarian state. This raises the obvious conceptual question of how to explain the implementation of such progressive judicial reforms in a country that is allegedly becoming more authoritarian politically.

Relying on official documents regarding quota reform, and interviews and communication with judges in Guangdong and Henan, this article examines the internal contradictions of the reform as it attempts to disentangle judging from pre-existing bureaucratic controls while at the same time embracing greater political control.³ The remainder of the article is arranged as follows. First, it situates judge quota reform within the broader literature on authoritarian legality and considers the nuances of judicial reform in such a political setting. It then explains the rationale and context of judge quota reform before continuing by exploring specific questions relating to quota reform. The final section concludes.

The Paradox of Judicial Reform

Similar to other authoritarian states, the People's Republic of China (PRC) has promoted legality in its governance, institutionalized a legal system and professionalized judges and lawyers.⁴ Indeed, aside from a few glaring gaps, the Party has persistently pursued a judicial reform agenda since the late 1970s that aims to enhance the effectiveness and credibility of the court in the name of judicial professionalism. A subscriber to law and development theories, the

3 The authors interviewed 27 judges in Guangdong province, 8 judges in Henan province and 10 judges from other parts of China.

4 Moustafa 2014; Solomon 2007.

Party recognizes the instrumental value of law and makes a partial yet serious commitment to rule-based governance, with the courts playing a meaningful role in the process.⁵ The fact that judicial reform has fluctuated over the time, and the legality that the Party promotes has been a sham or abusive in some areas and premature in others, does not necessarily cancel out its validity in certain areas.⁶

The SPC has to address three key concerns and tensions in setting out a reform agenda. First, it has to address political concerns and the tension between professional autonomy and the overarching political system. Reassessing China's long legal reform, some scholars continue to cast significant doubt on whether the party-state is able to allow a legal system that is rule-based and court-centric, with professional judges presiding over the commanding heights.⁷ Supporters of judicial reform in the early stage were increasingly of the view that the Chinese reform had exhausted its energy and resources and was no longer possible under the political system that had made a decisive turn against the rule-of-law type of reforms a decade earlier.⁸

However, a key difference that could have been made clearer in the literature is that judicial reform is principally limited to improving professionalism, which is defined in terms of the quality of judges, the level of institutionalization and the degree of rule-based adjudication, rather than judicial independence as defined in terms of political neutrality and institutional autonomy. Balancing the imperative of absolute Party leadership with a high degree of professionalism is a sensitive and delicate task that needs to be managed with great caution. Key to the possibility of judicial reform in a party-state such as China is the decoupling of the pursuit of professionalism from the pursuit of judicial independence.⁹

The court is torn between these two apparently competing imperatives. Zhou Qiang 周强, the chief justice of the SPC during the high point of the quota reform, joined the chorus denouncing judicial independence and the separation of powers as alien concepts that had no place in China. The SPC, while professionalizing the courts, must address concerns that any judiciary reform might serve as a Trojan Horse.¹⁰ Indeed, the SPC went to great lengths to insist that the quota reform was led and monitored by the Party, and that its success depended on political support. As the court reminded itself, the quota reform was likely to meet resistance from vested interest groups and had to rely on political support to clear the path.¹¹ The Party, while keenly aware of the risk that professionalism

5 Peerenboom 2002; Fu 2011; Gallagher 2017.

6 Zhang, Taisu, and Ginsburg 2019; Lin and Ginsburg 2015; Chang and Law 2018.

7 Clarke 2020; He, Xin 2020.

8 Minzner 2018.

9 See Ang and Wang 2019 for an analysis of the decoupling strategies and possibilities of following the Singaporean example.

10 “Jianjue dizhi xifang sifa duli deng cuowu sichao yingxiang” (Stand firm against misleading Western thoughts such as judicial independence). *Chinacourt.org*, 15 January 2017, <https://www.chinacourt.org/article/detail/2017/01/id/2512852.shtml>. Accessed 10 February 2021.

11 Wang, Yueduan 2021.

may nurture an expertise-based identity and fidelity which is in essence at odds with political loyalty, is supportive of and even demands enhanced professionalism.¹² The political limits of judicial reform are well accepted and taken as read, as illustrated by a prevailing sense of doubt, uncertainty and suspicion within the judiciary about the motivation and feasibility of continuous reform.¹³ Nevertheless, the SPC, with the blessing of the Party, has pursued a professionalization project without imagining judicial independence.

Second, the SPC needs to address efficiency concerns as well as the tension between a rule-based, adjudication-centred professional model that reform drives and a political model that relies on the pre-emption of disputes and their settlement through mediation and other bureaucratic means.¹⁴ China narrowed – and in many aspects even turned against – the professionalization project after 2003 and resorted to what is referred to as grant mediation. This was in part owing to the perceived failure of judicial reforms to bring surging social conflicts to effective and equitable resolution, leading to mass extra-judicial petitions that risked destabilizing social order.¹⁵ The SPC had to convince the Party and the public that rule-based, professionalized judicial dispute resolution offered a more efficient and better system of justice than its mass line alternative which was anchored in the Party's revolutionary tradition.¹⁶

The wave of criticism voiced by judges and scholars against the judge quota reform mostly related to the promises regarding improved efficiency and effectiveness despite fewer judges for more cases.¹⁷ It was pointed out that the quota reduction and proposed individualized judging were too drastic for a range of reasons: rising numbers of cases demanded more judges for their resolution; allowing judges more autonomy in decision making without prior vetting would adversely affect the quality of their decisions; and too much power in the hands of individual judges would open the door to corrupt practices. While centralized rule making, standardized implementation and faithful compliance, which are central to the new round of judicial reform, are all consistent with the Party's overarching governance strategy, it still remained to be seen if the reform could deliver effective governance and not repeat the failures of the court reform a decade earlier.¹⁸

Third, the SPC needs to address the issue of interests and the tension between multiple stakeholders whose interests would be redistributed by the reform. The reform was consequential and produced its winners and losers. Tensions multiplied between the local government and higher courts, between lower courts and higher courts, between political and administrative officials and professional

12 Yu 2011.

13 Interview with judge, Guangzhou, 23 October 2015, GD_BPC_03.

14 Minzner 2011; Fu 2014.

15 Biddulph 2015; Su and He 2010. For a different view, see Chen, H.Y. Albert 2016.

16 Minzner 2011; 2018.

17 Chen, Ruihua 2018; Zhang, Jian, and Jiang 2016.

18 Fu and Cullen 2012.

judges and, most importantly, between judges in management positions and those in frontline adjudication roles. The reform was set to redistribute judicial powers and resources, and, naturally, stakeholders were all prepared to explore the often open-ended reform process to maximize their interests. The quota reform was met with open as well as subtle resistance as it was implemented. To overcome this entrenched resistance, the SPC had to turn to the strong arm of the Party at the central level for support in implementing the reform.¹⁹ In doing so, it had to politicize the reform and reinforce central control to achieve the reform goals.

The Rationale of Quota Reform

The Party is openly suspicious of a separate judicial identity owing to the fear of a professional loyalty emerging outside of Party control. The Leninist system is predicated on the notion that the court is just one cog in the wheels of the larger political machine. Within that political-legal complex, judges are not distinct from prosecutors, police officers or prison wardens and are commonly referred to as cadre-police (*ganjing* 干警), a generic term that the Party uses to categorize all personnel within the political-legal establishment (*zhengfabian* 政法编, PLE hereafter), who are appointed and monitored by, and accountable to, the Party.²⁰

The size of the PLE, of which courts are an integral part, is determined and adjusted by the State Commission's Office of Public Sector Reform (*zhongyang jigou bianzhi weiyuanhui bangongshi* 中央机构编制委员会办公室, SCOPSR hereafter). The PLE has both judicial and non-judicial personnel and its size, once established, cannot be altered by a local authority, although the local authority may increase the size of the PLE by tweaking the posts outside of the PLE in accordance with local needs and pay levels. In Guangzhou Immediate People's Court, for example, the size of the PLE after quota reform is 534, including 280 judges, and the overall size of the court is 908.²¹

When estimating the number of judges at different levels of court prior to the reform,²² the Chinese judiciary calculated the figures for three different judicial types as follows, and the percentage of each sector was pertinent to the issue of quota reform: 1) the overall judicial size, as established by the SCOPSR and supplemented by the local government. This included judges, political and managerial staff and supporting personnel; 2) the number of judges, i.e. those with proper judicial qualifications and, importantly, the percentage of judges in the overall established judicial size; and 3) the number of so-called "frontline judges" (*yixian faguan* 一线法官), i.e. judges who actually adjudicate cases as judges, and

19 Wang, Yueduan 2020.

20 Finder 2021b.

21 Interview with judge, Guangzhou, 28 September 2017, GD_BPC_04.

22 There are four levels of courts in the judicial hierarchy: the Supreme People's Court (SPC) at the apex; high people's court (HPC) at the second tier; the intermediary people's court (IPC) in cities at the third tier; and the basic people's court (BPC) at the bottom.

their percentage among all judges, exclusive of those judges holding management positions in non-judicial posts.

Those numbers and percentages were at the heart of the quota judge reforms. Nationally, in 2002, there were approximately 210,000 judges, 150,000 of whom were frontliners.²³ The number and percentage of frontline judges had remained stable (211,990 judges in 2014) prior to the reforms. The percentage of frontline judges varied according to the level of court. The higher the court, the smaller the percentage of judges, reflecting a shift from the dispute resolution function at the lower level to policy functions at the higher level. Approximately, the proportion of judges was between 65 per cent and 70 per cent at the basic people's court (BPC), about 45 per cent at the intermediate people's court (IPC), and about 35 per cent at higher people's court (HPC).²⁴ Local courts showed a similar pattern. Prior to the reform, the percentage of frontline judges among judges in three of Guangzhou's BPCs was 50 per cent, 54 per cent, and 70 per cent.²⁵ A key problem that the quota reform attempted to address was the high percentage of judges not on the frontline and not performing any adjudication function. Judicial practices allowed judges to be rotated to non-judicial posts in the courts while retaining their judicial titles, and then to return to frontline judging after. A more serious problem, however, was that courts in the past used to hand out judgeships to administrative officials merely as rewards – a practice that the Standing Committee of the National People's Congress explicitly ruled against but which continued at the insistence of the SPC.²⁶

It is important to note that in China's judicial culture, adjudication is only the starting point in a judicial career. As a judge's judicial career progresses, he or she expects to be promoted away from that frontline position and the nitty-gritty work of judging. Judges who handle actual cases and face parties and their lawyers tend to be lower in rank and status. Judging is entry-level work linked to routine: it is repetitive and mechanical work, like doing the dirty laundry day in and day out, as one female judge interviewee vividly put it.²⁷ In that bureaucratic setting, judges tend to seek a career path that will eventually lead them to a management position or certain administrative offices that involve little judging but allow them to retain the title of judge.

There were three types of judges who did little or no judging. The first group involved judges in management positions, including presidents, vice-presidents and chief judges in professional chambers and their deputies. Following a centralized bureaucratic design, Chinese courts are hierarchical, and the hierarchy is rigid with multiple layers of "leaders" on top of each other. Nationwide, there were 15,100 court presidents and 50,036 chief judges in professional chambers

23 Xiao 2002.

24 Shen and He 2015.

25 Interview with judge, Guangzhou, 22 September 2017, GD_BPC_05; interview with judge's assistant, Guangzhou, 25 December 2017, GD_BPC_25.

26 Hou 2019.

27 Interview with judge, Guangzhou, 14 November 2017, GD_BPC_13.

who performed principally supervisory and managerial roles and had little or no adjudicative responsibilities.²⁸

Second, there were judges who had transferred from professional chambers to political and administrative departments within the courts. In Guangdong's courts, for example, prior to the quota reform, 150 judges worked on case management, an administrative role that involved tracking the progress of cases, and 294 judges worked in research units. In combination, those two posts alone took up 4.3 per cent of Guangdong judges.²⁹ A larger percentage of judges worked in other non-judicial posts.³⁰

Finally, there were judges whose sole responsibility was to execute judgments, reflecting a unique institutional design. Effectively, there were judges who served the function of court bailiffs in executing judgments. As of 2011, there were 1,912 enforcement judges (*zhixing faguan* 执行法官) in Guangdong (accounting for 18.3 per cent of the total number of judges in the province); 1,216 in Jiangsu (7.2 per cent); 3,107 in Shandong (15 per cent); 1,357 in Sichuan (14 per cent); 4,050 in Henan (31.1 per cent); and 742 in Jiangxi (7.8 per cent).³¹

The long-term objective of quota reform was to limit judgeship to judges whose principal job was to judge. The Central Political and Legal Committee (CPLC), the political arm in charge of the legal sector, promulgated its Document No. 53 (2014), entitled "Opinions on related issues of judicial system pilot reform," which set the well-known quota of 39 per cent, meaning that only a maximum of 39 per cent of the personnel in the Party's PLE in a province would be re-appointed as judges after quota reform. It is important to note that, within the unit of a province, the quota would not be uniformly set and applied in each court, and the respective provincial HPC was given the discretion to adjust the percentage of judges in different courts according to estimated case numbers, population within its jurisdiction, and other social and economic factors.³² In addition, the quota reform was an ongoing process. A city or province could begin with a lower than 39 per cent requalification rate in the first round of quota reform and requalify more judges in stages as the reform progressed.³³ At the same time, recruitment of new judges continued.

28 Guangdong HPC Research Team 2013.

29 Ibid.

30 In a BPC, the non-judicial departments include the general office (*bangongshi*), accounting office (*caiwushi*), secrecy protection office (*baomishi*), archives (*dang'anshi*), security department (*baosha*), court marshals (*fajingdui*), research office (*diao yanke*), library (*tushuguan*), estate office (*wuguanban*), transportation (*sijiban*), secrets room (*jinyaoshi*), print room (*dazishi*), judicial committee office (*siwei*), supervisors office (*jianchashi*), case registration tribunal (*li'anting*), inspectors office (*diao yanyuan bangongshi*), discipline inspection group (*jijianzu*), political affairs office (*zhenggongban*), trial supervision office (*shenjianting* / *shenguanban*), execution bureau (*zhixingju*) and secretary office (*mishuban*), among others.

31 Guangdong HPC Research Team 2013.

32 He, Fan 2014.

33 CPLC 2014.

Did the Reform Reduce the Size of the Judiciary?

With the endorsement of the CPLC, pilot provinces set different quotas in their respective jurisdictions in December 2014. This quota was adjustable according to the level of court and the number of cases in each province. The quota was as low as 33 per cent in Guizhou's BPC, where case intake was among the lowest,³⁴ and was as high as 65 per cent in Shenzhen's BPC, where case load was among the highest,³⁵ reflecting the social and economic differences of the two drastically different regions. At the very beginning of the quota reform, courts across the nation panicked, fearing that if the 39 per cent quota was rigidly imposed, a large number of judges would be made redundant.

There was a significant shake-up in the overall profile of the judiciary after the reform, with a large number of former judges ceasing to be judges. Where did those disqualified judges go? Among the 280 judges in the Guangzhou IPC, 54 judges were not re-admitted. Among the 238 judges who did not requalify in the BPCs, 61 joined the political/administrative departments.³⁶ No judge was formally downgraded to the rank of judicial assistant, but 58 of the disqualified judges continued to perform their duties as judges; 19 opted for early retirement, and the remainder left the judiciary. Among the 54 judges not re-admitted to Guangzhou's IPC, 37 were shifted to or remained in political and administrative departments, and 17 continued to perform judge duties without proper titles.³⁷

What was the impact of the quota reform, then? If one focuses on the number of frontline judges and their assistants, the result was largely neutral: the number of frontline judges remained more or less the same. Before the reform, the number of PLE personnel in Guangzhou's BPC was 2,205, including 691 frontline judges (excluding chief judges in professional chambers and their deputies).³⁸ After the reform, the total number in the PLE increased to 2,713, including 802 frontline judges (including chief judges and their deputies).³⁹ The number of frontline judges remained virtually the same. What has changed is an increase in the number of judicial assistants the reform promised.⁴⁰

The court was able to absorb and neutralize the impact of the reform during its implementation. As expected, a large number of judges opted out of the new system, especially those holding administrative positions. A key aspect of quota reform was to separate judges from administrators, forcing those judges holding political and administrative offices to make a choice. And their choices were

34 An and Jin 2015.

35 Shenzhen Municipal Committee of CCP 2014.

36 Interview with judge, Guangzhou, 28 September 2017, GD_BPC_04.

37 Ibid.

38 Ibid.

39 Ibid. Before the reform, chief judges in professional chambers and their deputies (*tingzhang*; *futingzhang*) were not frontline judges; after the reform, they became quota judges and were regarded as frontline judges.

40 In Guangzhou BPCs' PLE, there were 239 judges' assistants before the reform. After the reform, the number of judges' assistants increased to 459 including former judges who failed in quota selection. Interview with judge, Guangzhou, 28 September 2017, GD_BPC_04.

clear: the majority of them decided to stay in the administrative departments, while predictably few were willing to give up their status and ranking, especially those holding key positions. In that sense, the reform was successful in separating the judicial core from the political and administrative arm of the court, potentially leading to, in the long run, the formation of a separate judicial identity.

There were other incentives for judges to shift to administrative posts. Judges nearing retirement were persuaded to transfer to non-judicial departments. Early retirement was also encouraged. In Guangdong province, for example, the provincial political and legal committee allowed senior judges to retire earlier at a rank at the next higher level.⁴¹ In any event, the quota reform was more incremental than the official policies openly stated, and flexibility was maximized.

A larger challenge was the mass departure of middle-career judges for law firms or other private-sector employment. Able judges had already been leaving the judiciary for other careers and the quota reform was intended to halt that exodus.⁴² Ironically, by reducing the size of the judiciary and creating uncertainty among judges, the quota reform itself triggered another mini exodus – judges, fearful of being left out and worried about their future prospects in an uncertain environment, seized the opportunity to leave the judiciary. Quota reform coincided with a sudden and sharp increase in the court docket and was accompanied by increased rhetoric about judicial accountability, which in combination drove many young judges to abandon the courts.⁴³ Courts in different parts of the country scrambled to make internal rules to restrict or prohibit judges resigning.⁴⁴

A more significant challenge has been how to absorb the sizable group of judges who participated in the quota selection but failed and as a result were demoted to the rank of judicial assistant. The official policy stated that they could maintain their status and benefits for a five-year transitional period.⁴⁵ While the demotions created some short-term management difficulties, reports from the field revealed mixed reactions: some demoted judges found it hard to accept the loss of honour and salary increments;⁴⁶ others were reluctant to work for quota judges, especially younger and newly qualified quota judges.⁴⁷ But overall the level of hostility and resistance among judges who were not readmitted was subdued, either because they were senior in age and were near to retirement or, in the case of younger judges, they hoped to requalify in a future round following some tacit agreement from the management.⁴⁸

41 Interview with judge, Guangzhou, 21 December 2017, GD_BPC_24.

42 Hu 2015, 197.

43 See Finder 2021b for a survey of judicial discipline in China.

44 Interview with judge, Shenzhen, 9 March 2020, GD_BPC_21.

45 Jiang Wei's speech at the CPLC Judicial Pilot Reform Work Meeting, 21 October 2015. This transitional period gave judges maximum flexibility in making the choice. For example, in H district of Guangzhou, a deputy director at the political office did not apply in the main round of the selection. He changed his mind and applied for the second round but gave up before the examination took place. He finally made up his mind and applied in the third round and was re-admitted. Interview with judge, Guangzhou, 12 September 2018, GD_BPC_08.

46 Interview with judge, Guangzhou, 17 March 2016, GD_BPC_02.

47 Interview with judge, Zhengzhou, 17 December 2017, HN_HPC_23.

48 Interview with judge, Guangzhou, 12 September 2018, GD_BPC_08.

There was a transition or grace period during which some of the disqualified judges were allowed to adjudicate as *de facto* judges. Thus, some of the disqualified judges saw more continuation than change in their status and insisted on regarding themselves as judges and not judicial assistants. After all, they continued to perform the same duties they had been undertaking before the reform. As one BPC court judge in Henan explained, “I do not feel much difference from before or after the reform. Being a quota judge or not, judges who used to bury themselves in cases are still busy with cases, and those who were not involved in cases are now still not. Really, there is no difference at all.”⁴⁹ During the grace period, judges who were not re-appointed as quota judges continued to work on the “frontline” and served as members of adjudicative panels (*heyiting* 合议庭), sometimes under the title of acting adjudicators (*daili shenpan-yuan* 代理审判员).

This informal practice was soon challenged legally. In a Hunan court, a panel of judges, including one who had not been readmitted, heard a case and made a decision. The losing party appealed against the decision on the grounds that one of the judges on the adjudicative panel was not qualified following the quota reform and the decision was therefore null and void. The IPC of Hengyang allowed the appeal and remanded the case to the first instance court for retrial, holding that it was a significant procedural defect to allow a judge who had not requalified to adjudicate a case.⁵⁰ As the reform continued, the informal practice of allowing disqualified judges to continue to judge was gradually phased out. In a BPC in Henan, the transitional period was curtailed – in 2017, a disqualified judge could still hear a case on his or her own, in his or her own name, but this practice was finally brought to a halt in 2018.⁵¹ By 2020, only judges who were requalified could adjudicate cases in Guangzhou, although the informal practice still continues in some inland provinces.⁵²

One overlooked aspect of the reform is the creation of a prototype judicial path and a new hierarchy. Quota reform introduced a significant change to the widespread practice of promoting clerks to the court to a judgeship within the same court. This was the predominant method of judicial selection in China prior to the reform, whereby it was mostly up to the leaders of a court to decide who from within the pool of court clerks should be promoted to a judgeship. Further, the quota reform was a measure to remove the near monopolistic power over judicial appointments from the BPC and to centralize it in the hands of the IPC. Thus, whenever a judicial vacancy appears, eligible candidates can take the city-wide assessment and compete for that position. During the

49 Interview with judge, Xuchang, 26 November 2017, HN_BPC_19.

50 Interview with judge, Changsha, 20 December 2020, HN_HPC_36.

51 Interview with judge, Xuchang, 1 February 2021, HN_BPC_19.

52 Interview with judge, Luohe, 4 February 2021, HN_IPC_30. For a summary on cases where disqualified judges served on adjudicative panels, see “Chengxu bianle? Wei ru’e faguan shen’an shu chengxu weifa” (It is procedurally unlawful for a disqualified judge to hear a case). *Sohu.com*, 24 September 2019, https://www.sohu.com/a/343020413_120073184. Accessed 22 June 2021.

quota reform period, 197 clerks or assistants were appointed as judges at different BPCs under the new structure in Guangdong province.⁵³

The change is more significant and impactful in the higher courts. Before the reform, higher courts routinely, if not exclusively, appointed judges from within their own pool of judicial assistants or clerks. A court clerk at a HPC would become a justice of the HPC upon appointment. Quota reform, supplemented by other judicial policies, effectively put an end to that practice – judges in higher courts must be selected from judges in lower-level courts and all new judges must start their judicial career at a BPC. The PRC Judge Law (*faguanfa* 法官法) was revised in 2019 to institutionalize this practice. In combination, the reform has the potential to diminish, if not to end, the fragmentation in judicial appointments whereby every court, regardless of level, effectively internally appointed its own judges who then literally served in the same court for their entire judicial career.

How Did Judges Requalify?

With some exemptions for senior leaders of a court,⁵⁴ there was a lengthy selection process that judges had to go through before their requalification. The vast majority of judges were required to go through what many regarded as a demeaning process, as judges marched to the examination halls, perhaps ironically for the many in judge gowns. In addition, they had to undergo oral examinations conducted by senior judges, law professors and government officials and pass closed-door vetting. Beyond internal recommendation by the court and political vetting by the Party committees, a new judicial selection committee called the Committee for the Selection of Judges and Procurators (*faguan jianchaguan linxuan weiyuanhui* 法官检察官遴选委员会, JPSC hereafter) was formed to endorse recommendations made by the court.

The requalification examinations were not designed to screen out unqualified judges. In fact, the questions were drafted in such a way that they were hard to fail. Judges were not asked to answer Bar exam types of questions – which up until then had been the main requirement for judges. Rather, they were tested on questions related either to criminal, civil or administrative trials.⁵⁵ In addition to legal questions, political questions invited judges to reflect on Xi Jinping's thoughts on how courts should serve the people.⁵⁶ The oral examinations were open-ended, asking such questions as “how do you cope with the challenge of

53 Qi 2017.

54 In some courts, only the president was exempted, but in others, the exemption list included vice-presidents as well. Interview with judge, Guangzhou, 23 January 2021, GD_BPC_01; interview with judge, Guangzhou, 2 February 2021, GD_HPC_31; interview with judge, Luohe, 23 January 2021, HN_IPC_22.

55 Liu, Qi and Zhao 2016.

56 Interview with judge, Guangzhou, 27 November 2017, GD_BPC_19.

quota reform?” and “What do you do to be a good judge against the backdrop of socialist rule of law?”⁵⁷ The oral examination, in its format and substance, was designed to be informal and casual.

Examinations were followed by a holistic performance evaluation by court leaders, with some participation from fellow judges. While the examinations were transparent and carefully prepared, with well-crafted rules and procedures on question-setting and marking, what really mattered was the overall performance evaluation, which was opaque and unaccountable and carried greater weight in the selection process.⁵⁸ In both Henan and Guangdong provinces, the written exam only accounted for 30 per cent of the final mark to allow for greater discretion of decision-makers in the process. All the evidence indicates that it was the Party group in a court that decided which judges were in and which were out.⁵⁹ For example, in one BPC, while every judge was allowed to vote for his or her choice of candidate, not every vote carried the same weight: a Party group member’s vote was worth nine points; a vote from a member in a mid-level leadership position was worth three points; and a vote from a frontline judge was worth only one point.⁶⁰ In the end, the Party group in a BPC recommended a shortlist of judges to the IPC, which considered the list and submitted a city-based list to the provincial HPC for the final decision.

Upon receiving lists from different IPCs, the HPC first sent the list to the JPSC for further consideration and recommendation. The newly established JPSC is a standing committee, set up at the provincial level, for the purpose of selecting judges and prosecutors. It was meant to introduce a degree of professionalism and neutrality into the judicial selection, adding a new institutional layer to the process. It is chaired by an experienced and respected member of the legal community external to the Party’s political-legal system. The vice-presidents of the JPSC, however, come from the provincial political and legal committee, the provincial court and the provincial procuratorate. The JPSC has both permanent members and non-permanent members. Permanent members are representatives of the Party and government organs, notably the Party’s organization department, and non-permanent members include lawyers and legal scholars.⁶¹

The JPSC performed a mostly rubberstamping role in lending credibility to the quota reform process. The JPSC process was artificially imposed onto the existing process and played a narrow and largely negligible role. The Party and, for

57 Interview with judge, Guangzhou, 25 September 2017, GD_BPC_08.

58 Applicants were informed of the results of their respective written tests and oral exams but were not informed of the results of Party groups’ assessments and the ranking of candidates on the recommendation list. Interview with judge, Guangzhou, 29 October 2019, GD_BPC_08.

59 Interview with judge, Guangzhou, 12 September 2018, GD_BPC_17; interview with judge, Lanzhou, 15 September 2018, GS_IPC_28; interview with judge, Luohe, 17 September 2018, HN_IPC_22; interview with judge, Nantong, 18 September 2018, JX_IPC_11; interview with judge, Guangzhou, 8 March 2020, GD_HPC_31. See also Song 2017; Zuo 2020.

60 Song 2017, 104.

61 On 12 October 2015, the Guangdong JPSC was established with 8 permanent members and 60 nonpermanent members, and its secretariat was set up in the Guangdong Provincial Political and Legal Committee. See Chen, Jiesheng 2015.

that matter, the court, made it abundantly clear that the process was politically driven, with the Party groups at different levels of courts in charge. With limited terms of reference, the JPSC received a list of judges from one arm of the HPC and passed it on to the other after going through the motions of formality.

In Guangzhou city, there were 1,069 judges in the first batch of “quota judges.” They took the oath on 29 September 2016 and were endorsed by people’s congresses at the corresponding level on 1 October 2016.⁶² The second round, which was open to judge’s assistants and former judges who had failed to qualify in the first round, opened in July 2017 and the quota judges were confirmed in November 2017.⁶³

Did the Reform Create a Judicial Identity and Autonomy?

While a number of policy initiatives were put in place to support the quota reform,⁶⁴ the centrepiece of judge quota reform was to facilitate individualized judging by freeing frontline judges from bureaucratic control when making judicial decisions and by abolishing the vetting system that required judges to submit their draft opinions to leaders for approval. In hinterland provinces in particular, individual judges technically did not have the authority to sign off and issue adjudication papers prior to the reform.⁶⁵ The usual practice was that the judge who handled a case drafted the adjudication papers, then reported to the multiple authorities for approval. After being vetted and signed by court leaders, a formal adjudication document was officially drawn up and issued. Indeed, without the signature to endorse a decision from a competent leader, no court chop could be affixed.⁶⁶

A drastic change for judges in inner provinces since the reform has been the newly gained freedom to decide without leaders’ approval. The impact on individualized judging in coastal cities has been less drastic, as the practice had been introduced incrementally since 1998. By the time the quota reform was implemented, the power to sign and issue a formal adjudication document in Guangzhou had already been mostly delegated to individual judges, except in a few types of socially and legally impactful cases.⁶⁷ A judicial culture has firmly taken root, with vetting and reporting no longer acceptable and indeed deemed offensive.

62 Mao and Zhou 2016.

63 Interview with judge, Guangzhou, 25 December 2017, GD_BPC_25.

64 Wang, Yueduan 2021; He, Xin 2020.

65 Interview with judge, Luohe, 17 December 2017, HN_IPC_22; interview with judge, Guangzhou, 29 October 2019, GD_BPC_08; interview with judge, Luohe, 22 December 2020, HN_IPC_22.

66 Interview with judge, Luohe, 22 December 2020, HN_IPC_22.

67 Approval is required for the following: 1) cases that involve collective disputes and may endanger social stability; 2) cases that are difficult, complicated and likely to have a major impact in society; 3) cases that may depart significantly from the established decisions made by the same court or higher courts; 4) cases involving complaints of judicial wrongdoings. Interview with judge, Guangzhou, 29 October 2019, GD_BPC_29.

Where interference lingers in Chinese courts, it is informal and regarded as illegitimate. The quota reform has enhanced the position of judges on the front-line and strengthened their confidence to resist interference:

Interference may come from colleagues or other departments, but most judges simply ignore it ... The judicial reform demands judges to be responsible for their cases for life. At the same time, the salary and benefits have improved, with the result that judges prioritize the quality of adjudication and other factors do not matter that much anymore.⁶⁸

Indeed, the Party through its CPLC has prohibited, in clear and forceful terms, any form of interference in the judicial process and requires judges to place any such interference on record.⁶⁹ The judicial reforms are working to develop a culture of rules-based adjudication and judicial autonomy in case handling for most routine cases that are not deemed sensitive. In the busy courts in Guangdong, in particular, few judges have the time or the need to seek approval, for frontline judges have the power, knowledge and incentives to judge on their own.

The quota system was successful in placing individualized judging and accountability at the centre of adjudication in the vast majority of cases and in shifting the focus of judicial decisions away from a fixation on the social impact of a decision and towards an emphasis on its internal legal quality within an increasingly self-referencing judicial universe. Once a sharp focus is placed on the court-centric and rules-based dimension of judging, as the reform requires, judges will necessarily look for legal guidance to craft a decision. As pointed out by a judge:

These days even the political and legal committee does not interfere with our cases anymore and administrative departments inside the court cannot tell us what to do either. The political and legal committee does not ask about the details of a case, and its main role is to coordinate with other departments for us when needed ... Now we enjoy autonomy in deciding cases as long as we follow the unified trial standard. We have an online system to see all the relevant cases in all the BPCs and the IPC in our city. Besides, lawyers also provide precedents for us to consider.⁷⁰

Another judge admitted that judges are taking legal rules and precedent cases more seriously and that what matters more now is what their professional peers may have decided rather than what their political bosses may be saying.⁷¹ Individualized judging has created demand for clear rules and guideline cases to avoid embarrassing discrepancies. Indeed, the SPC and other courts have all been busy trying to develop a guideline case system to fill a gap created by the discontinuation of internal approval.⁷² How those guideline cases would guide judges in making decisions that are effective and credible remains a challenge.

Of course, judges continue to work within China's political and bureaucratic system and are still subject to the same external and internal accountability mechanisms. Regular and irregular political controls and bureaucratic management will continue not only to ensure that key court decisions are politically

68 Ibid.

69 GOCCPCC and State Council 2015; CPLC 2015.

70 Interview with judge, Guangzhou, 29 October 2019, GD_BPC_08.

71 Interview with judge, Guangzhou, 30 October 2019, GD_BPC_17.

72 Interview with judge, Zhengzhou, 28 December 2020, HN_HPC_23.

compliant and that judicial work does not deviate from the larger political narratives, but also to ensure that junior judges receive the necessary guidance for the quality control of their judgments and to check any abuses of power or corruption. Various measures have been put in place in courts to guide junior judges, including the creation of advisory groups such as “professional judges’ meetings” (*zhuan ye fa guan hui yi* 专业法官会议), which can provide professional guidance on legal issues on request.⁷³ In general, judges have been cautious in adjusting their working relationship with the court leaders who used to vet and approve their decisions. Some judges are known to continue to seek informal approval from their leaders, while both sides are highly aware of the sensitivity of the matter and do not want to be seen as meddling in the decision-making of their senior colleagues.⁷⁴

While the rise of individualized judging has created space for judges to deliberate on individual cases, it does not reduce judicial accountability. Rather, it has created an opportunity for the reconfiguration of the control system. First, there is the replacement of internal vetting and approval of decisions by enhanced hierarchical guidance at the appellant level. Over a short period of time, the HPC has gained an unprecedented level of power and influence in judicial management over the province. After all, it is the HPC that decided the allocation of quotas to each court in a province during the reform period and decides judicial appointments in the future, which gives it significant levers of control over lower courts in the province. The supervisory jurisdiction of a higher court has become comprehensive and pre-emptive, reaching far beyond a traditional appellant jurisdiction. Riding on the tide of standardization, a higher court is filling the gap that the reform created at the local level and is now exercising real leadership. Now, the provincial court has substantial influence in appointing court leaders at the city level, it directly monitors the workload of court presidents and other court leaders at lower levels,⁷⁵ and it determines judge quotas and appoints quota judges. Inevitably, it has started to control the judges in other respects. As control over courts has decisively shifted to the province, the HPC has become very “bullish.”⁷⁶

This newly gained power has been on open display. In the words of one district judge, “people in a higher-level court literally see themselves as our direct leaders, they tell us what to do and what not to do. They place us under their unified management and direction.”⁷⁷ Inspection officers from higher-level courts routinely check whether judges are dressed properly and whether female judges are carrying prohibited luxury items such as designer handbags.⁷⁸ The quota reform has in

73 Interview with judge, Guangzhou, 18 January 2021, GD_BPC_29; see also Finder 2021a.

74 Interview with judge, Guangzhou, 29 October 2019, GD_BPC_08; interview with judge, Changsha, 20 December 2020, HN_HPC_36; interview with judge, Guangzhou, 22 December 2020, GD_BPC_33.

75 SPC 2017.

76 Interview with judge, Guangzhou, 29 December 2020, GD_BPC_01.

77 Interview with judge, Guangzhou, 25 December 2017, GD_BPC_25.

78 Ibid.

fact altered the constitutional arrangements of the relationship between different levels of courts and allowed a higher court to assume an increasingly *de facto* leadership role over the lower courts.⁷⁹

While the higher court has strengthened its supervisory jurisdiction by giving lower courts more hands-on judicial guidance on the adjudication of specific types of cases in the form of issuing guideline cases and other ad-hoc instructions, it has not replaced court leaders with regards to vetting or approving draft decisions from the lower courts. Its oversight over lower courts is mainly limited to administrative matters. The centralization within the judiciary is not meant to undermine, and has not undermined, decisional autonomy on the part of trial judges. Undoubtedly, some judges continue to seek the views of appellate judges they are friendly with on cases that are likely to be appealed, as they have always done on an informal basis,⁸⁰ but there is little sign of proactive interference with individualized judging; this would be viewed as a serious regression, according to one HPC judge. On the contrary, the centralization is viewed as a force with which to undercut local interference from within and without the court and as a protective shell to sustain the quota reform.⁸¹

The separation of judges and administrators in the same courts has had, in the short term at least, a perverse effect. Administrators remain powerful in China's political-legal system, reflecting the weak political position of judges. Before the reform, powerful administrators were also judges sharing a common identity and enjoying the same benefits, therefore they may have been sympathetic to the frontline judges. Judges in the past were allowed to move back and forth between judicial and non-judicial posts, crossing the boundary as the institution saw fit. When a judge burned out on the frontlines, he or she could apply for a rotation to a non-judicial post and then return to the frontline later. The rotation not only allowed judges to take a break from exhausting adjudicative work but it also gave them the opportunity to experience other aspects of the operation of the court and its interaction with the outside world. Given the politicization of judicial work and bureaucratic control, that cross-fertilization proved to be a significant part of the judicial life of judges.

Following the quota reform, administrators were deprived of their judicial titles and not allowed to share the higher judicial pay; however, they remained equally powerful, perhaps even more so in the politicized environment in which the Party has demanded increasing loyalty as well as expertise. The gap between identity and pay may have contributed to the intensification of political control over judges. Judges, for example, are accountable to the disciplinary

79 Under the Constitution (Article 132), a higher court “guides” the work of the lower courts, differing from the procuratorate in which a higher procuratorate “leads” the work of a lower procuratorate (Article 137). Given the extensive, although often *de facto*, control over the judge quota, nomination of court leaders and judicial budget by a provincial high court in the province, the balance of power is being tilted decisively away from the traditional horizontal control towards a vertical control.

80 Interview with judge, Guangzhou, 22 December 2020, GD_BPC_33.

81 Wang, Yueduan 2020.

inspection group in charge of anti-corruption and internal investigations, the political affairs office in charge of promotion and the trial supervision office in charge of case management, all of which have the power to make judges' work more difficult.

During the quota reform period and since, bureaucrats have indeed enhanced and routinized their political and administrative supervision of judges now that judges have been given more professional autonomy. As one judge said:

In the past, while there was supervision and evaluation, it happened at the end of each year, and through the whole year, judges handled cases according to their own rhythm of case-handling ... Now, the administrative departments evaluate judges' performance every month, every day, every minute. The inspection and political departments ask judges about the progress of cases they are handling. They ask a judge about how many cases he closed monthly and quarterly. Each judge has to make a progress report on his cases every month. The result is then ranked, compared, publicized and circulated within the court. I guess administrators intentionally pick on us because they think we are now better paid, we therefore should carry more responsibilities and do more work.⁸²

In many ways, the court leaders use the administrative arm of the court to keep the professional arm in check.

Conclusion

Notwithstanding the fanfare, self-contradictions and tensions, quota reform has been implemented to create a more identifiable, distinct judiciary. It is now well established that judges are those who judge, and political and administrative officers no longer may be given the title of judge. The reform is leading judges to mostly write their own decisions, subject to statutory and some political exceptions where approval is still required. Informal interference will linger and judges, unsure about their professional responsibilities, will from time to time continue to consult their leaders and committees in order to share liability or out of respect. At the same time, there are genuine concerns that individualized judging has led to inconsistency in decisions and also to judicial corruption. However, the experiences of Guangdong and other coastal regions show that individualized judging is unavoidable if the judiciary is to play an active role in social and economic governance.

Legal reform in China has meandered over the past four decades, following a unique path with a sharp focus on professionalism and institutionalization. Gradually, judges have rid themselves of the straightjacket of the cadre-police mentality and instead are developing a judicial mindset. That has been the aspiration and struggle of generations of lawyers and judges since 1982 when the first batch of formally trained lawyers entered the legal system in the post-Cultural Revolution era. Judicial reform began to be implemented soon after and has continued. There have been setbacks and interruptions to the process, but a reformist momentum has generally been maintained, with reformist forces both inside and

82 Interview with judge, Guangzhou, 25 December 2017, GD_BPC_25.

outside the judiciary attempting to broaden and enhance professionalization within the narrow space that the political system permits – and from time to time encourages – with varying degrees of success. None of the reform projects has had a significant impact in terms of bringing qualitative change to the judiciary. And it was never meant to be so. However, in incremental ways, judges have become significantly better educated and more qualified; professional codes and procedures have multiplied and become more distinct, effective and consequential; and the level of judicial institutionalization has been undoubtedly raised. While the short-term impact of judicial reform, including quota reform, may be limited, its long-term impact could be substantial. When the national judicial re-examination was introduced, its impact on the judiciary was not clear and people were doubtful whether an examination could change the quality of the judiciary. But, 20 years later, we have seen a facelift in judicial profiles across the nation – fewer former military officers remain as judges in China and the professional standing is now significantly different than before. The quota reform was based on the earlier reform and is likely to reinforce achievements in sharpening a professional identity, nurturing a judicial community and developing professional ethics and loyalty.

The quota reform reflects the contradictions of judicial reform in a party-state. Criticisms of Chinese courts abound, ranging from corruption to the lack of effectiveness; many of these problems can be attributed to the root cause of local protectionism and judicial bureaucratization. Courts are controlled by local Party committees and paid for out of local government budgets. Judges are appointed by and accountable to local political authorities. Local interests breed corruption, nurture an inward-looking mentality and distort the national legal standard. To develop a more professional judiciary that is well-equipped to deal with the legal challenges that China faces, the Party has to break down the barriers that local states have raised. If the judges are poorly paid, the Chinese government should raise salaries and provide better support; if the judges are controlled by a localized appointment process, the Party should centralize the appointment at the provincial level, raising judicial appointment above local control; if the judges cannot be fair and effective in adjudication because of interference by individual Party officials or the meddling of their leaders, the Party should issue stern warnings and punish those who dare to do so. The quota reform should be seen as part of the larger political effort to overhaul the legal system and to ensure that the judiciary is effective and credible under Party rule. Enhanced judicial credibility and effectiveness are good for governance; both the Party and the courts are aware of that common ground.

Yes, the Party that has initiated and supports the reform also controls its pace and objectives. The Party manages the reform to ensure that the judiciary operates within the bounds of and serves to undergird, rather than undermine, the political system that creates it. The political limits of judicial reform are better understood now than at any time before, and few judges were excited about the reform's potential. Chinese judges have experienced a number of rounds of

major reforms and, by the time the quota reform was launched, the first batch of the post-Cultural Revolution judges was reaching retirement with a strong sense of reform fatigue, frustration and distrust. The prevailing sense was that the reform was too little and too late. The quota reform, which can be seen as the last endeavour of that generation, potentially offers more than its predecessors in terms of substance, but paradoxically has produced less excitement and less visible short-term reform impact.

For academic observers, the macro political context matters more than technical details; for the first generation of reformers on the ground, however, there is no other viable alternative to the incremental reform that has defined their careers. They made full use of the reform opportunities that the party-state offered to create a limited judicial space while realizing and accepting the political and institutional constraints. As the quota reform story testifies, the judiciary within an authoritarian political system can explore spaces for its own professionalization – judges can judge on their own most of the time and in most of the cases. In that process, the Party could be both a helping and a restraining hand, and the bureaucratic system, of which the court is an integral part, creates both positive and negative incentives for the reform. As soon as the reform project launched, it was subjected to processes of negotiation, compromise and adjustment. In any event, managing suspicious Party leaders concerned about the political implications of a potentially run-away court and an angry public resentful of judicial corruption and incompetency is only part of the difficulties. Pushing reform through the bureaucratic maze against the vested interests of multiple stakeholders has always been a litmus test of the wisdom of reformist leaders in China's political-legal system.

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Conflicts of interest

None.

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摘要: 本文是关于法官员额制改革的原创性研究。员额制改革的本质是推进司法职业化。一定比例的法官被淘汰，通过考试考核者才被选任为员额法官，从而使审判职能与行政职能的岗位职责分工更加明确。员额制改革的关键一环是减轻法官在审理案件过程中所受到的来自政治和官僚的控制和干扰，将审判权下放给主审法官，在法院内部去行政化的同时加强司法责任制。本文探讨了中国共产党领导的渐进式法治进程的大背景下法官员额制改革的潜力和限度。

关键词: 司法改革; 员额法官; 合法性; 裁判自主; 职业化; 中国

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