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# Reevaluating ‘countermeasure from below’: evidences from judicial personnel reforms in China

Yueduan Wang

Harvard Law School, Cambridge, MA, USA

## ABSTRACT

In the past few years, China has made a drastic switch to a more centralized approach to institutional change, thus vastly reducing the decades-old problem of local non-compliance. Using the recent judicial personnel reforms (员额制改革) as a case study, this paper examines the functioning of this new top-down model. Based on field research, the paper finds that the reforms have drastically reduced judge headcounts, placing tremendous burden on those remaining. In addition, they have made it much harder for new recruits to rise to the rank of judge, forcing them to remain as ‘judicial assistants’ who are not allowed to adjudicate cases independently. These changes have driven many judges to resign and have significantly diminished the appeal of judicial posts to new talent, especially in developed regions where caseloads are heavier and alternative career options more lucrative. Furthermore, such problems have continued to plague the judiciary despite long-standing widespread acknowledgment of them within and outside the judiciary. These developments highlight a critical disadvantage of the new top-down approach: unlike the previous decentralized system, under which powerful local actors could often de facto reject institutional changes they deemed flawed or unsuitable to local circumstances, the new centralized approach provides little effective check against design defects in the center’s reforms.

## KEYWORDS

Judicial reform; judicial personnel reform; basic court; center-local relations; China

## Introduction

Chinese localities’ resistance to national reforms is often viewed as a major impediment to the modernization of China’s various government institutions, including the judiciary. For example, Liu notes that the central government’s efforts to conform the courts to global institutional norms, such as the promulgation of procedure laws and establishment of different court divisions, ‘encounter[ed] unexpectedly huge resistance from local political and social orders’.<sup>1</sup> Ng and He similarly recognize that each court is embedded in a local institutional matrix and is therefore subject to its strong pressure, which greatly affects the efficacy of any top-down measures to modernize the court.<sup>2</sup> Consequently, such local

**CONTACT** Yueduan Wang  [ywang@sjd.law.harvard.edu](mailto:ywang@sjd.law.harvard.edu)

<sup>1</sup>Sida Liu, ‘Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court’ (2006) 31 *Law & Social Inquiry* 75, 102.

<sup>2</sup>Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-making in China* (Cambridge University Press 2017) 195.

resistance – popularly known as ‘where there is a policy from above, there is a countermeasure from below’ (上有政策, 下有对策) – poses ‘substantial reservations to the current reform policies of the Chinese government as well as the optimistic predictions of formal legal changes in China by many international “rule of law” programs’.<sup>3</sup>

While it is undoubtedly true that local non-compliance has caused significant delays to many important reform projects, one should also be mindful of the potential virtues of such ‘countermeasures from below’. Three of the frequently cited virtues of federalism are (1) protecting against the center’s arbitrary use of power, (2) promoting responsiveness to the diverse needs of a heterogeneous society, and (3) enabling localities to experiment with novel policies.<sup>4</sup> While it is an open question whether the Chinese regime can be accurately characterized as ‘federal’,<sup>5</sup> it is possible that a relatively decentralized and entrenched center-local relationship can perform functions similar to those of federations. This is especially true in light of China’s continuous institutional innovation, which, like its counterpart in natural science, requires a mechanism of trial and error – whereby mistakes in original designs can be systematically identified and corrected. In large and diverse countries like China, local discretion and resistance are significant parts of such a mechanism, as local governments possess not only for more information than the center about actual program implementation but also superior ability to improve program design based on local knowledge. For such a trial-and-error mechanism to properly function, however, generally requires that local governments have substantial power to reject or alter central directives when they deem them flawed or unsuitable to local conditions – a checks-and-balances measure that is often (at least in theory) present in federal systems. Removing or substantially reducing localities’ ability to counter central policies, therefore, carries the risk of producing deficient or one-size-fits-all changes that undermine rather than enhance China’s institutionalization process.

Currently, there is a great opportunity to test this hypothesis and to more generally evaluate the pros and cons of the different modes of institutional innovation. In the past few years, China has made a dramatic shift towards an almost completely top-down approach to institutional change that allows minimal regional variations and does not tolerate non-compliance, including in the realm of judicial reforms. During the third plenum of the 18th Central Committee in 2013, Xi Jinping outlined the administration’s master plan for the judiciary, which aimed to make judges more professional, to isolate them from interference by court leaders, and to make the courts more independent from local government, among many other initiatives.<sup>6</sup> In less than three years, the center imposed on all Chinese provinces a detailed plan made by the Supreme People’s Court, and it was declared that ‘[a]s of the end of 2016 ... [most] reform tasks had been basically accomplished or carried out in an all-round way’.<sup>7</sup> The validity of this

<sup>3</sup>Liu (n 1) 102.

<sup>4</sup>See Edward Rubin and Malcolm Feeley, ‘Federalism: Some Notes on a National Neurosis’ (1993) *UCLA Law Review* 903, 917–26; Erwin Chemerinsky, ‘The Values of Federalism’ (1995) 47 *Florida Law Review* 499, 524–29.

<sup>5</sup>See generally Yongnian Zheng, *De Facto Federalism in China: Reforms and Dynamics of Central-local Relations* (World Scientific 2007); Gabriella Montinola, Yingyi Qian and Barry R Weingast, ‘Federalism, Chinese Style: The Political Basis for Economic Success in China’ (1995) 48 *World Politics* 50.

<sup>6</sup>Central Committee of the Chinese Communist Party, ‘Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform’ *China.org.cn* (2014) <[www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602\\_9.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602_9.htm)> accessed 3 October 2018.

<sup>7</sup>Supreme People’s Court of China, *Zhongguo Fayuan De Sifa Gaige: 2013–2016 [Judicial Reform of Chinese Courts: 2013–2016]* (People’s Court Press 2017) 4.

statement, however, is the subject of much scholastic debate. While some argue that the reforms represent significant progress in terms of judiciary independence, power, and professionalization,<sup>8</sup> others doubt the central government's ability to make good on its promises due to potential obstacles such as poor implementation, regional divergence, the regime's rejection of Western ideas, and the deep-rooted historical practice of judicial dependence.<sup>9</sup>

Using one important aspect of the judicial reforms – the personnel reforms (员额制) – as a case study, this paper examines the functioning of the new top-down model of judicial reform as well as evaluates the broader shift in the pattern of institutional innovation. Based on evidence collected during fieldwork, the study finds that the personnel reforms have reduced the number of judges by over 60% and created a new class of judicial assistants who are not allowed to preside over cases. Such arrangements have severely overworked remaining judges and disheartened judicial assistants, resulting in serious judiciary brain drain, particularly in urban regions where caseloads are large and alternative job opportunities are ample. Consequently, the reform not only fails to realize many of its stated professionalization goals but also threatens to undermine the progress made by the other recent judicial reform components. These developments expose a serious disadvantage of the top-level design model relative to a decentralized approach: due to the consolidated power structure, political actors can no longer serve as effective checks against flawed institutional design made by the center. This suggests that local resistance to national reforms plays a positive role in the modernization of China's judiciary. However, the author also acknowledges the advantages of the centralized model in overcoming local protectionism and embeddedness, which are more pronounced in the other aspects of the judicial reforms.

### **'Two initiatives': checks and balances with Chinese characters?**

Unlike the US Constitution, which assigns enumerated powers to the federal government and (theoretically) reserves remaining powers to the states, the Chinese Constitution vaguely stipulates that:

The divisions of functions and powers between the central and local state organs are guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.<sup>10</sup>

Although the Chinese Constitution does not provide further explanation, scholars largely rely on Mao's famous 1955 speech *On The Ten Major Relationships* (论十大关系) – which is widely considered the origin of this clause – in their interpretation of this so-

<sup>8</sup>See e.g. Taisu Zhang and Tom Ginsburg, 'China's Turn Toward Law' (2019) 59 *Virginia Journal of International Law* 306, 311 (arguing that after the judicial reforms, the Chinese courts 'have never been as independent, professional, and powerful in PRC history as they currently are'); Randall Peerenboom, 'Fly High the Banner of Socialist Rule of Law with Chinese Characteristics!' (2015) 7 *Hague Journal on the Rule of Law* 49.

<sup>9</sup>Ng and He (n 2) 91; See e.g. Jacques Delisle, 'Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping' (2017) 26 *Journal of Contemporary China* 68, 80–81; Jerome A Cohen, 'A Looming Crisis for China's Legal System' *Foreign Policy* (2016) <<http://foreignpolicy.com/2016/02/22/a-looming-crisis-for-chinas-legal-system/>> accessed 17 February 2017; Carl Minzner, *End of An Era: How China's Authoritarian Revival Is Undermining Its Rise* (Oxford University Press 2018) 104.

<sup>10</sup>Xianfa art. 3 (1982).

called principle of ‘Two Initiatives’ (两个积极性).<sup>11</sup> Mao’s speech suggests that this principle includes the following components:

- (a) The powers of the center are supreme. When the center makes a decision concerning any given issue, such decision takes precedence over those of the local governments.<sup>12</sup> However, when exercising such powers, the center should consult the localities whose interests will likely be affected.<sup>13</sup>
- (b) The local governments should be given considerable discretions in forming local policies.<sup>14</sup> Moreover, the local governments are also the primary implementers of central laws and policies.<sup>15</sup>

Although the virtue of Two Initiatives is the subject of much scholastic debate, many agree that it serves as China’s guiding principle – both in theory and practice – on the constitutional relationship between its center and local governments.<sup>16</sup> One manifestation of this principle is the broad policy-making power of local governments after 1978, particularly in the economic realm. Indeed, some scholars go so far as to call China’s division of policy power ‘federalism, China style’<sup>17</sup> or ‘de facto federalism’, even suggesting that ‘there is no essential difference between China’s de facto federalism and other forms of federalism in the world in terms of policy formation and implementation, except that China is not democratic’.<sup>18</sup>

This decentralized policy-making structure had profound impact on China’s post-1978 reforms. Economic and fiscal decentralization gave local officials sufficient resources and discretion to test various new policies and institutional innovations to attract investment and develop local economies, which boosted their promotional prospects as well as private fortunes. Furthermore, the increasing power fragmentation – both vertical (center-local) and horizontal (across different government branches and agencies) – allowed local governments to defy or substantially alter central directives when they felt that such policies were detrimental to local interests. Given its vast size and regional disparities, China’s policy and institutional landscape became increasingly diverse, especially between developed and underdeveloped areas.

<sup>11</sup>E.g. Suli Zhu, ‘The Division of Power between the Central and Local Governments in Contemporary China: Reinterpretation of Chapter Five of “On the Ten Prominent Relations” by Mao Zedong’ (2004) *Social Sciences in China* 42, 46; Jiang Shigong, ‘Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China’ (2010) 36 *Modern China* 12, 33.

<sup>12</sup>‘According to our Constitution, the legislative powers are all vested in the central authorities ... it is imperative to have a strong and unified central leadership and unified planning and discipline throughout the country.’ Zedong Mao, ‘On the Ten Major Relationships’ (1956) <[www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_51.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_51.htm)> accessed 28 August 2019.

<sup>13</sup>‘We should encourage the style of work in which the local authorities are consulted on the matters to be taken up ... We hope that the ministries and departments under the central authorities will pay due attention to this and will first confer with the localities on all matters concerning them and issue no order without full consultation’. *ibid.*

<sup>14</sup>‘[P]rovided that the policies of the central authorities are not violated, the local authorities may work out rules, regulations and measures in the light of their specific conditions and the needs of their work, and this is in no way prohibited by the Constitution’. *ibid.*

<sup>15</sup>‘[Some] central departments ... have the task of laying down guiding principles and mapping out work plans, while the local authorities assume the responsibility for putting them into operation’. *ibid.*

<sup>16</sup>See e.g. Zhu (n 11) 46–47; Shigong (n 11) 33; Xiaoli Hu and Xixin Wang, ‘Infrastructure Power and the Optimization of “Veritcal Governing Structure”’ (2016) *Political Science and Law* 54, 56; Yan Lin, ‘Cooperative Federalism: Law Enforcement Oversight Shapes Center-local Relations’ (2017) 29 *Peking University Law Journal* 845, 847.

<sup>17</sup>See generally Montinola, Qian and Weingast (n 5).

<sup>18</sup>Yongnian Zheng, ‘Explaining the Sources of de Facto Federalism in Reform China: Intergovernmental Decentralization, Globalization, and Central-Local Relations’ (2006) 7 *Japanese Journal of Political Science* 101, 108.

That said, Two Initiatives does not necessarily connote policy diversification because in theory, the principle demands not only local policy discretion but also central political supremacy. Mainly through the Chinese Communist Party's nomenclatura and disciplinary systems, the center holds ultimate power over the careers of subnational and local leaders and by extension, their policies. But to effectively utilize such power against local governments requires the center to act as a politically unified force – which became exceedingly difficult after Mao's death and downright impossible during the intense factional conflict in the 2000s. Consequently, local governments held considerable sway over China's institutional evolution throughout most of the Reform and Opening era, due largely to the center's vibrant intraparty competition during much of that period.

However, the political dynamic has changed dramatically since 2013, resulting in a drastically different approach to institutional reform. The consolidation of power under the new administration has enabled the central government to rein in local governments in a fashion unprecedented since the Reform and Opening era. The anti-corruption and party discipline campaigns have substantially reduced local officials' policy discretion, as they are under the constant threat of investigation by the centralized disciplinary apparatus.<sup>19</sup> The new promotion evaluation system also emphasizes following higher-ranked officials' instructions rather than performance indicators such as GDP growth.<sup>20</sup> In addition, the System of Requesting Instructions and Submitting Reports (请示报告制度), which requires most officials to regularly report their work to higher authorities, has led to even tighter top-down control of local cadres.<sup>21</sup> Chen observes that under these conditions, local officials have begun to prioritize political correctness (讲政治) over performance (讲政绩) and have become far more cautious about deviating from central directives.<sup>22</sup> Consequently, despite their significant policy-making authority, local officials have little incentive to engage in policy innovation, especially when doing so may be viewed as defying national laws or policies. With the administration's repeated emphasis on top-level design (顶层设计), the Chinese government has been moving steadily towards a centrally driven model of institutional innovation.

The swift decline of the long-standing system of decentralized policy experimentation carries significant consequences. On the one hand, the end of power fragmentation means easier coordination and more steadfast implementation of nationwide institutional changes, such as the judicial reforms. This is particularly true for reforms that infringe upon vested local interests. On the other hand, the nature of the old system provided effective checks and balances against flawed institutional designs, thus significantly reducing the systematic risks associated with China's continual and often sweeping reforms. Replacing the system with an almost completely top-down model means there is no institutionalized way to effectively reject or alter a defective center-made design. This is particularly troubling given China's vast size and diversity, which often necessitate substantial regional variations and extensive trial and error when implementing a major

<sup>19</sup>Genia Kostka and Jonas Nahm, 'Central-local Relations: Recentralization and Environmental Governance in China' (2017) 231 *The China Quarterly* 567, 568.

<sup>20</sup>Xuelian Chen, 'A U-Turn or Just Pendulum Swing? Tides of Bottom-up and Top-down Reforms in Contemporary China' (2017) 22 *Journal of Chinese Political Science* 651, 663.

<sup>21</sup>'Guanyu Xin Xingshi Xia Dangnei Zhengzhi Shenghuo De Ruogan Zhunze[Code of Conduct for Intraparty Political Life under New Circumstances]' *Xinhua News* (2016) <[www.xinhuanet.com/politics/2016-11/02/c\\_1119838382.htm](http://www.xinhuanet.com/politics/2016-11/02/c_1119838382.htm)> accessed 10 August 2019.

<sup>22</sup>Chen (n 20) 671.

nationwide change. As discussed later, this problem turns out to be particularly pronounced in the context of the judicial personnel reforms.

## Policy background of the personnel reforms

Judges' professional competence and independence have been among the most serious problems faced by the Chinese judiciary for a long time. Due to the scarcity of formal legal education before the mid-1990s, Chinese judges' low professional quality was considered by some as the primary problem for the courts. Peerenboom points out that in the early 2000s, judges' 'low level of technical competence [was] a more serious problem than limitations on judicial independence'.<sup>23</sup> In his 2003 article, Zhang observes that a 'significant portion of the "judges" was made up of army veterans ... only 5 percent of the judges nationwide have earned undergraduate degrees, and only 25 among a thousand judges have earned graduate degrees'.<sup>24</sup>

Although the situation improved markedly in the subsequent decade, many Chinese courts have remained troubled by the uneven quality of judges in recent years. Due to the rapid expansion of formal legal education and the 2001 Amendment to the Judge Law (which stipulates that all newly recruited judges must pass the uniform national judicial examination), the number of judges receiving formal legal training rose rapidly in the 2000s.<sup>25</sup> However, in the early 2010s, many judges who joined the judiciary in the twentieth century were still working in a judicial capacity, often resulting in huge disparity in judge quality within the same court.<sup>26</sup> Brain drain also became a problem. As mid-ranking judges became desirable candidates for associate-level positions in law firms, brain drain became a significant threat to some of China's local courts, especially those in developed regions like Shanghai.<sup>27</sup>

The current administration vows to tackle the issue with top-down judicial personnel reforms, which are part of a broader plan to reform the Chinese courts. The central government (along with the Supreme People's Court), emboldened by the almost unprecedented centralization of power,<sup>28</sup> became the indisputable driver of both the design and implementation of the recent court reforms. In 2013, the third plenum of the 18th Communist Party (CCP) Central Committee issued a decision laying out a broad roadmap for judicial reforms.<sup>29</sup> This blueprint was reconfirmed and elaborated during the fourth plenum of the CCP Central Committee in 2014, the first high-profile meeting dedicated to 'governing the country according to the law'.<sup>30</sup> In June 2014, the Central Leading Group for Comprehensively Deepening Reform, a Party body headed by Xi Jinping

<sup>23</sup>Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press 2002) 289.

<sup>24</sup>Qianfan Zhang, 'The People's Court in Transition: The Prospects of the Chinese Judicial Reform' (2003) 12 *Journal of Contemporary China* 69, 78–79.

<sup>25</sup>Benjamin L Liebman, 'China's Courts: Restricted Reform' (2007) 191 *The China Quarterly* 620, 625.

<sup>26</sup>Ng and He (n 2) 60–66.

<sup>27</sup>Jonathan J Kinkel, 'High-End Demand: The Legal Profession as a Source of Judicial Selection Reform in Urban China' (2015) 40 *Law & Social Inquiry* 969, 982–83; Ng and He (n 2) 78; Chunyan Zheng, Jiahui Ai and Sida Liu, 'The Elastic Ceiling: Gender and Professional Career in Chinese Courts' (2017) 51 *Law & Society Review* 168, 190–91.

<sup>28</sup>Kostka and Nahm (n 19) 568.

<sup>29</sup>Central Committee of the Chinese Communist Party (n 6).

<sup>30</sup>Central Committee of the Chinese Communist Party, 'CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward' (*China Copyright and Media*, 2013) <<https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>> accessed 3 October 2018.

himself, officially authorized the implementation of the reforms in six provinces (these were expanded to the remaining provinces in 2016).<sup>31</sup> While the Party was in charge of the reforms, much of the actual design and implementation work was entrusted to the Supreme People's Court and its Leadership Group for Judicial Reforms, which was headed by Court President Zhou Qiang.<sup>32</sup> In 2015, the Court promulgated the Opinions on Comprehensively Deepening the Reform of People's Courts, which laid out specific reform measures for the entire judiciary.<sup>33</sup> These include 'the regularization, specialization and professionalization of judicial personnel' (henceforth 'the personnel reforms').<sup>34</sup>

According to the Supreme People's Court, the personnel reforms include several components. The first is the new judge quota system, which cuts the number of judges in most courts to 30–50% of pre-reform levels.<sup>35</sup> The second is a new judge selection system based on uniform examinations and interviews.<sup>36</sup> The third is the 'classified management of judicial personnel', which classifies court employees into judges, judicial assistants, and administrative staff. In theory, each class has its own clearly defined responsibilities, with judges alone having the power to handle cases.<sup>37</sup> The fourth is a new salary system, which is designed for 'greatly increasing the salary level of judges'.<sup>38</sup> The purpose of these measures is to create a more professionally capable and well-paid group of judges that focuses exclusively on adjudicating cases.

The personnel reforms also form the basis for another key aspect of the administration's masterplan for the courts, namely the judicial accountability reforms (司法责任制改革). The accountability reforms involve a series of institutional changes that aim to make frontline judges more independent from their superiors when adjudicating cases, in order to achieve 'the one who handles the case will decide' (审理者裁判) and 'the one who decides will be accountable' (裁判者负责). Some scholars have long claimed that Chinese judges' poor professional quality is an obstacle to their independence. For example, Zhu argues that due to many basic-court frontline judges' lack of formal training, the adjudication committees were an institutional mechanism for solving new or difficult cases, providing frontline judges with professional guidance from court leaders who generally had received better education and were more experienced.<sup>39</sup> Peerenboom echoes Zhu's view by claiming that 'legal reformers are hard-pressed to argue that poorly trained judges should be given more power and independence'.<sup>40</sup>

<sup>31</sup>Weihan Yang, 'Zhongyang Jueding Zai Shanghai Guangdong Deng Liu Shengshi Shidian Sifa Gaige [The Party Center Decides To Test Judicial Reform In Guangdong And Other Five Provinces]' *Caixin.com* (2014) <<http://china.caixin.com/2014-06-16/100690795.html>> accessed 3 October 2018.

<sup>32</sup>Supreme People's Court of China, *Zhongguo Fayuan De Sifa Gaige: 2013–2018 [Judicial Reform of Chinese Courts: 2013–2018]* (People's Court Press 2019) 7.

<sup>33</sup>Supreme People's Court of China, 'Zuigao Renmin Fayuan Guanyu Quanmian Shenhua Renmin Fayuan Gaige De Yijian [Opinions of the Supreme People's Court on Comprehensive Deepening of Reform of People's Courts]' *Chinacourt.org* (2015) <[www.chinacourt.org/law/detail/2015/02/id/148096.shtml](http://www.chinacourt.org/law/detail/2015/02/id/148096.shtml)> accessed 3 October 2018.

<sup>34</sup>*ibid.*

<sup>35</sup>*ibid.*

<sup>36</sup>Supreme People's Court of China (n 7) 46–47.

<sup>37</sup>*ibid.* 47.

<sup>38</sup>*ibid.* 55.

<sup>39</sup>Suli Zhu, 'Jiceng Fayuan Shenpan Weiyuanhui Zhidu De Kaocha Ji Sikao [Investigation and Thoughts On The Adjudication Committee System In Basic Courts]' (1998) *Peking University Law Review* 320, 338.

<sup>40</sup>Peerenboom (n 23) 289.

On this matter, the Supreme People's Court seems to largely agree with Zhu and Peer-enboom. For example, Zhou Qiang, the Court president and one of the key reform designers, recognizes that the success of the personnel reforms and the resulting inflow of judicial talent 'is the cornerstone of the accountability reforms'.<sup>41</sup> Vice President Li Shaoping later elaborated on the relationship between the two reforms:

To deepen the institutional reform of the judiciary, it is not enough to just select better judges and to raise their salary. The purpose of selecting better judges through the quota system is to raise the quality of the judicial profession and increase the capacity of the frontline judges, thus laying the foundation for the accountability reforms.<sup>42</sup>

Essentially, the Court envisions the two sets of reforms as two sides of a single coin: the personnel reforms will generate an elite group of highly qualified and well-paid judges, and the accountability reforms will bestow on them the power and responsibility to adjudicate cases independent of interferences from their superiors.

Like the rest of Xi's judicial reforms, the personnel reforms have attracted considerable scholarly attention. In their recent piece, Zhang and Ginsburg note that recent personnel reforms 'aimed to reward high performers with substantially higher salaries and greater responsibilities' and argue that 'the rise in compensation levels have allowed the courts to recruit more ambitiously'.<sup>43</sup> Contrasting this account, Cohen writes that '[m]any younger judges are quitting because their career prospects are restricted by the manner in which court reforms are being carried out, favoring older, often less-qualified but more ensconced cadres'.<sup>44</sup> Similarly, Carl Minzner warns of 'skyrocketing workloads' and 'an exodus of trained personnel' as a result of Xi's reforms.<sup>45</sup>

Without further empirical evidence, however, the actual efficacy of the reforms is hard to evaluate. Drawing on in-depth interviews with judges and lawyers from three provinces, this study aims to answer several crucial questions about the personnel reforms: Were the top-down reforms faithfully implemented throughout different regions, without being compromised by the historical pattern of 'countermeasure from below'? Did the reforms produce a more elite group of judges capable of independently adjudicating complex cases, or did it hurt the judiciary by driving the younger and more qualified judges away from the courts? What does the answer to these questions say about the transition from decentralized experimentation to top-level design?

## Data and methods

This study is based on the author's interviews with Chinese judges and lawyers during summer 2018. The fieldwork covered three province-level units of varying levels of socio-economic development, including the affluent Zhejiang (14 judges and 15 lawyers), the moderately prosperous Chongqing (10 judges and 10 lawyers), and the relatively underdeveloped Yunnan (10 judges and 8 lawyers). The author interviewed judges in various

<sup>41</sup>Mengmeng Wang, 'Zhou Qiang: Tuijin Faguan Yuanzhi Gaige, Rang Youxiu Faguan Rencai Chongshi Dao Shenpan Yixian' *Xinhua* (2015) <[www.xinhuanet.com/politics/2015-07/25/c\\_1116037375.htm](http://www.xinhuanet.com/politics/2015-07/25/c_1116037375.htm)> accessed 27 April 2019.

<sup>42</sup>Shaoping Li, 'Zhengque Chuli Fangquan Yu Jiandu Jiandingbuyi Quanmian Luoshi Sifa Zerenzhi' (*The Supreme People's Court of The People's Republic of China*, 2018) <[www.court.gov.cn/zixun-xiangqing-88442.html](http://www.court.gov.cn/zixun-xiangqing-88442.html)> accessed 5 May 2019.

<sup>43</sup>Zhang and Ginsburg (n 8) 17–18.

<sup>44</sup>Cohen (n 9).

<sup>45</sup>Minzner (n 9) 105.

positions ranging from judicial assistants (technically not judges) to court presidents, with the majority being frontline judges and division chiefs/vice-chiefs. Among the judges, most (29 out of 34) were from basic courts, and the rest were from intermediary courts.<sup>46</sup> Most interviewees had at least six years of experience in their respect profession, which means they could make meaningful comparisons between the pre- and post-reform judiciary. However, since most interviewees (23 out of 34 judges and 33 out of 33 lawyers) worked in the cities, there is a potential urban bias in the sample.

The interviews were semi-structured. Typical questions relevant to this study include:

- (1) What is your position in the court (or law firm)? What is your practice area?
- (2) When did you start working here? Did you have other legal experiences before joining?
- (3) What measures have been taken with regard to the personnel reforms (员额制) where you work/practice?
- (4) What do you think are the effects of the personnel reforms?

Besides these questions, the interviewees were also encouraged to speak on any relevant issues they were interested in discussing. The author also asked follow-up questions not on the list. Interviews with judges lasted around 30–75 minutes, and interviews with lawyers lasted around 20–40 minutes.

The most challenging aspect of the fieldwork is the political sensitivity surrounding the judicial reforms, in particular, the personnel reforms. The judicial reforms are critical to the current administration's pledge to 'govern the country according to the law', which is one of the centerpieces of his domestic policy. As a result, some court officials might be wary about potential 'negative publicity' for the reforms that could be tracked to a specific court. This was especially true in the case of the judicial personnel reforms, which many judges considered by far the most unsuccessful component of the judicial reforms.

To address this problem, interviewees were promised both individual interviewees and the entities they were working for that their names and cities/counties would not be mentioned in publications. The interviewees' names are coded in letters and numbers (e.g. JA01 or LA01) using the following method. The first letter (J or L) denotes 'judge' or 'lawyer', representing the occupation of the interviewee. The second letter is a province-level unit code representing the location of the interview (Zhejiang: A, Chongqing: B, Yunnan: C). The numbers that follow indicate the interview number.

## The implementation of personnel reforms

During the interviews, judges unanimously reported that the courts in Zhejiang, Chongqing, and Yunnan had implemented all the major reform measures related to judicial personnel management. However, many of the interviewees, particularly the judges, had harsh criticisms of these reforms. Their main complaint was that the new system reduced the number of judges, forbade many young professionals from handling cases by themselves, and did not sufficiently raise judicial salaries. As a result, the personnel

<sup>46</sup>China has a four-level court system: the Supreme Court, high courts, intermediary courts, and basic courts.

reforms have made life much more miserable for the remaining judges and the court significantly less attractive to law graduates, especially in developed regions.

As previously mentioned, the personnel reforms include several components, including the judge quota system, the new judge selection system based on uniform exams and interviews, the classified management of judicial personnel (including the creation of judicial assistants), and an increase in judicial salaries. The judge quota system, along with the judge selection system, forms the core of the personnel reforms, as the judge classification and salary reforms are premised upon the implementation of the new judge quota. However, the quota system attracted the most complaints by far from the interviewed judges, largely due to their drastically increased caseloads. Most saw the reduced number of judges as the main problem facing their courts.<sup>47</sup>

Based on the quota set by the central government and Supreme People's Court, local courts are required to cut the number of judges to no more than 39% of their total headcounts.<sup>48</sup> The quota represents a major reduction, as most court employees are considered judges after a couple years of clerkship. In theory, the reforms are supposed to reduce the number of judges through two means: (1) by demoting professionally incapable judges, who are mostly senior judges without formal legal training and (2) by demoting judges who perform only court administrative functions.<sup>49</sup> However, the plan has been only half successful. While many senior judges were indeed demoted to either judicial assistants or administrative staff, many judges who performed only administrative functions (such as presidents, vice presidents, and heads of various administrative offices) prior to the reforms retained their judgeships thanks to their 'leadership' status. To satisfy the formal requirement that only judges who adjudicate cases remain in the quota, these 'administrative-function judges' began to handle relatively small numbers of cases, sometimes around 30% of a frontline judge's normal caseload.<sup>50</sup> Since many of these administrative-function judges, including court presidents and vice-presidents, are considered court leaders, they are often prioritized to enter the judge quota.<sup>51</sup> This has produced a major problem: since these administrative-function judges handle a small fraction of their non-administrative colleagues' caseloads, including them in the quota means the number of quota judges doesn't accurately reflect the number of practicing judges. It is like counting senior US judges as active judges, though the former often have significantly reduced caseloads compared to the latter. One judge described the situation in his court as follows:

Prior [to the reform], we had around a hundred judges. Fifty to sixty actually handled cases. Now we only have thirty-plus judges within the quota. Among them, ten-plus handle cases on the front line, and the rest ten-plus [judges] are court leaders [who do not handle as many cases]. As a result, the pressure of case-handling on each individual judge has increased.<sup>52</sup>

<sup>47</sup>E.g. Interview with JA02, Judge, Basic People's Court, in Zhejiang, China (6 June 2018); Interview with JB01, Judge and Director of the Research Office, Basic People's Court, in Chongqing, China (22 June 2018); Interview with JC06, Judge and Member of the Adjudication Committee, Basic People's Court, in Yunnan, China (11 July 2018).

<sup>48</sup>Jie Gao and Fang Li, 'Zuigao Fayuan Shoupi Yuane Faguan De Chansheng Cici Gaige Shui Jiang Huoyi?' *Xinhua* (2017) <[www.xinhuanet.com/politics/2017-07/07/c\\_1121283391.htm](http://www.xinhuanet.com/politics/2017-07/07/c_1121283391.htm)> accessed 7 May 2019.

<sup>49</sup>*ibid.*

<sup>50</sup>Interview with JB08, Judge and Director of the Trial Administration Office, Basic People's Court, in Chongqing, China (27 June 2018); Interview with JC03, Judge, Basic People's Court, in Yunnan, China (10 July 2018).

<sup>51</sup>Interview with JB06, Judge and Vice Division chief of the 1st Civil Division, Basic People's Court, in Chongqing, China (27 June 2018); Interview with JB08.

<sup>52</sup>Interview with JC02, Judge, Basic People's Court, in Yunnan, China (10 July 2018).

The new classified management of judicial personnel has worsened the situation by creating a new class of judicial assistants not allowed to independently adjudicate cases. Prior to the reforms, only two types of legal professionals existed in the courts: judges and clerks. Back then, a recent law school graduate would normally serve as a clerk for two to three years before becoming an assistant judge. Although assistant judges were not ‘full’ judges, they could handle cases individually. Under the new system, however, most who hold a law degree but do not make it into the judge quota become judicial assistants, who are not allowed to preside over hearings or sign their names on court opinions.<sup>53</sup> Instead, they are supposed to perform functions similar to those of law clerks in the US federal court system. In practice, some of these judicial assistants still function as judges in all but name for simpler cases – they still do most of the work, but the case ‘belongs’ to one of the judges.<sup>54</sup> This means that the judge formally assigned to a case must spend time reading case materials and presiding over hearings as well as bear responsibility for any wrong decisions.<sup>55</sup> This also means that judicial assistants cannot take much credit for their work on these cases, as they are not supposed to be handling cases in the first place.<sup>56</sup> As a result, judges, judicial assistants, and lawyers all recognize that judicial assistants have little incentive to work hard under the new system because they can no longer take full responsibility and credit for the cases they work on.<sup>57</sup> One judge summarized the situation as follows:

The people who are not in the quota still handle cases. But they are ‘invisible people’ when handling cases. How do we calculate their caseload? Do [cases registered under a judge’s name but actually handled by a judicial assistant] belong to the judge or to the assistant? It is hard to evaluate the judges based on that because they did not actually do much work on these cases; it is even harder to evaluate assistants because they are theoretically not allowed to handle cases.<sup>58</sup>

The situation is exacerbated by the dim promotion prospects for judicial assistants. Since the judge quota for each court is relatively fixed, the only way a judicial assistant can become a judge absent a policy change is to wait for a judge to retire or resign. Based on the current judge quotas, some estimate that a newly recruited judicial assistant will need to work around ten years before becoming eligible for judgeship, as opposed to two to three years before the reform.<sup>59</sup> Taken together, the recent reforms create huge disincentives for many young court professionals.<sup>60</sup> Some judges reported difficulty recruiting new talent from law schools. For example, one judge explained:

The reform hopes to attract more frontline judges. That goal was not met. Now [judges] in the quota are working under high pressure just like before, and those outside the quota do not

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<sup>53</sup>E.g. Interview with JA01, Judge, Basic People’s Court, in Zhejiang, China (6 June 2018); Interview with JA03, Judge, Basic People’s Court, in Zhejiang, China (6 June 2018); Interview with JB02, Judge, Basic People’s Court, in Chongqing, China (22 June 2018).

<sup>54</sup>Interview with JA04, Judge and Vice Division chief of the Administrative Division, Basic People’s Court, in Zhejiang, China (6 June 2018).

<sup>55</sup>ibid.

<sup>56</sup>Interview with JB02.

<sup>57</sup>E.g. Interview with JA04; Interview with JB02; Interview with LC07, Partner, Anonymous Law Firm, in Yunnan, China (12 July 2018).

<sup>58</sup>Interview with JC10.

<sup>59</sup>Interview with JA13, Judge, Intermediary People’s Court, in Zhejiang, China (8 June 2018); Interview with JC04, Judicial Assistant, Basic People’s Court, in Yunnan, China (10 July 2018); Interview with JC10.

<sup>60</sup>Interview with JA13; Interview with JB03, Judge and Director of the Trial Administration Office, Basic People’s Court, in Chongqing, China (22 June 2018).

know when they will get into the quota. Law students who come to courts are the ones with ideals, but ideals must be balanced with realities. Nowadays, after entering the courts, [they] might have to wait ten years before handling cases themselves. So, the attractiveness to youth would necessarily decrease.<sup>61</sup>

In addition to the problems described above, the interviewed judges complained about the inconsistent quality of judicial assistants under the new personnel system. Most judicial assistants belong to one of two distinct groups: young judicial assistants who recently graduated from law school and are too junior to be considered for the judge quota<sup>62</sup> and senior judges who lack sufficient legal training and thus cannot pass the judge quota tests.<sup>63</sup> The younger judicial assistants, while discouraged by the new personnel system, typically have received good legal training.<sup>64</sup> They can be very helpful to judges and often assist with analyzing evidence and drafting opinions. In contrast, though many senior judicial assistants have spent much of their careers in the courts, they are generally far less capable of handling legal work due to their generation's lack of rigorous legal education.<sup>65</sup> To make matters worse, they have even less incentive than their younger counterparts to perform well, as they have mostly given up on promotion to judgeship due to both their lack of skill and the demanding judge workloads under the new system.<sup>66</sup> Because the work quality of judicial assistants varies so widely, the interviewed judges' opinions regarding the usefulness of judicial assistants also vary widely, ranging from 'extremely helpful'<sup>67</sup> to 'not very helpful'.<sup>68</sup> Those who find judicial assistants helpful said that the new division of labor relieves them from dealing with mundane matters, enabling them to focus on two main tasks: presiding over hearings and drafting complex opinions.<sup>69</sup> Those who find judicial assistants unhelpful believe their assistants incapable of providing usable legal opinion drafts.<sup>70</sup>

As for the new salary system, very few judges expressed satisfaction with the increase in compensation. In the words of the Supreme People's Court, the reform promised to 'greatly increas[e] the salary level of judges'.<sup>71</sup> This prompted high expectations, and judges are generally disappointed in the subsequent salary increases.<sup>72</sup> This disappointment is particularly acute because (1) judges often need to pass several hurdles to become a judge under the quota, including passing a test and being interviewed and (2) caseloads have increased due to the much smaller number of judges.<sup>73</sup> Many judges feel that the pay increase does not match the increased requirements and effort necessary to become a judge. As one judge explained: 'It was said that the compensation would rise by 50 percent. That was not implemented in practice. What was implemented was a

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<sup>61</sup>Interview with JA13.

<sup>62</sup>Interview with JA08, Judge, Basic People's Court, in Zhejiang, China (7 June 2018).

<sup>63</sup>Interview with JA01; Interview with JC02; Interview with JC10.

<sup>64</sup>Interview with JB03; Interview with JB06; Interview with JC03.

<sup>65</sup>Interview with LA14, Partner, Anonymous Law Firm, in Zhejiang, China (5 June 2018).

<sup>66</sup>Interview with JC02.

<sup>67</sup>Interview with JA07, Judge and Vice Division chief of 2nd Civil Division, Basic People's Court, in Zhejiang, China (7 June 2018).

<sup>68</sup>Interview with JA04.

<sup>69</sup>Interview with JA07.

<sup>70</sup>Interview with JA04; Interview with JA10, Judge and Division chief of 1st Civil Division, Basic People's Court, in Zhejiang, China (7 June 2018).

<sup>71</sup>Supreme People's Court of China (n 7) 49.

<sup>72</sup>Interview with JA04; Interview with JA12; Interview with JB08.

<sup>73</sup>Interview with JB08.

3000–4000 RMB raise per person. But that was not worth the increased workload.<sup>74</sup> Similarly, another judge complained: ‘[The salary increase] was loud thunder but small rain-drops; the promises were grand, but they were not fulfilled.’<sup>75</sup>

In general, the interviewed judges consider the personnel reforms highly undesirable. One judge’s opinion summarizes their overall reactions to these reforms:

Around the time when [the reforms] first came, many of my colleagues went to law firms, especially the capable judges... The attractiveness of the profession is also declining. When I first entered [the court], there were graduates from Zhejiang University and Fudan University.<sup>76</sup> Now there are few. My personal feeling is that the judicial reforms have failed because they have driven the judges away, and those left also feel miserable.<sup>77</sup>

However, although judges everywhere dislike the personnel reforms, the intensity of their distaste depends heavily on their location. As one lawyer summarized: ‘Among the basic [courts], [those in] developed regions gave lower evaluations and [those in] poorer regions gave higher evaluations.’<sup>78</sup> Judges in developed regions tend to have the most complaints about the personnel reforms, while judges in less developed regions feel less strongly about them. This is because judges in wealthier regions, mostly big cities, handle many more cases than their counterparts in other places.<sup>79</sup> For example, one judge from a large-city court complained that:

The distribution of quotas is very unreasonable. Some county courts have only 2,000 cases per year and ten-plus [judges]. The main city district [courts] have between 10,000 and 20,000 cases but only forty-plus judges. The disparity in per-person caseloads is too big.<sup>80</sup>

Consequently, the decrease in headcounts has had larger negative impact on judges in more developed regions.

The lawyers’ evaluations of the personnel reforms are somewhat mixed, but still generally negative. Several lawyers recognized that eliminating senior judges without formal legal training from the bench has improved the professionalism of the courts and the quality of the opinions.<sup>81</sup> On the other hand, many lawyers confirmed the problems voiced by the judges, including severe shortage of judge quotas, disheartened and irresponsible judicial assistants, and low salaries. In addition, most lawyers said that the reduction in the number of judges has resulted in delays in their cases.<sup>82</sup> It has become increasingly common for judges to ask lawyers to ‘voluntarily’ file a petition to suspend a pending case, so that the six-month statutory time limit will not expire before the judge has time to make a ruling.<sup>83</sup> Some noted that judges have less time to interact with them<sup>84</sup> and that there are

<sup>74</sup>Interview with JC03

<sup>75</sup>Interview with JA04.

<sup>76</sup>Both are highly respected universities with top-ranked law schools.

<sup>77</sup>Interview with JA04.

<sup>78</sup>Interview with LC07.

<sup>79</sup>*ibid.*

<sup>80</sup>Interview with JC06.

<sup>81</sup>E.g. Interview with LA02, Partner, Anonymous Law Firm, in Zhejiang, China (4 June 2018); Interview with LB09, Associate, Anonymous Law Firm, in Chongqing, China (28 June 2018); Interview with LC05, Associate, Anonymous Law Firm, in Yunnan, China (12 July 2018).

<sup>82</sup>E.g. Interview with LA06, Associate, Anonymous Law Firm, in Zhejiang, China (4 June 2018); Interview with LB01, Partner, Anonymous Law Firm, in Chongqing, China (20 June 2018).

<sup>83</sup>Interview with LA12, Associate, Anonymous Law Firm, in Zhejiang, China (5 June 2018); Interview with LB06, Associate, Anonymous Law Firm, in Chongqing, China (28 June 2018).

<sup>84</sup>Interview with LA06; Interview with LB10, Partner, Anonymous Law Firm, in Chongqing, China (28 June 2018).

more typos in judges' opinions.<sup>85</sup> One Zhejiang lawyer's response was rather representative:

After the reforms, the old and incapable judges are transferred to non-frontline departments such as administrative or secretarial posts. Those remain in the quota are younger judges with professional trainings, which has resulted in higher-quality work products. On the negative side ... there are too many cases and too few judges in the basic courts ... Moreover, their salaries remain very low compared to lawyers. Many judges have asked me to help them voice their grievances. If this situation continues, there will be more judges leaving their posts. In one of my cases, I had three different judges during the trial stage, because the first two quit [during the trial stage]. We recently hired three judges, all of whom have excellent legal skills. It's a good thing from the firm's perspective, but in the long run this could make the legal profession unsustainable.<sup>86</sup>

### **Court reforms in the era of top-level design: high risk, high reward?**

The presented evidences seem to paint a rather bleak picture of the personnel reforms. Although creating a more elite judiciary seems a logical solution to the long-term problem of uneven professional quality, the actual plan is not well-suited to realizing this vision. Indeed, the mass reduction in number of judges and the vague role of judicial assistants run counter to the very goal of improving professionalism. Moreover, the disparity of responses between courts in developed and underdeveloped regions also shows that the reforms have failed to sufficiently account for China's vast diversity.

The persistence of these problems four years after the initiation of the judicial reforms is closely associated with the top-down nature of the reforms' design and implementation. In earlier times, the decentralized model of institutional change allowed considerable variation across regions, thus generating diverse solutions tailored to local socioeconomic environments. By contrast, the implementation of the current personnel reforms closely follows a single, centrally imposed formula. Indeed, it is stipulated that any regional variations that deviate from the center's plan must be first approved either by the Supreme People's Court or by the central government itself.<sup>87</sup> The author noticed little variation in reform design and implementation across three provinces as well as between developed and underdeveloped regions. Such lack of diversity is especially troubling in the context of the judge quota system because uniform implementation will inevitably result in more dramatic workload increases for judges in big cities compared to those in rural areas.

Perhaps more importantly, the centralized model minimizes opportunity for trial and error, which was critical to China's Reform and Opening process. For decades, the old saying 'crossing the river by feeling the stones' (摸着石头过河) was a guiding principle for China's institutional evolution. In practice, the 'hands' that China used to feel the stones were mostly the subnational and local governments. For example, coastal regions like Guangdong and Shanghai served as pioneers of economic liberation in the 1990s. In the 2000s, many socioeconomic innovations were also piloted by provinces such as

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<sup>85</sup>Interview with LC04, Associate, Anonymous Law Firm, in Yunnan, China (9 July 2018); Interview with LC08, Associate, Anonymous Law Firm, in Yunnan, China (12 July 2018).

<sup>86</sup>Interview with LA14.

<sup>87</sup>Supreme People's Court of China (n 32) 7.

Sichuan, Jiangsu, and Chongqing.<sup>88</sup> Such experimental processes produced vast amounts of information that other subnational actors and the central government could use to evaluate the pros and cons of a project, allowing them to adjust the design before adopting it themselves (if they decided to do so at all). Compared to direct nationwide adoption, this practice of subnational experimentation significantly reduced the political, economic, and social risks associated with introducing unfamiliar ‘Western’ elements (such as a market economy and elections) into the officially communist state.

There is little sign that the implementation of the judicial personnel reforms has a similar mechanism that can sufficiently address the shortfalls of the original plan. To be sure, as part of the broader judicial reforms, the personnel reforms have officially gone through three rounds of ‘pilot phase’. The first, which included Shanghai and Guangdong, was initiated in seven province-level units in June 2014. The second started in June 2015 and extended the reforms to eleven additional provinces. This pilot program was then extended to the rest of China in March 2016, before the reform measures were officially declared national policies in July 2016.<sup>89</sup> As a natural result of such an extended pilot program, many noticed problems early on. Since 2015, various media outlets, including the judiciary’s own news websites and the official state news agency Xinhua, have published numerous articles noting that the personnel reforms have resulted in ‘too many cases, too few judges’ (案多人少) in developed regions such as Beijing and Fujian.<sup>90</sup> Some also report that many judges are discontented with the negligible salary raises.<sup>91</sup>

Unfortunately, such realizations have not led to effective solutions. As early as 2015, the courts themselves have been trying to remedy these problems through various means, including developing alternative dispute resolution mechanisms,<sup>92</sup> streamlining workflow,<sup>93</sup> moving judge quotas from courts in underdeveloped regions to those in developed regions,<sup>94</sup> and even forcing less capable judges out to become administrative staff or judicial assistants.<sup>95</sup> However, the author’s fieldwork suggests that judges continued to suffer from increasing workloads and lackluster compensation well into 2018. Indeed, judges complain that the situation has only worsened over the past couple of years, as case-loads continue to expand due to the changing economic situation and the new case-filing system (立案登记制), which sets a lower bar for filing cases.<sup>96</sup> As several judges and lawyers have suggested, the real problem is the reforms themselves because reducing the number of judges is fundamentally incompatible with the rapid increase of legal

<sup>88</sup>See generally Wen-Hsuan Tsai and Nicola Dean, ‘Experimentation under Hierarchy in Local Conditions: Cases of Political Reform in Guangdong and Sichuan, China’ (2014) 218 *The China Quarterly* 339; Chunhua Chen and Bruce Dickson, ‘Coping with Growth in China: Comparing Models of Development in Guangdong and Chongqing’ (2018) 3 *Journal of Chinese Governance* 197.

<sup>89</sup>Supreme People’s Court of China (n 32) 5.

<sup>90</sup>E.g. Fenglin Yang, Guoli Yuan and Xiaofei Wang, ‘Sifa Gaige Bannianqi Tanfang “Anduo Renshao” Wenti Tuxian [Half Year After Initiation of the Judicial Reforms: The Emerging Problem of “Too Many Cases, Too Few Judges”]’ *Xinhua News* (2015) [www.xinhuanet.com/politics/2015-07/06/c\\_127987237.htm](http://www.xinhuanet.com/politics/2015-07/06/c_127987237.htm) accessed 12 August 2019; Liang Zheng and others, ‘Shenhua Sifa Gaige Weihu Gongping Zhengyi [Deepen the Judicial Reforms, Uphold Equality And Justice]’ *China Court* (2016) <[www.chinacourt.org/article/detail/2016/03/id/1820822.shtml](http://www.chinacourt.org/article/detail/2016/03/id/1820822.shtml)> accessed 12 August 2019.

<sup>91</sup>Xiangjun Fu, ‘“Shouru Gao 43%” De Faguan Bingbu Haodang [“Judges With 43% More Salary” Is No Easy Job]’ *People’s Daily Online* (2015) <<http://opinion.people.com.cn/n/2015/0425/c159301-26901773.html>> accessed 12 August 2019.

<sup>92</sup>Supreme People’s Court of China (n 32) 30–31.

<sup>93</sup>*ibid* 32.

<sup>94</sup>Yiling Wang, ‘Faguan Yuanhezhi De Guangdong Shidian [Piloting Judge Quota In Guangdong]’ *Guangming Daily* (2015) <[http://epaper.gmw.cn/gmrb/html/2015-06/08/nw.D110000gmrb\\_20150608\\_1-10.htm](http://epaper.gmw.cn/gmrb/html/2015-06/08/nw.D110000gmrb_20150608_1-10.htm)> accessed 12 August 2019.

<sup>95</sup>Supreme People’s Court of China (n 32) 49.

<sup>96</sup>E.g. Interview with JA07; interview with JB01.

disputes in China.<sup>97</sup> Consequently, the only feasible way to fix the problems is to substantially increase the overall judge quota, which would effectively declare the personnel reforms a mistake.

However, due to the drastically different underlying power dynamics, rectifying such major mistakes in institutional design is much more difficult during the age of top-level design than it was when decentralized experimentation was the norm. Two interconnected elements were crucial to China's system of policy experimentation: (1) a decentralized policy-making structure that awarded local governments sufficient authority and resources to adopt innovative policies and institutional changes and (2) vibrant intraparty political competition in the center, which ensured the center would not form a monolithic force that could easily encroach upon local government discretion.<sup>98</sup> Under such circumstances, when local actors deemed a centrally mandated reform measure to be either flawed or unsuitable for their specific goals or context, they could often substantially adjust or even decline implementation. In effect, this combination of structural decentralization and factional competition created a balance mechanism that vaguely resembles a federal system, with similar advantages in reducing policy mistakes by a monolithic state.

The calculation is completely different for reforms sanctioned by a more unified central government. The recent consolidation of political power in the center means that the central government can effectively utilize all the tools at its disposal – including the nomenklatura and disciplinary systems – against unruly local officials. Under such political dynamics, subnational and local actors – despite institutionally retaining most of their decision-making authority – have very little incentive to resist reform measures decreed by the center, as they are evaluated based on the steadfast implementation of orders from above rather than on performance indicators.<sup>99</sup> In particular, the disciplinary campaign and the System of Requesting Instructions and Submitting Reports have greatly cemented the top-down control of cadres, creating what some call 'zero tolerance [for] non-compliance with central directives'.<sup>100</sup> Consequently, there is no built-in mechanism, such as local non-compliance or alteration of major flaws in reform designs, that can produce an effective response to the abovementioned problems. One intermediary court judge confirmed that top-down structure was a central cause of the personnel reforms' persistent problems:

The decision-making of this round of judicial reforms was quite hasty. [People from] the Office of Judicial Reforms [of the Supreme People's Court] told us in a meeting that the central [government] urged them to speed up [the judicial reforms] ... It was first tested in Shanghai. However, it was spread out [to other provinces] despite [that] many problems [associated with the personnel reforms] were left unresolved ... That was the reason that [the personnel reforms] failed to take into consideration China's vast diversity. When the [intermediary court] leaders assigned the tasks [associated with the reforms] to us, he said that 'the reform plan is not theoretically mature, but we have to enforce it anyway'.<sup>101</sup>

That said, it would be premature to dismiss the top-level design approach simply because the personnel reforms have generated undesirable results, as they represent

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<sup>97</sup>E.g. Interview with JC10; interview with LA14.

<sup>98</sup>See generally Yueduan Wang, 'Laboratories of Authoritarianism' (Unpublished Doctoral Dissertation).

<sup>99</sup>Chen (n 20) 663.

<sup>100</sup>Kostka and Nahm (n 19) 568.

<sup>101</sup>Interview with JC10.

what is likely the worst aspect of the recent judicial reforms. Based on the author's fieldwork, the accountability reforms have successfully enabled frontline judges to decide most cases without obtaining prior approval from court leaders and have limited the use of adjudication committees, making individual judges more autonomous.<sup>102</sup> Despite their inherent political limitations, in the span of a few years, these changes have partially overcome the judges' deep-rooted embeddedness in local contexts and historical practices,<sup>103</sup> an outcome almost unimaginable within an environment of decentralized policy. Here, the benefit of political fragmentation is turned on its head: when power is fragmented among many stakeholders, it becomes exceedingly difficult to overcome established interests and practices. Power consolidation thus becomes a virtue to those who seek change.<sup>104</sup>

## Conclusion

Drawing on evidence from fieldwork in courts and law firms, this study examines the implementations and impacts of the judicial personnel reforms under the current administration. All courts involved in the interviews reported that they had mostly implemented the personnel reforms, including the judge quota system that reduces the number of judges by over 60% and the creation of a new class of judicial assistants who are not allowed to preside over cases. However, although the reforms have been successful in removing many senior judges with little formal legal training, they have also created serious problems. Since many court leaders who had worked mostly in administrative roles entered the judge quota, many recent law graduates could not. Instead, they have been demoted to judicial assistants with no power to preside over hearings or even sign their names on opinions. This not only has resulted in more work for judges, who must preside over and take formal responsibility for many more cases, but also means that judicial assistants cannot take credit for the cases they work on, as these cases do not 'belong' to them even when they do most of the work. The reforms have also failed to deliver the promise to 'greatly increase the salary level' of judges who remain in the quota, as the actual increase in compensation has been quite small, especially when compared to the caseload increase.

As a result, the personnel reforms have caused severe problems with recruiting talent in many courts, especially in developed regions where judges' caseloads were already high before the reforms. Judges who have successfully entered the quota lament about the drastically increased workload and the broken promise of a substantial salary increase, which has led to low morale and a significant number of resignations. Morale is even lower among the recent law graduates who have failed to make into the quota. They not only play a more inferior role than before but also, given the small judge quota, have dim prospects for promotion to judgeship. This has created a

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<sup>102</sup>See generally Yueduan Wang, 'Overcoming Embeddedness: How China's Judicial Accountability Reforms Make Its Judges More Autonomous' (Forthcoming) 43 *Fordham International Law Journal*.

<sup>103</sup>See generally Ng and He (n 2); Ling Li, 'The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-party State' (2012) 37 *Law & Social Inquiry* 848.

<sup>104</sup>See generally Yueduan Wang, 'The More Authoritarian, the More Judicial Independence? The Paradox of Court Reforms in China and Russia' (Forthcoming) 22 *University of Pennsylvania Journal of Constitutional Law*.

long-term problem with recruiting talent, as the reforms make court jobs much less attractive to law school graduates.

In addition, the shortcomings of the personnel reforms may have spillover effects on other judicial reform components. As discussed earlier, Zhu and Peerenboom argue that the high professional quality of judges is an important basis for empowering them to make decisions without supervision from better trained and more experienced judges.<sup>105</sup> This view was echoed by many of the interviewed judges and lawyers, who conveyed that some judges are not professionally ready to operate independently. Several top reformers – including the president of the Supreme People’s Court – also seem to agree with the idea that the accountability reforms must be based on the success of the personnel reforms.<sup>106</sup> As the ever-increasing workloads and brain drain continue to undermine individual judges’ ability to make sound legal judgements independently, the newly enhanced autonomy of frontline judges may be on increasingly shaky ground.

In sum, as a poster child for top-level design, the recent judicial reforms showcase both the advantages and disadvantages of a centrally driven approach to institutional innovation. In particular, the personnel reforms have demonstrated that the top-down approach lacks an efficient mechanism to check against major design deficiencies, even when they are readily apparent to implementers. This disadvantage is especially apparent when compared to a decentralized policy experimentation model, under which flawed institutional designs are unlikely to spread due to power fragmentation across different state segments. By the same token, however, the new approach can overcome local protectionism and embeddedness. This advantage is more pronounced in the accountability reforms, where design flaws are less apparent and the problems with local embeddedness are arguably more serious.

The study also sheds light on the larger discussion about the efficacy of top-level design as a general approach to institutional change. The issues surrounding the personnel reforms notwithstanding, the judiciary is, in many ways, particularly suitable for top-down reforms. Chinese judges account for less than 1% of state employees, and despite their geographic dispersion, judges across China receive similar professional education, socialize with similar legal professionals, and – most importantly – practice the same written laws enacted by the center. Reforming the courts through central directives, therefore, is likely easier and more efficient than reforming other institutions that are larger or internally more diverse. In addition, a centralized judiciary, which connotes a more unified application of law and more independence from local protectionism, is considered by many (though not all) as a virtue in itself. However, applying the top-down model to other types of institutional reform, such as those concerning state-owned enterprises or local bureaucracies, might be more challenging. Given the more localized and flexible nature of these larger and more diverse sectors’ jobs, it is not only more difficult to reform them through central mandates but also less likely that a one-size-fits-all reform will generate desirable outcomes.<sup>107</sup>

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<sup>105</sup>Zhu (n 39) 338; Peerenboom (n 23) 289.

<sup>106</sup>Wang (n 41); Li (n 42).

<sup>107</sup>See e.g. Barry Naughton, ‘The Current Wave of State Enterprise Reform in China: A Preliminary Appraisal’ (2017) 12 Asian Economic Policy Review 282.

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