

## Chapter 2

# The Organization of the Court

For D. J. Galligan, the way that discretionary powers are exercised is affected by the way an authority is organized (Galligan 1986, p. 133). That is to say, the exercise of discretionary power is relevant to “the degree of power which one official has over another, the extent to which it is hierarchical, the degree of autonomy particular officials have to act as they think best, the position regarding promotion – each of these factors, together with a range of others” (Galligan 1986, p. 133). An examination of the structure of the court provides a wider organizational context for a discussion of the organizational influences on AC decision-making. Judge positions introduced in this chapter will be a source of frequent reference in the remaining chapters.

The Chinese court system is built upon a bureaucratic hierarchical model within which judges are placed in different administrative ranks. The administrative rank of each judge is related to the level of the court in which a judge is placed and the position that a judge holds in a court. For example, the president of an IPC is placed in the *juji* (bureau level), a chief judge of an IPC in the *chuji* (division level), and the president of a BPC is also placed in the *chuji* (division level). In one court, the administrative ranks of the president, vice presidents, chief judges, deputy chief judges, and ordinary judges are placed in descending order. Higher ranking judges are generally responsible for overseeing adjudications handled by lower ranking judges. They also exercise considerable influence in areas which affect the careers of lower ranking judges, such as promotions, evaluations, welfare, vacations, transfers, and so on. In other words, a higher administrative rank brings a judge corresponding rights and duties in both administrative and adjudicative matters.

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Appendix 6: a diagram that shows the organization of the court.

## 2.1 Court President (*Yuanzhang*): High-Level Link to Outside Resources

A court is headed by the court president. Court presidents at various levels are elected and removed by the relevant people's congresses (NPCSC 1995, art. 11; NPCSC 1979a, art. 34).<sup>1</sup> A term of office for a court president is the same as that of the people's congress at corresponding levels (NPCSC 1979, art. 35). If the standing committee of a people's congress deems it necessary to replace a court president when the congress is not in session, it shall report the matter to the people's court at the next higher level for submission to the standing committee of the people's congress at the next higher level for approval (NPCSC 1979, art. 35).

The responsibilities of a court president are generally provided by the Judges Law. Article 6 of the 1995 Judges Law sets down that the court president shall perform judicial functions and duties, as well as other functions and duties that commensurate with his/her post (NPCSC 1995, art. 6). A court president usually represents his/her court throughout its jurisdiction. She/he is responsible for overseeing, managing, and performing a variety of tasks associated with the daily operation of his/her court, including ensuring the compatibility of court business with relevant policies, laws, regulations, directives, and procedures; recommending nominees for vice presidents, members of the AC, chief judges, and deputy chief judges and judges (NPCSC 1995, art. 11); appointing and removing assistant judges (NPCSC 1995, art. 11); presiding over the AC (NPCSC 1979, art. 10); and reporting to relevant Party committees (IPC of Jiyuan City 2007, art. 20).

The primary role played by the court president is to serve as a high-level link to outside forces. Henry Mintzberg described the functions performed by higher level professional administrators, which are to serve as the key roles in the boundaries of the organization, between the professionals inside and the interested parties outside (Mintzberg 1979, p. 362). They work to earn support from outsiders, such as the government and interest groups. They maintain liaison contacts, act as figureheads and spokesperson in a public relation capacity, and negotiate with outside agencies (Mintzberg 1979, p. 362).

In the Chinese judiciary, a court president plays the important role of external linkage. Randall Peerenboom places great emphasis on the external role played by the court president of the SPC Wang Shengjun.

They require someone who understands how the various organs relate and who has the trust of the various players and the stature to get something done – to negotiate an agreement, a *modus vivendi*, acceptable to all the stakeholders. In fact, many judges have called for a politically strong head of the court. Given his background, Wang understands the concerns

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<sup>1</sup> Relevant people's congress refers to the people's congress at the same level of the people's court. However, there are exceptions. Where intermediate people's courts are set up in the prefectures of provinces or autonomous regions or in the municipalities directly under the Central Government, appointment or removal of the presidents of these courts shall be decided by the standing committee of the people's congresses of the provinces, autonomous regions, or municipalities directly under the Central Government (NPCSC 1995, art. 11; NPCSC 1979a, art. 34).

of the Party leadership and how Party organs operate. He is thus well placed to suggest feasible reforms acceptable to other stakeholders and yet make the judiciary more effective in responding to rising demands and the changing circumstances. (Peerenboom 2010, p. 19)

The external role played by court presidents is mainly twofold, as a high-level link to the masses and to the Party.

### ***2.1.1 Function of Court President I: High-Level Link to the Masses***

The Mass Line is a political method developed by the leaders of the Chinese Communist Part and especially endorsed by Mao Zedong, during the Chinese revolutionary period. It simply means that a government of the people should listen to the masses and immerse political leadership into the concerns and conditions of the masses. It is captured by Mao's maxim: "[f]rom the masses, to the masses." For the judiciary, the Mass Line was interpreted as justice for the masses (*sifa weimin*) after the 16th National Congress of the Chinese Communist Party (CCP) in 2002 (SPC 2003a, b). It seeks to satisfy the needs of the masses for justice.

After several years of judicial reforms under the banner of professionalism and judicial independence, Mass Line, as one of the "three supremes," returned to govern the court system in December 2007. In a speech at the National Conference on Political-Legal Work, President Hu Jintao said that the grand judges and grand prosecutors shall always regard the Party's cause, the interests of the masses, and the constitution and laws as supreme (Yang 2008, 1 February).

The "Three Supremes" have been treated seriously by Wang Shengjun and promoted throughout the court system (Cohen 2008, 18 October). Wang Shengjun said in an interview that justice for the masses was an inherent requirement of socialism with Chinese characteristics (Li 2008, 16 June). To serve the masses, he thought, people's courts shall show sufficient respect to the will of the masses and commit themselves to protecting the rights of the mass and solving their problems (Li 2008, 16 June). He has the tendency to interpret judicial fairness and justice in light of the will of the masses (Cohen 2008, 18 October).

A court president is supposed to be in the best place to bring justice for the masses, because she/he is empowered to refer cases to the AC for decisions on whether to reopen the case if she/he finds some definite errors in the fact finding or the application of laws (NPC 1996, art. 205; NPC 1991, art. 177; NPC 1989, art. 63). To hear the will of the masses, a court president reception day has been established. Reception day at the HPC of Guangdong Province is on the morning of the 1st and 15th of every month (HPC of Guangdong Province 1999, art. 2). This court also requires lower courts to seriously implement the reception day and establish a multiple level reception system (HPC of Guangdong Province 1999, arts. 1, 2, 3, and 4). Reception day provides court presidents with information sources to oversee the operations of their courts and comprehend the miscarriage of justice in individual cases.

In practice, reception day is usually used as a strategy for self-presentation. A judge indicated that “The reception day of the president is just like that of the mayor. It carries more political significance than practical utility.”<sup>2</sup> Directly heard by court presidents, complaint lodgers have reasons to believe that their cases would be given sufficient attention and unlikely to be tainted during case processing. The judge continued:

The president only makes a primary judgment on whether there is a case throughout the reception. If s/he thinks that there is a case, case materials will be passed to the case filing division and processed as usual.<sup>3</sup>

Although a case filed on reception day may draw the attention of the court president, it does not make much difference for a strong case. Moreover, a case filed on reception day may drag on for a long time. A lawyer indicated that “there are no clear rules on the period of time for complaint processing and usually complaint lodgers need to wait for a long time.”<sup>4</sup> The undue delay may weaken the external role played by court presidents.

### ***2.1.2 Function of Court President II: High-Level Link to the Party***

A court president serves as a high-level link to the Party. The latter takes control of the career of the former. Treated as one of the Party and governmental leading cadres, court presidents are not only governed by the Judges Law but also the Regulation on Selection and Appointment of Leading Party and Governmental Cadres set down by the Central Committee of the CCP (CCP Central Committee 2002, art. 4). According to this regulation, local Party committees are responsible for selecting and nominating court presidents with the assistance of courts at higher level.

Court president selection and nomination mainly consist of three stages: democratic recommendation (*minzhu tuijian*), assessment, and decision-making. The human resources department of the higher Party committee shall preside over the meetings of democratic recommendations (CCP Central Committee 2002, art. 13). The results of the democratic recommendations serve as important basis for candidate selection, but they are not the only source (CCP Central Committee 2002, art. 17).

Candidates for assessment are determined by the Standing Committee of the CCP at the same level after it communicates with the human resources department of the Party committee at the immediate higher level (CCP Central Committee 2002, art. 16). The assessment work and final decision of a court president nominee is made by a relevant Party committee (CCP Central Committee 2002, arts. 20 and 32).

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<sup>2</sup>Question outline 3, interview note 10 from Interviewee 4.

<sup>3</sup>Question outline 3, interview note 11 from Interviewee 4.

<sup>4</sup>Interview with a lawyer, in a southern city of China (July 19, 2007).

As a court president is under the management of the local Party committee and the court at the immediate higher level, the Party committee needs to write to the higher people's court for consultation before it makes any decision (CCP Central Committee 2002, art. 31). The court at higher level is deemed to agree with the decision of the local Party committee, if it does not reply to the written consultation within one month after receipt (CCP Central Committee 2002, art. 31). If the higher court disagrees with the decision made by the Party committee, their dispute shall be referred to the human resources department of a higher Party committee for coordination (CCP Central Committee 2002, art. 31). Although higher courts are encouraged to suggest court president nominees (SPC 2004a, art. 3; SPC 2008, art. 20), in most instances, higher court nominations do not draw sufficient attention, and the higher court usually agrees with the decision of the Party committee (Liu 2005, p. 13).<sup>5</sup>

Party committees also play an important role in recommending its nominee for election. Before the Party committee officially recommends a court president nominee to the local people's congress, it will introduce its recommendation opinions to the contemporary Party unit (*linshi dangzuzhi*) of the local people's congress and Party group (*dangzu*) and Party members of the standing committee of the local people's congress (CCP Central Committee 2002, art. 43). After the primary introduction, the Party committee will issue a recommendation letter to the presidium in the name of the local Party committee (CCP Central Committee 2002, art. 44). The recommendation letter would specify the nominee's information and reasons for recommendation (CCP Central Committee 2002, art. 44).

If any representatives of the people's congress and members of the standing committee of the people's congress disagree with the nomination before the election, the Party committee will seriously study the dissenting opinions and provide the necessary explanations (CCP Central Committee 2002, art. 47). If the Party committee finds any evidence that supports the dissenting opinions and is against the election, the Party committee may suggest that the people's congress suspend the election or recommend another nominee (CCP Central Committee 2002, art. 47). If the nominee is not elected, she/he could be recommended for other positions or recommended again for the same position in the next people's congress (CCP Central Committee 2002, art. 48).

Apart from the selection, nomination, and recommendation, a Party committee also plays a critical role in the assessment (Organization Department of CCP Central Committee 1998, art. 41) and resignation of court presidents. Take resignation as an example. When a president of a local people's court or special court who shall resign initiatively according to the rules does not submit a resignation application, the relevant Party committee may, after negotiating with the people's court at an upper level and with the consent of the latter, suggest to the people's congress or the

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<sup>5</sup>There are exceptions. For example, it is reported that the appointment and removal of court presidents of BPCs in Heze City are mainly determined upon the suggestion of the IPC of Heze City (Hu 2004, 20 June). This practice is advocated by the Party committee of Heze City and run on a regular basis.

standing committee of the people's congress that the post of the court president be recalled, replaced, or dismissed in accordance with legal procedures (SPC 2001, art. 6). Therefore, the term of a court president is almost determined by the Party committee. And a court president then has reasons to strongly support and firmly implement Party policies.

### 2.1.3 Conclusion

Court presidents primarily serve as a high-level link to outside forces. As a link to the masses, they receive visits on reception days and address the grievances of the masses. As a link to the CCP, they have reasons to firmly implement Party policies as the CCP has control over their careers.

## 2.2 Chief Judge (*Tingzhang*): Middle-Line Managers

Unlike the court system in the United States, each court in China is divided into several divisions (*ting*) based on the types of cases. Every judge, except for the president and vice presidents of the court, works within one division. A division serves as a basic management unit. Its performances in adjudicative and administrative work are annually assessed. Each division is headed by a chief judge and one or two deputy chief judges. The functions and duties of chief judges are generally provided by the Judges Law. Article 6 of the Judges Law specifies that chief judges and deputy chief judges shall perform adjudicative functions and duties as well as other functions and duties that commensurate with their posts (NPCSC 1995, art. 6).

Chief judges exercise control over administrative and adjudicative work of his/her division (Zuo et al. 1999, p. 84) as the middle-line manager.<sup>6</sup> According to organization studies, middle-line managers play important roles in controlling the operation of the work. They have three primary tasks. One is to handle the disturbances that arise between two workers in the work flow (Mintzberg 1979, p. 316). The second is to work in their liaison role with first-line workers to instill their standards into the operating tasks (Mintzberg 1979, p. 316). Their third role is to

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<sup>6</sup>This is evident in a conversation in the interview. Question: What do you think about chief judges who join a collegiate bench and try a case? Answer: I do not think it is very meaningful. Exactly speaking, I do not understand why chief judges need to do this. I think the reform to have chief judges join a collegiate bench and try a case aims to avoid chief judges being detached from adjudication work. But in fact, chief judges [engage in the adjudicative business] because they are responsible for the quality of the adjudication work of the whole division, and many hard cases are reported to them for their opinions. I do not think they need to participate in adjudication work in that way. Moreover, she/he is also responsible for a lot of judicial administration work. How could she/he spare so much time to join a collegiate bench and hear a case? Question outline 3, interview note 9 from Interviewee 4.

**Table 2.1** Cases completed by chief judges, presiding judges and ordinary judges in the BPC of Laiyang City in 2005 and 2006 (Judge Management Section of the Political Department of the HPC of Shandong Province and Research Unit of the HPC of Shandong Province 2007, p. 48)

Category		Chief judge		Presiding judge		Ordinary judge		Total	
Cases		2005	2006	2005	2006	2005	2006	2005	2006
No. of completed cases		27	498	1,120	1,424	2,684	1,884	3,804	3,308
Rate for no. of completed cases		0.007	15.1	29.4	43.1	70.6	56.9		
Judgment	No. of cases	16	336	244	444	791	337	1,034	781
	Rate (%)	59.3	67.5	21.8	31.2	29.5	17.9	27.2	25.4
	Increase/decrease (%)		+8.2		+9.4		-11.6		-3.6

support the vertical follow, feedback information up the hierarchy, and action plans that come back down (Mintzberg 1979, p. 316). They perform their functions through dissolving conflicts, setting up operating standards, and disseminating information. Chief judges are like middle-level managers within the courts. They exercise control by participating in trials, presiding over presiding judge joint meetings, and signing judicial decisions.

2.2.1 Judicial Control I: Participating in Trials

In 2005, the SPC promulgated a judicial interpretation on enhancing judicial capacities and proficiencies. It provides that people’s courts shall establish and implement mechanisms for court presidents and chief judges to try cases and include the number of cases tried into performance assessments (SPC 2005, art. 26). This requirement is confirmed in the Second Five-Year Outline Plan (SPC 2004b, art. 26) and further specified in a judicial interpretation promulgated by the SPC in 2007 (SPC 2007). According to the 2007 interpretation, chief judges shall join collegiate benches or act as an individual judge to handle cases (SPC 2007, art. 1). Suitable cases consist of difficult, complicated, or important cases, new-type cases, cases with universal significance in the application of law, and cases in which the chief judge deems necessary for participation (SPC 2007, art. 2). The number of cases heard by a chief judge shall be determined by his/her court in light of local circumstances (SPC 2007, art. 3). Chief judges shall participate in a certain number of cases as responsible judges (SPC 2007, art. 3).

This reform has swept across the nation and gained remarkable achievements in some areas (Tong 2008). Great changes have taken place in the BPC of Laiyang City since this court launched the reform in 2006. Table 2.1 illustrates the number of cases completed by chief judges, other presiding judges, and ordinary judges in the BPC of Laiyang City between 2005 and 2006.

The number of cases completed by chief judges has been included in the judge's annual post assessment in some courts. A 2006 judge performance assessment sheet from the BPC of Nanshan District, Shenzhen City, requires that cases assigned to a chief judge shall not be less than 80 % of the cases assigned to an ordinary judge of the same division on average and cases assigned to a chief judge of a people's tribunal shall not be less than 70 % of the cases assigned to an ordinary judge of the same tribunal on average (BPC of Nanshan District Shenzhen City 2006).

Direct participation provides an opportunity for chief judges to fully engage in the judicial decision-making process and exercise control. However, this method is not without limits. First, the number of cases heard by a chief judge is limited. Direct participation requires more time and energy. Chief judges could only hear and try a limited number of cases and exercise judicial control over the cases that they sit in.

Second, functions played by a chief judge in judicial administration pose a threat to collegiate evaluation. Chief judges oversee performance assessments, promotions, vacations, and other personal welfare of collegiate bench members. Working with chief judges in the same bench, other members could be mindful of the impacts of their unpopular opinions. This concern may weaken the operation of the collegiate evaluation.

Third, there is a real possibility that chief judges only nominally participate in trials. There is no clear provision that states how much work a chief judge should complete in his presiding judge capacity. A chief judge is likely to play the role of a presiding judge only in name. The nominal practice would surely weaken the effect of this judicial control method.

### ***2.2.2 Judicial Control II: Presiding over Presiding Judge Joint Meetings***

Before the presiding judge reform, chief judges and deputy chief judges had division meetings (*tingwu huiyi*) to discuss major or difficult cases and other important work within the court division (Ye 2008, p. 41). After the reform, presiding judges became a permanent position. The stability of the position conditioned the emergence of joint meetings.

Thus far, there have not been any national regulations or judicial interpretations that govern the operation of joint meetings. Joint meetings operate differently in different courts or divisions. In most instances, a presiding judge joint meeting is held within a division, composed of chief and deputy chief judges, selected presiding judges, and relevant collegiate bench members (Ye 2008, pp. 42–43; IPC of Xuzhou City 2007, art. 3; IPC of Qujing City 2004, art. 1). Major issues discussed consist of individual cases, trial guidance, difficult legal issues, and other important issues related to adjudication (Ye 2008, p. 43).

The question of whether joint meeting decisions have binding effects on collegiate benches is crucial. Some courts view that collegiate benches are bound by joint meeting decisions. Moreover, most courts consider joint meeting decisions as recommendations. If collegiate benches do not agree with the decisions made at the joint meetings, they are allowed to depart from them.



Chief judges can exercise judicial control through presiding over joint meetings. First, joint meetings offer a regular access for a chief judge to supervise the adjudicative business of his/her division. Joint meetings provide chief judges with the channel to regularly have discussions with collegiate bench members and exercise their supervisory power in a routine manner.

Second, presiding over the joint meetings, chief judges can incorporate their standards into the judicial decision-making process and maintain judicial consistency. At the meetings, chief judges are able to communicate their standards with participants and ensure consistency between standards and joint meeting decisions.

### ***2.2.3 Judicial Control III: Signing and Issuing Judicial Decisions***

Chief judges continue to enjoy an important role in signing and issuing judicial decisions. A research group from the Chongqing No. 1 IPC proposed a mode to divide authority among the presiding judges, chief judges, and court president to sign and issue judicial decisions. According to this mode, chief judges are empowered to sign and issue judgment of cases assigned to presiding judges, cases with major impacts in the jurisdiction, cases on which collegiate bench members have considerable disagreement, cases which may be decided differently by another bench, those likely to result in mass dispute and petition, those remanded by higher courts for retrial, and cases decided by the AC of the first-instance court and likely to be altered (Research Group of Chongqing No. 1 IPC 2008, p. 93).

Signing and issuing legal documents have their limitations as a judicial control method. First, the case information is incomplete. A chief judge approves a case principally based on written reports made by collegiate benches. Without hearing the case, some important case information may be missed.

Second, signing and issuing judgment cannot effectively control the case processing procedure. The right to sign and issue judgments by the chief judges may only pertain to substantive contents of the cases rather than the processing procedure.

Third, chief judges play passive roles in signing and issuing judgment. Chief judges sign and issue judgments based on the information produced by collegiate benches. They may request that collegiate benches produce new information but seldom collect such by themselves.

### ***2.2.4 Conclusion***

Each court division is headed by a chief judge. Chief judges serve as the middle-line managers within the courts. They exercise judicial control through participating in the trial, presiding over joint meetings of presiding judges, and signing judicial decisions. These control methods help chief judges to engage in the decision-making process, but some of them have their limitations.

## 2.3 Presiding Judge (*Shenpanzhang*): New Wine in an Old Bottle

Collegiate benches are established to temporarily hear actual cases and dissolved with the completion of the cases (Chen and Shi 2002, p. 3; Zhang 2003, pp. 124–125). A presiding judge is supposed to be the chief adjudicator for each collegiate bench appointed by the president of a court or the chief judge of a division (NPCSC 1979, art. 9). When the president of a court or the chief judge of a division joins a collegiate bench and hears a case, she/he will act as the presiding judge (NPCSC 1979, art. 9). The presiding judge is an old position, but efforts have been made to breathe new life into this position.

The problem that faces the collegiate bench mode is that a bench is usually observed in name rather in fact, which is captured by the phrase “*xinghe shidu*” (Zhang 2003, p. 124). This problem takes place because bench members other than the responsible judge neither truly participate in the trial nor join the responsible judge for case deliberation. To strengthen collegiate benches, the SPC puts forward a scheme in the First Five-Year Outline Plan (SPC 1999, art. 20). This scheme aimed to strengthen the abilities of collegiate benches by creating benches with stable memberships and selecting well-qualified presiding judges (Chen 2004, p. 141). Although this scheme has been criticized as being at odds with the hierarchies within a court, it is confirmed and specified in the Provisional Measures of the SPC on Selection of Presiding Judge of People’s Courts of 2000 (SPC 2000) and has started to shape the operations of collegiate benches from the SPCs to the BPCs across the nation.

In crude terms, the presiding judge reform tends to formalize the position of presiding judges and strengthen collegiate benches. Formalization is a term used to describe the application of rules (Hage 1965, p. 292). It can be measured by the degree of work codified and the amount of deviation that is allowed from standards (Aiken and Hage 1966, p. 499). Higher degrees of work codification and smaller amounts of deviation allowed imply increasing formalization of an organization. Specifically, the degree of organizational formalization can be assessed from the following aspects: roles, authority relations, and sanctions (Hall et al. 1967, p. 907).

### 2.3.1 Formalization of Roles

Formalization of roles in an organization can be assessed from the presence or absence of written job descriptions and the degree to which the positions are concretely defined (Hall et al. 1967, p. 907). Chinese judicial reforms are committed to bringing about advances to court procedures and management by laying down various written measures. The presiding judge reform is no exception. Written measures on the position of presiding judges have been propagated by courts at different levels and implemented across the nation. These measures tend to define

the presiding judge position by regulating the number of positions, providing position qualifications, and specifying the responsibilities.

According to the SPC Provisional Measures on Selection of Presiding Judges of People's Courts, the number of presiding judges in each court is related to the needs of the adjudication work and the number of collegiate benches (SPC 2000, art. 2). The needs of the adjudication work in practice have been usually measured by the number of cases completed annually or in the most recent 3 years by each court (BPC of Baqiao District Xi'an City 2001, art. 7; Xu 2008). The concrete number of presiding judges for the SPC shall be decided by the SPC and the number for other courts shall be decided by the relevant HPCs (SPC 2000, art. 2).

In fact, a limited number of able judges have been selected as presiding judges for each court. The SPC is a good example. Forty-seven presiding judges were selected by the SPC in the first round in 2000, less than 16 % of the total number of judges (Wu 2002, p. 13). The number is even smaller in the lower people's courts. Sixteen presiding judges were selected from 224 qualified judges by the IPC of the Nanjing Municipality in early 2000, a total of 7.14 % of judges in this court (Research Unit of the IPC of Nanjing City 2003, p. 13). Moreover, 12 presiding judges were designated by the BPC of Luohu District, Shenzhen City (Wu 2002, p. 13).<sup>7</sup>

A presiding judge must satisfy certain qualifications. The Provisional Measures on Presiding Judges indicates that the presiding judge of the SPC and HPCs, as well as the presiding judge of the IPCs in normal circumstances, shall be a law degree holder, and the presiding judge of the BPCs shall have at least the academic qualifications of a special education course in the law (*faliu zhuanke*) (SPC 2000, art. 3).

This interpretation continues to specify that presiding judges of the SPC and the HPCs shall be judges with at least 5 years of experience in adjudicative work; the presiding judge of the IPCs shall be judges with at least 4 years of experience; and the presiding judge of the BPCs will need to have at least 3 years of experience (SPC 2000, art. 3). For the people's courts in a region with an underdeveloped economy and culture, the education and experience requirements may be properly relaxed by the AC of these courts with the approval of the court at the immediate higher level (SPC 2000, art. 3). This exception is formulated based on the fact that courts, especially courts located in remote and underdeveloped regions, are poorly staffed and short of eligible judges.

The responsibilities of a presiding judge are mainly confined to adjudicative businesses. Impetus to presiding judge reform is to ensure the professional quality of collegiate benches (Dan 2000, 3 September). Selected presiding judges are supposed to serve as a presiding officer in adjudication and free from judicial administration duties. His/her responsibilities include five aspects: assigning bench members to the cases, presiding over hearings, presiding in case discussions, deciding on case referrals to the AC, and examining and signing legal documents within his/her authority (SPC 2000, art. 5). Focusing on adjudicative work, presiding judges are able to ensure the well-functioning of collegiate benches and guarantee the quality of adjudicative work.

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<sup>7</sup>This court disposes more than 10,000 cases per year (Wu 2002, p. 13).

However, the attempt to confine presiding judges to adjudicative work has been tempered by the existing court management system. As a selected presiding judge said:

Actually, there exist some problems in the presiding judge reform. One important issue is the existing judicial hierarchy system. Presiding judges are not only unable to extricate themselves from the existing predicament [caused by the conflicts between bureaucratization and professionalism] but also constitute a new hierarchy. (Lai 2006, p. 100)

The conflicts between the presiding judge reform and existing judicial administration systems are apparent in the following places. First, the attempt to instill stability into collegiate benches entails extra management. According to management science, a stable organization necessitates regular management (Zhang 2003, p. 127). Constant benches require daily management. Presiding judges naturally take over the management responsibilities, such as work statistics, bonus distribution, and policy and law studies.

Second, presiding judges are assessed based on their performances in both adjudication and administration work of his/her collegiate bench. According to the Provisional Measures on Presiding Judges, presiding judges are assessed on a comprehensive basis with special focus on her/his adjudicative work (SPC 2000, art. 6). This evaluation mechanism treats a presiding judge like a chief judge and is likely to distract him/her from adjudicative work.

Third, the role of the presiding judges has been confused by the equal vote of bench members and right to approve by the presiding judges. The former treats presiding judges as a presiding officer and the latter as a leading cadre. As a presiding officer, she/he should not possess the right to approve, while as a leading cadre of a bench, his/her vote should have more weight in case decisions. These conflicts between new reforms and the existing system offset the formalization of the role of presiding judges.

### ***2.3.2 Formalization of Authority Relations***

The formalization of authority relations is principally indicated by the degree to which the hierarchy of authority is clearly defined (Hall et al. 1967, p. 907). The authority relation of a presiding judge with other judges varies in different fields. In judicial administration, presiding judges are subordinate to the direction of chief judges and the court president, while in adjudication, the presiding judges are under their supervision (Zhang 2002; HPC of Hainan Province 2000, art. 13). Supervision is different from subordination and is mainly conducted through the approving of case judgments.

The authority to approve case judgments has been developing in a dynamic way in reaction to practical needs, which blurs the authority relations. Generally speaking, the dynamic development has experienced three stages. The first stage was characterized by the broad power vested in chief judges and court presidents. Before the late 1990s, judgments could not be issued until they were signed by court presidents

or chief judges (Research Group of Chongqing No. 1 IPC 2008, p. 87). Court presidents and chief judges were allowed to directly change the judgments (Research Group of Chongqing No. 1 IPC 2008, p. 87).

The second stage started in 1998 and witnessed an emerging challenge to traditional practices. The role of adjudicative bodies (*shenpan zuzhi*) was emphasized. The 1998 Regulations of the SPC on Issues with Regard to Civil and Economic Trial Mode Reforms empower presiding judges and single judges to directly issue a legal document when collegiate bench members reach an agreement; the case involves no hard legal issues and court president approval is not required (SPC 1998b, art. 33).

The second stage can be seen in reforms adopted by BPCs and IPCs in Chongqing City. Chongqing courts empower presiding judges to sign and effect criminal legal documents except for cases in which the death penalty or suspension of punishment is handed down; civil legal documents except for documents with regard to procedural issues, such as jurisdiction, transference, and preservation, and administrative legal documents except for cases where specific administrative acts are annulled and state compensations are rewarded (Research Group of Chongqing No. 1 IPC 2008, p. 88). In this stage, neither a chief judge nor a president is allowed to directly vary a judgment. They can only veto the opinion of an adjudicative body or direct the case back to the bench or the AC to make a decision.

The third stage started in the period of the Second Five-Year Outline Plan for the Reform of the People's Courts. During that stage, the authority of an adjudicative body to sign and issue judgment was formally or informally adjusted. Drawbacks of reform in the second phase have been discerned and discussed. It was criticized that the expansion of the power of presiding judges is incompatible with the professional quality of current judges, results in inconsistency, and conflicts with the present judicial administration system (Research Group of Chongqing No. 1 IPC 2008, pp. 89–90).

In recognition of these disadvantages, courts tend to narrow the scope of the authority of presiding judges. For example, the No. 1 IPC of Chongqing Municipality promulgated the Provisional Regulations on Revision and Remanding for Retrial of Second Instance Cases in 2006 which narrowed the authority of presiding judges to sign and issue legal documents and correspondingly increased the authority of chief judges. The dynamic development blurs the authority relations.

Authority relations between presiding judges and higher ranking judges have been further blurred by various coping strategies. Even if a presiding judge is authorized to give effect to a certain type of case, it is unrealistic to say that a presiding judge is able to independently issue a judgment. There are some mechanisms that ensure judicial decisions represent the opinion of the court rather than a collegiate bench. Some courts indicate that presiding judges need to take the lead to report to chief judges or deputy chiefs and accept guidance and supervision from them (e.g., HPC of Hainan Province 2000, art. 13). An interview with a judge of a BPC shows:

- Q: Would presiding judges seek opinions from deputy chief judges or chief judges when they have the right to sign and issue the judgment of a case?
- A: Yes. They would do that when they are not sure whether their opinions are correct.
- Q: Would deputy chief judges or chief judges reply to all the enquiries from presiding judges? Can they refuse to answer the questions?

- A: Normally, chief judges need to reply to all the inquiries. If they are not sure whether their opinions are correct, they can seek the opinions of the vice presidents of the court. If a case is known and discussed by many judges, it is usually not viewed as an incorrectly decided case.<sup>8</sup>

Some courts establish informal procedures for a presiding judge to seek opinions from chief judges or relevant vice presidents (BPC of Nanshan District, Shenzhen City 2005, art. 6; IPC of Jincheng City 2006, arts. 25–26). If a chief judge or a vice president agrees with the bench's opinion, the presiding judge can sign and issue the judgment (BPC of Nanshan District, Shenzhen City 2005, art. 6). If they disagree and ask for reconsideration, collegiate benches will need to reconsider the case (SPC 2002, art 17). If the reconsidered result still dissatisfies the chief judge or the vice president, the vice president may refer the case to the AC for a final decision (SPC 2002, art 17).

The authority relations of presiding judges have been further complicated by the cooperation between responsible judges and deputy chief judges. There exists an overlap of authority between presiding judges and deputy chief judges. The overlapped authority plus engrained relationship of responsible judges with deputy chief judges result in the willingness of responsible judges to follow the direction of deputy chief judges rather than presiding judges. Cooperation between responsible judges and deputy chief judges mitigates the authority of presiding judges and makes the presiding judge a mere figurehead from time to time. This is illustrated by a judge who has more than 10 years of experience in an HPC.

Q: Is every presiding judge selected [in the reform]?

A: Generally speaking, presiding judges do not seem to be so important now.

Q: How did this happen to the selected presiding judges?

A: ... In some period of time, presiding judges indeed had some power, but [the problem is] power is exercised by presiding judges, but the responsibilities are shouldered by the chief judges. Moreover, there are several deputy chief judges. The responsible judges are not always under the direction of the presiding judges. It is difficult for presiding judges to exercise the powers provided [by the Provisions on the Work of Collegiate Benches] given the existence of deputy chief judges and responsible judges. (Lai 2006, p. 100)

### 2.3.3 Formalization of Sanctions

Sanction is another key indicator which reflects the degree of formalization. Formalization of sanctions can be evaluated in terms of the number of written rules and the degree to which penalties are clearly stipulated (Hall et al. 1967, p. 907). There has been a proliferation of written rules on judicial discipline (NPCSC 1995; SPC 1998a). This section first introduces a general judicial disciplinary sanction against judges and then introduces a particular sanction for presiding judges.

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<sup>8</sup>Question outline 3, interview note 10 and 11 from Interviewee 2.

At the core of the judicial disciplinary system is the incorrectly decided case system. This mechanism dates from the late 1980s and early 1990s and has been widely implemented across the nation (Liao 1999, p. 31).<sup>9</sup> Incorrectly decided cases lack a unified and unambiguous understanding. The HPC of Shanxi Province defines incorrectly decided cases as those in which judges should be investigated for legal responsibilities in that they break substantive and procedural laws in the trial and result in obvious errors or negative influences (Wang 1997, p. 4). The HPC of the Inner Mongolia Autonomous Region enumerates seven types of incorrectly decided cases, such as incorrect determination of basic facts, obviously incorrect application of laws, serious violation of procedural laws, and so on (Wang 1997, p. 4). The question of whether it is a sufficient mistake in fact finding and law application are left to the AC or the adjudication supervision office within a court to decide.

Furthermore, the incorrectly decided case system sanctions judges based on the standards of “right” and “wrong” decisions, which further confuse the standards for incorrectly decided cases. Incorrectly decided cases not only sanction judicial misconducts but also make professional conduct as the subject of disciplinary proceedings. The former carries personal attributions of fault, including misuse of office, dereliction of duty, illegal contact with litigants, favoritism for himself/herself or relatives, bribe-taking, and so on, whereas the latter tends to stigmatize “honest error” (Sankar 2000, p. 1251) which may be as a result of unpopular rulings and judicial judgment. The major problem is that it punishes judges not on the basis of differentiation between honest decisional conduct and other misbehavior, but rather on the differentiation between “right” and “wrong” decisions. This further confuses the standards for incorrectly decided cases.

The ambiguous standards make it difficult for judges to foresee the decisions that will be subject to incorrectly decided case sanctions. With this kind of ambiguity, judges are like “sitting ducks” threatened by the “crocodiles in the bathtub” (Uelmen 1997; Griffen 1998, p. 77). To clarify the standards for incorrectly decided cases, the SPC issued the Provisional Measures on the Responsibility of Unlawful Adjudication by Adjudicative Personnel of the People’s Courts. This judicial interpretation not only abandons the titles of incorrectly decided cases, but also transfers its focus to punishing judicial misconduct.<sup>10</sup> In the words of a Chinese scholar, the SPC replaces substantive standards with procedural standards (Ge 2004, p. 35).<sup>11</sup> For Western scholars, the SPC tends to separate judicial decisional conduct from judicial

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<sup>9</sup>This was officially confirmed in the report by the President Jiang at the Fifteenth National Congress of Communist Party of China. In President Jiang’s report, he emphasized that to push forward judicial reform, judicial organs should be systematically protected to exercise adjudicative and procuratorial power independently and incorrectly judged case investigation mechanism should be established.

<sup>10</sup>Provisional Measures on Adjudicative Disciplinary Sanctions of the People’s Courts, another judicial interpretation laid down by the SPC in 1998, also adopts procedural standards to judge incorrectly decided cases.

<sup>11</sup>*Li Fan* and *Li Rui* disagreed with judicial discipline based on inviolation of procedural laws because they think that judicial behaviors which result in miscarriage of justice could not be a violation of procedural law. They suggested the existence or absence of fault as a good standard to assess whether a case is incorrectly judged (Li and Li 2004, p. 15).



misconduct and make the latter as the subject of disciplinary proceedings. Although progress has been made by the SPC and some lower courts, this interpretation has not come into full play (Ge 2004, p. 35). Judges at lower level courts are still plagued with vaguely tailored incorrectly decided case investigations.

The particular sanction for a presiding judge is removal from the presiding position. It may not immediately spring to mind as a disciplinary measure because removal is applied to judicial misconducts as well as other inculpable reasons. However, it is an important means to disqualify an incompetent presiding judge. According to the interpretation of the SPC, a presiding judge could be removed from his/her position for the following reasons: unlawful adjudication, receiving political or administrative disciplinary sanctions, health reasons, resignation, transferring to a non-adjudicative position, removal from the bench, etc. (SPC 2000, art. 7). The use of a catch-all provision shows a strong intent to exclude all unable judges from the presiding judge position. The decision to remove is put forth by the court president upon the recommendation of relevant chief judges to the AC for the final decision (SPC 2000, art. 7). However, despite the broad reasons for removal and relatively relaxed procedural requirements, this sanction is rarely used to punish errant presiding judges. A judge from a BPC was asked about the removal practice:

- Q: Do you know of any presiding judge who has been removed from the presiding position?  
 A: If a presiding judge does not want to assume his duties, s/he could ask for resignation.  
 Q: I mean whether any presiding judge is removed upon the recommendation of a higher ranking judge?  
 A: I do not think that any presiding judge in my court has been removed in that way. As far as I know, some presiding judges lose their presiding position when they are transferred from substantive divisions to administrative divisions, such as administrative office.<sup>12</sup>

Although the removal is rarely used in practice, it is clearly written into judicial interpretation and also helps to formalize the sanctions of presiding judges.

### 2.3.4 Conclusion

A presiding judge serves as the chief adjudicator for each collegiate bench. In recent reforms, efforts have been made to formalize the position and bring new life into the old position. The role of presiding judges has been further concretely defined through written measures by regulating the number of positions, providing position qualifications, and specifying responsibilities. The authority of presiding judges in adjudicative business is still less than definite. It is blurred by the dynamic development of authority division, coping strategies, and cooperation between presiding judges and deputy chief judges. Incorrectly decided case sanctions against presiding judges have been further clarified. Although particular sanctions to remove a presiding judge from his position have been rarely used in practice, these are clearly

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<sup>12</sup> Question outline 3, interview note 7 and 8 from Interviewee 2.



written into the judicial interpretation and also help to formalize the sanctions of presiding judges.

## 2.4 Responsible Judge (*Chengban Faguan*): First-Line Worker

A responsible judge is a position provided by judicial interpretations (e.g., SPC 2002, arts. 7 and 10). This position denotes such a role in every adjudicative body and is a reflection of the practice. A responsible judge is in charge of individual cases in two senses. First, she/he is in charge of the whole adjudicative process, from judicial investigation to archiving the case. Second, she/he is always the person to assume responsibilities once the case is found to be incorrectly decided (Feng 2006). Where a case is tried by a single judge, the single judge is the responsible judge. Where a case is tried by a collegiate bench, the situation is more complicated.

A collegiate bench has a presiding judge and a responsible judge. The presiding judge could wear two hats in one case, serving as both presiding and responsible judges. Where a presiding judge does not serve as the responsible judge, in practice, she/he mainly takes charge of procedural matters, such as declaring rights and duties and organizing members of his/her collegiate bench to discuss the case.<sup>13</sup> The responsible judge takes the lead in investigating case facts and questioning parties and witnesses.<sup>14</sup>

For example, Judges A, B, and C are in the same division and Judge C is the chief judge. Judges A, B, and C form a collegiate bench to try a case. According to the law, Judge C is the presiding judge for this case (NPCSC 1979, art. 9). Judge A is assigned by the docketing division (BPC of Xincheng District Xi'an City 2000, arts. 4 and 10; BPC of Nanshan District Shenzhen City 2004, art. 7)<sup>15</sup> to be the responsible judge for this case in terms of his/her workload (BPC of Huaping County Lijiang City 2009, art. 6) or electronically selected (BPC of Nanshan District Shenzhen City 2004, art. 11). In the trial, Judge A takes charge of evidence collection, fact investigation, and court debates, while Judge C is responsible for declaring the rights of the litigants at the beginning of the trial. After the trial, Judge C calls Judges A and B to discuss the case. During the discussion, Judge A first gives his/her opinion on the facts, evidence, and law (SPC 2002, art. 10). Usually, Judges B and C pay less attention to this case, and Judge A as the responsible judge is considered as the real trial judge in this case (Zhang and Wen 2003, p. 42).

<sup>13</sup>An interview with an assistant judge from an IPC, in a southern city of China (September 23, 2007); also an interview with an assistant judge from a BPC, in a southern city of China (September 24, 2010).

<sup>14</sup>An interview with an assistant judge from an IPC, in a southern city of China (September 23, 2007); also an interview with an assistant judge from a BPC, in a southern city of China (September 24, 2010).

<sup>15</sup>There are a few courts where responsible judges are fixed by trial divisions rather than docketing divisions.

In the AC system, the responsible judge attends the committee meetings. At the meeting, she/he plays two roles: creating the reports and answering questions. The responsible judge reports cases by submitting written reports and delivering oral reports. Written reports are submitted several days before the commencement of a meeting and distributed to the AC members on paper or electronically through an internal network. Oral reports are made at the meeting before the case discussions. A responsible judge is also supposed to answer questions during the discussions. Their answers help to clarify ambiguous points and provide factual and legal information for committee decisions.

## 2.5 Conclusion

The Chinese court is built upon a bureaucratic and hierarchal model within which judges are placed in different administrative ranks. A court president takes charge of the whole court and acts as a high-level link to outside forces, such as the masses and the Party. A chief judge heads a division. She/he exercises judicial control as the middle-line manager by participating in trials, presiding over presiding judge joint meetings, and signing and issuing judicial decisions. A presiding judge is the chief adjudicator for each collegiate bench. In recent reforms, efforts have been made to formalize the position, which have brought new life into the old position. A responsible judge serves as a first-line worker. She/he is responsible for individual cases in the sense that she/he takes charge of the whole process and assumes responsibilities once the case is found incorrectly decided. An examination of the structure of the court provides a wider organizational context for an analysis of organizational influences on the AC decision-making process.

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