

COURT MEDIATION IN CHINA: TIME FOR REFORM

by

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ABSTRACT

This thesis focuses on the current court mediation institution in China against the worldwide movement of alternative dispute resolution in searching for more consensual and more efficient ways of resolving disputes. When the West is seeking more informality-oriented forms of dispute resolution, China, on the other side of the world, is making great efforts to improve its formal justice system rather than conventional means of dispute resolution like mediation. This thesis attempts to identify the role court mediation has played in Chinese legal history, to explore its current functions, to examine the rationale underlying the system, and to suggest its future reform.

The economic analysis of law, particularly Posner's economic analysis of civil procedure and the Coase Theorem, and the ideas of Rawls' theory of justice provide theoretical underpinnings for this study. A review of these classical theories is conducted from the perspectives of efficiency and fairness. Although it is generally understood that both efficiency and fairness cannot be equally achieved by a legal policy, a good one should be concerned with both efficiency and fairness. The article concludes that the balance between efficiency and fairness should be presented in an optimal court mediation form.

China's court mediation has remained an important means of dispute resolution, but left much to be improved. The author argues that the current court mediation is not as successful as it declares; it is, in fact, neither efficient nor just. The existing law governing court mediation does not provide a clear function and purpose for court mediation, nor does it consider the efficiency and fairness of court mediation. In practice, although it remains the dominant position in resolving disputes, it is merely a substitute for adjudication rather than a substantive alternative dispute resolution. By analyzing the current allocation of cases for different dispute resolutions, the author suggests that considering the overloaded court caseloads and the lack of a variety of alternative dispute resolutions in today's China, court mediation should be preserved, but thoroughly reformed, as a more acceptable and efficient means of resolving disputes. Upon its reform, this conventional means of dispute resolution with Chinese characteristics will play a positive role in the future.

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Introduction

In the past fifteen years, alternative dispute resolution¹[ADR] has gained popularity in the West and various civil justice systems have shown increasing interest in embracing mediation in their formal judicial processes, which has given birth to the innovation of “court mediation”² under which litigants are often ordered, encouraged, or voluntarily referred to attend a mediation session before their matter is formally heard by a judge.³ This movement is widely motivated by the dissatisfaction with the traditional litigation system, its high cost, onerous processes, and ineffective response to many disputes. The use of mediation is sought to remedy these deficiencies by virtue of its merits such as streamlining case processing, providing more expeditious and cheaper dispute resolution, stimulating creative settlements, and increasing access to justice by making adjudication more accommodating. The final objective is to provide a more consensual approach to problem solving, a more accessible form of dispute resolution and a less expensive and more efficient way of resolving civil disputes.⁴

¹. ADR may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party. See Henry Brown & Arthur Marriott, *ADR Principles and Practice*, (Sweet & Maxwell, 1999) at 12.

². In the United States and Canada, it is known as court-connected, court-attached, court-annexed or court-related mediation. See Laurence Boulle & Kathleen J. Kelly, *Mediation: Principles, Process, Practice* (Toronto: Butterworths, 1998) at 203.

³. There are different types of court-connected mediation, some are mandatory and some voluntary. See *supra* note 2 at 205-209.

⁴. D. Paul Emond, “Alternative Dispute Resolution: A Conceptual Overview” in *Court-Annexed ADR, The New Practice Direction*. (Department of Continuing Legal Education, The Law Society of Upper Canada, 1994) at D-1[hereinafter “A Conceptual Overview”]; See also Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy, Practice*, 2d ed. (Rochester, N.Y. : Lawyers Co-operative Pub. Co., 1994) s.5:02 at 4-6

Ironically, just when the West is discovering ADR, the trend in China, where mediation has been a traditional means of dispute resolution, is opposite. The ever-triumphant mediation is now withering away. Non-judicial mediation – People's Mediation⁵ - has extensively declined; court mediation, which has been established in the Chinese legal system for more than half a century and has held a leading position in resolving civil disputes, is now being attacked furiously.

The purpose of this thesis is to examine the court mediation system China has so far established in terms of its functions, rationales, and practice. Through such examination, this article is purported to address problems China is now confronting in using court mediation a main mechanism for resolving civil disputes. It aims to provide a different perspective for the improvement of China's court mediation.

Despite its growing popularity, to some extent, mediation is a practice in search of a theory. It can be approached from several disciplinary areas such as sociology, psychology and politics, but has yet to develop its own explanatory theories. In this work the subject-matter is approached primarily, not exclusively, from a legal perspective, focusing on two aspects of mediation. One is the concern about the economic rationale for mediation, i.e., the issue of efficiency, which resolves around the likelihood of rationale economic actors selecting mediation over alternative processes by virtue of its capacity to maximize resources while minimizing costs. The other relates to the issue of justice. Because of its close connection to the judicial

⁵. See *infra* Chapter 5, section 2, a.

system, there are pressures for mediation to comply with standards of due process and procedural fairness. Hence, it faces the prospect of having its procedures scrutinized and evaluated by legal standards, and to uphold substantive rights and fairness.

Upon discovery of the efficiency and fairness of mediation, a question is that how should mediation address and combine efficiency and fairness. An idea generally shared by economists and philosophers is that a legal rule may either achieve distributive fairness or bring about an efficient outcome, but not both. However, it has been argued that a good legal policy should combine them into a unified theory of justice that form the basis for legal rules that give weight not only to efficiency but also to fairness and attempt to merge the two as a useful step in improving legal policy-making are welcomed.⁶ In this article, the author argues that an optimal court mediation system should take into account of both efficiency and fairness and search a balance between them in order to obtain the outmost output of the system.

It is assumption of this thesis that a review of general theories with respect to questions of efficiency and that of fairness among the Western literatures will provide some enlightenments for the analysis of China's court mediation. Therefore, apart from offering a general background of this study and defining the scope of its analysis, Chapter I reviews some literatures within the discipline of economic analysis of law and John Rawls' theory of justice as theoretical cornerstone for this study.

⁶. See generally Michael I. Swygert & Katherine Earle Yanes, "A unified Theory of Justice: The Integration of Fairness into Efficiency" (1998) 73 Wash. L. Rev. 249. For critiques of this unified theory attempt, see Russell B. Korobkin & Thomas S. Ulen, "Efficiency and Equity: What can be Gained by Combining Coase and Rawls?" (1998) 73 Wash. L. Rev. 329.

Based on the above literature reviews, Chapter II goes on to discuss the economic analysis of law, particularly the Coase Theorem and Posner's economic analysis of civil procedure, as useful tools for examining issues regarding efficiency of court mediation, including cost-effective and time-saving, and the ideas of John Rawls for procedural fairness of court mediation. These discussions attempt to explore the underlying rationales of an optimal court mediation institution with consideration of providing a theoretical cornerstone for the evaluation of China's court mediation.

Chapter III introduces the formation and development of court mediation in the context of China's legal culture, political influences, economic system and other social conditions. An outline of the statutory framework of the current court mediation is also provided in this part. Chapter IV starts to examine the current court mediation model, focusing on three aspects: functions, efficiency and fairness. By exposing some common problems arising from its practice associated with those deficiencies of China's court system, it concludes that China's current court mediation is theoretically problematic and practical dangerous. In Chapter V, the current debates over the role of court mediation and its reform among Chinese legal academics and practitioners are reviewed. Given the fact that China's courts are increasingly overloaded by growing caseloads due to the lack of a diversity of alternative dispute resolutions and ineffectiveness of existing dispute resolutions, the author suggests that China's court mediation should be preserved, but thoroughly reformed, to provide a more efficient and satisfactory means of dispute resolution.

Chapter I Conceptual Framework

Section 1: Background of the Study

a. Worldwide Movement of ADR and the Development of Court Mediation

Alternative dispute resolution gained momentum in late 1970s at the same time that scholars world-wide were beginning to examine problems of access to justice.⁷ Early critiques of mediation challenged these informal processes as “second class justice.”⁸ They relied on a view of justice as the vindication of legally defined rights through formal and public procedures, and criticized mediation programs as diverting the poor and disadvantaged away from courts where they had rights and where procedural protections gave them a chance to prevail against more advantaged parties, especially in mandatory mediation which imposes costs on participation and thereby diminishes participant’s capacity to pursue litigation.

However, this rights-based notion of justice has been challenged by some scholars and practitioners who raised questions about the capacity of courts and formal

⁷. See generally Mauro Cappelletti & Bryant Garth eds., *Access to Justice*, (Alphen aan den Rijn : Sijthoff and Noordhoff, 1978).

⁸. Richard Hofrichter, “Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective” in Richard L. Abel ed., *The Politics of Informal Justice* (New York : Academic Press, 1982) at 167 [hereinafter “Politics of Informal Justice”]. The further development of “second class” justice theory results in a “two-track” systems of justice: the judicial justice which provides first class seats, and the mediation justice which provides economy class. See J Folberg & A Taylor, *Mediation – A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco : Jossey-Bass, 1984) at 1-7; J Auerbach, *Justice Without Law* (New York : Oxford University Press, 1983) at 144 [hereinafter “Justice Without Law”].

adjudicatory processes to deliver justice.⁹ From their perspectives, individuals should be empowered by justice to shape decisions about their own lives and conflicts in ways that are meaningful to them. The standard for such decision are not necessarily based on legal rights and entitlements, and the procedures for empowerment are typically informal, rather than formal ones with procedural safeguards. In this view, mediation is where disputants presumably have the power to participate actively, and to decide outcomes for themselves. Indeed, the ADR movement largely arose also because of the observation that, in practice, courts are often costly and slow, and intimidate and confuse parties by their formal procedures. By comparison, ADR enables disputants to select procedures appropriate to individual disputes based on their natures and circumstances. It gives parties more power and greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective and creative settlements. Because of these recognized merits, the use of alternative dispute resolution, either in conjunction with or separated from court system, has largely expanded.

Part of the overall growth of ADR movement is the development of court-annexed ADR, including court-annexed mediation. The Americans have played a leading role in this area and become most experienced with court-annexed mediation systems and other forms of ADR.¹⁰ The 1976 Pound Conference marked the beginning of a

⁹. See generally Robert A. Baruch & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, CA: Jossey-Bass,1994); Deborah M. Christie, "Conflicts as Property" (1997) 17 Brit. J. Criminology 1; Andrew W. McThenia & Thomas L. Shaffer, "For Reconciliation" (1985) 94 Yale L. J. 1660.

¹⁰. Supra note 1 at 85.

systematic effort to introduce mediation in the courts as an alternative to adjudication.¹¹ One of the most significant developments arising out of the relationship between ADR procedures and the court system has been the creation of Multi-Door Courthouse,¹² in which a single entry fee provides access not only to adjudication but also to other processes including mediation and arbitration. The Multi-Door concept has been tested in experiments in various parts of the United States and a number of States now offering Multi-Door programs. Experimentation began in small claims courts and its success made it a good launchpad for introducing mediation to other courts. Gradually, many programs have expanded to deal with more complicated matters, and court-annexed or bar-sponsored dispute resolution centers have been widely established.¹³ The development of these centers led to the increased use of mediation in courts during the late 1980s. Today, court-annexed mediation practice has expanded to state and federal courts of general jurisdiction. Programs range from the purely voluntary to mandatory, depending upon state legislations and court administrations.¹⁴ However, low voluntary usage has resulted in a gradual shift to

¹¹. The Pound Conference was held on April 7-9, 1976 in St. Paul, Minnesota. It had significant influence on establishing court ADR programs in the U.S.. See Roscoe Pound, "Address Before the American bar Association Annual Meeting" in A. Leo Levin & Russell R. Wheeler eds., *The Pound Conference: Perspectives On Justice In the Future* (1979).

¹². The author of the concept of Multi-Door Courthouse was Frank E.A. Sander, a professor of law at Harvard University, who delivered a paper in 1976 to the National Conference on the Causes of Popular Dissatisfaction with Administration of Justice. See Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 F. R. D. 111. [hereinafter "Varieties of Dispute Processing"].

¹³. Craig A. McEwen & Richard J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 Me. L. Rev. 237 at 260-264; Kimberlee K. Kovach, *Mediation: Principles and Practice*, (St. Paul, Minn.: West Pub. Co.,1994) at 22.

¹⁴. Statutory approval of ADR in the federal district (trial) courts is given under the 1990 Civil Justice Reform Act, which required district courts to develop plans to reduce costs and delay in civil litigation. The most recent legislative step was taken on October 30, 1998 when president Clinton signed the Alternative Dispute Resolution Act of 1998, which requires each federal district court to authorize the use of ADR in

mandatory mediation despite many critics and concerns.¹⁵

Influenced by the ADR movement in the United States, many forms of court-annexed mediation have also been introduced in Canada in recent years. Most have been either in family courts or in the small claims courts. In 1996, a Task Force of the Canadian Bar Association reported on systems of civil justice within Canada, which recommended measures for the promotion of settlement, the streamlining of procedures and the harnessing of new technology, all seeking to achieve lower cost and improving access to justice. The Task Force Report has clearly influenced the use of court-annexed ADR in Canada. Since January 4, 1999, all new civil, non-family, case-managed actions must first be submitted to mediation before litigation may commence in Toronto and Ottawa.¹⁶ Many other court-annexed mediation programs have been introduced or extended throughout the country.¹⁷

In Australia, statutory mediation in areas of economic and social activity and court-annexed mediation or other ADR systems have also been developed.¹⁸ Courts in New Zealand also introduced policies as regards a whole range of matters relevant to court-annexed ADR system, which enables judges to refer cases to mediation or arbitration

all civil cases and to establish its own ADR program. See generally Federal Judicial CTR: Court-Based Dispute Resolution Programs, (1991); see also *supra* note 1 at 85-93.

¹⁵. Edward F. Sherman, "Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?" (1993) 46 SMU L. Rev. 2079 at 2084-2089.

¹⁶. *Supra* note 2 at 204-205.

¹⁷. *Supra* note 1 at 93.

¹⁸. *Ibid.* at 96.

shortly after the defense has been filed.¹⁹ Although there is less experience in England with the use of ADR in conjunction with litigation, in recent years the courts have drawn attention to the value of ADR in the resolution of civil disputes and it has been the subject of several practice directions.²⁰

The principle objective of the court-annexed mediation movement has been to achieve settlements or, failing that, to streamline case processing and reduce the costs and delays of litigation. The cost-saving element is based on the assumption that the costs, including time and money, of running a mediation will invariably be lower than a trial, and that cost savings can be considerable. If, however, the mediation does not resolve the issues and the parties have to proceed to formal trials, the process also helps the parties gather information and clarify or narrow issues; discussion during mediation may also provide basis for later settlement.

Although complaints about the delays, costs and risks of litigation may not always be as sharp in other jurisdictions, especially in civil law systems, as they are in the common law system as practiced in the United States, Canada, and England, but they are nevertheless familiar elsewhere because of the nature of litigation itself. Therefore, processes that address these are universally welcome and provide useful examples for other countries to deal with the similar issues.

¹⁹. Ibid. at 99.

²⁰. Mr. Justice Waller, "Practice Statement: Alternative Dispute Resolution", Ibid. at 32.

b. Alternative Dispute Resolution in China

Mediating disputes by smoothing away discords has been a traditional way that China has used to resolve civil disputes. This traditional preference for dispute resolution by extra-legal means is profoundly influenced by Chinese legal culture, political systems, and social-economic structures.²¹ After the foundation of the People's Republic of China in 1949, China codified the widespread informal mediation system in 1954.²² Since then mediation committees and mediators have spread throughout the country. The promulgation of the new regulation governing People's Mediation committees in 1989 has made significant changes to improve this alternative dispute resolution model.²³ It confirms the government's support of this extra-legal dispute resolution device and also imposes more structure on the mediation committees. As a result of this revision, a modern mediation system has emerged in China, which is more independent from the domination of the Communist Party. The mediation system has exercised a prominent extra-judicial function in Chinese society by settling cases covering a wide array of subject matters such as divorce, inheritance, parental and child support, alimony, debts, real property, production, and torts, as well as other civil and economic disputes and minor criminal cases. It has also played an important role in preventing crime, reducing litigation in the courts, enhancing the people's

²¹. For a comprehensive analysis of these factors, see Cao Pei, "The Origins of Mediation in Traditional China" (1999) 54 *Disp. Resol. J.* 32.

²². See *Infra* note 236 and accompanying text.

²³. *Ibid.*

unity, and promoting social stability.²⁴

Because of the recognized advantages of mediation as an effective method for resolving civil disputes, mediation has been attached to China's arbitration proceedings. Both internationally and domestically-oriented commissions, are required or encouraged by their respective rules and regulations to attempt mediation before proceeding to arbitrate.²⁵ In addition, China has taken the lead in inventing new mediation methods such as "joint mediation" in international arbitration proceedings.²⁶ According to recent statistics, currently about 30% of the international arbitration cases accepted by Chinese International Economic and Trade Arbitration Center (CIETAC) were resolved by mediation.²⁷

Mediation is also combined with Chinese civil litigation, in so-called "court mediation", which forms a distinguished feature of Chinese civil procedure. In fact, Chinese courts have a long history of using mediation to resolve civil disputes. However, the guiding principle of court mediation has changed over years of practice. Before 1982, the policy was expressed as " Mediation first, litigation second"; the

²⁴. Ren Jianxin, " Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China" (1987) 15 Int'l Bus. Law 395 [hereinafter " Mediation, Conciliation, Arbitration and Litigation"]. Ren Jianxin is previously the Chief Justice of the Chinese Supreme Court.

²⁵. See *infra* chapter V, section 2, c.

²⁶. Under the "joint mediation " device, a Chinese party may apply to CIETC and the foreign party to a corresponding arbitral organ in his/her own country for joint arbitration. Upon such application, the arbitral organs each appoint one or more mediators on an equal basis to mediate the case jointly.

²⁷. Wang Shengchang, " A Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission" (1992) J. Int'l. Arb. 93 at 115.

Civil Procedure Law of 1982 changed this to an injunction to “ stress mediation”; when it was revised in 1991 it provided that courts should “conduct mediation in accordance with the principles of voluntariness and lawfulness”.²⁸ Although the law no longer emphasizes mediation as the primary means of dispute resolution, in practice, Chinese courts still rely heavily on mediation to resolve civil and commercial cases.

In spite of the widespread use of mediation in Chinese legal history, mediation is now furiously attacked as theoretically dangerous and harmful in practice. As one indicates,

“mediation in the PRC does not qualify as an example of the decentralization of authoritative decision making. Public participation in dispute settlement is strongly encouraged but in execution rather than in the formation and control of policy...[M]ediation is a means of propagating the policies and laws of the state, of maintaining a stable order, and of strengthening the unity of the PRC. The ultimate purpose is to mobilize the masses of the people by raising the political consciousness of those persons in disputes.”²⁹

Some also point out that as a result of the market-oriented economic reforms, “in the growing non-governmental sectors of the economy an individualistic and competitive mentality has displaced past notions of socialist harmony; litigation over civil and economic matters has increased, and mediation is receding.”³⁰

Probably the most intensive critiques are those leveled against court mediation.

²⁸. See *infra* chapter III, section 1, b.

²⁹. Elmer Johnson, “Mediation in the People’s Republic of China: Participation and Social Control” in Barak-Glantz & Elmer Johnson eds, *Comparative Criminology* (Lexington, Mass: Lexington Books, 1982) at 64.

³⁰. Stanley B. Lubman, “Dispute Resolution in China After Deng Xiaoping: Mao and Mediation Revisited”, (1997) 11 Colum. J. Asian L. 229 at 292. [hereinafter “Mao and mediation Revisited”]

Earlier critiques attacked court mediation as a barrier to the long term strategy of making China a country ruled by law. From their perspectives, mediation is a unique product of Chinese “feudal” society, where the despotic “feudal” state used the penal method to dispose of civil disputes. In today’s China, the feudal mindset of “no litigation” and civil law nihilism must be replaced by a new culture of “the rule of law”. When economy is in chaos, a legal mechanism is especially needed for its adjustment. Primitive, unlimited, and repetitive mediation slows down capital turnover, wastes energy and damages the economy. Furthermore, mediation hinders the development of legal professionalism. Chinese judges normally start at civil tribunals where mediation is the main mechanism. When mediation is taken as the primary means of dispute resolution, judges’ professional skills cannot be enhanced since mediation does not require a high standard of legal knowledge.³¹

In recent years, critiques of court mediation have turned to focus more on the perceived deficiencies in its practice, such as coerced and illegal mediation. This not only results in disputants’ less confidence about courts and resistance to mediation, but also confuses the function of courts and the role of judges. Because of judges’ preference to mediation over adjudication, Chinese civil litigation becomes a mediation-dominated trial procedure instead of an adjudication-dominated one.³²

Additionally, as Chinese courts are facing increasing caseloads, the search for a more

³¹ Zhang Xingzhong, “Zhuozhong tiaojie yuanze-zhi wo jian” [My Opinion about the Principle of Emphasizing Mediation], *Fazhi ribao* (Legal Daily), May 22, 1989, at 6.

³² Lihao, “Minshi shenpan zhong de tiaoshen fenli” (Separation of Mediation and Adjudication in Civil Litigation) (1996) 105 *Case Journal of Law* 57.

expeditious and effective form of dispute resolution becomes imperative. In 1995, the Supreme People's Court began a campaign to "reform the model of civil litigation" in which one of the main targets is a greater emphasis on trial model.³³ Today, legal reformers are discussing the use of open trials, adversarial advocacy, and even judicial independence in order to improve the efficiency of the system.³⁴ One of the concerns about the civil procedure is to reform the current court mediation. However, whether to completely abolish it or to preserve it is highly controversial. Under such circumstances, a deep examination of China's court mediation seems particularly meaningful.

Section 2 Defining the Scope of Analysis

a. Function

Because of cultural, historical, political, and social-economic differences, court mediation formed in different countries may represent distinctive functions and values. As Lubman notes, "in terms of the functions they perform... that several functions may co-exist, that apparently similar institutions may have different

³³. See the Supreme Court President Ren Jianxin on Reform of Judicial Procedure, BBC, July 31, 1996. available in LEXIS, Asia PC Library.

³⁴. See generally Margaret Y. K. Woo, "Law and Discretion in the Contemporary Chinese Courts" (1999) 8 Pac. Rim L. & Pol'y J. 58; Jerome A. Cohen, "Reforming China's Civil Procedure: Judging the Courts" (1997) 45 Am. J. Comp. L. 793.

functions, and that apparently dissimilar institutions may perform similar functions.”³⁵ Thus, to examine what functions have been assigned to court mediation when it was originally formed, how these functions have changed or remained the same in the transition of Chinese socio-economy, and whether they remain desirable is of great importance. It helps to identify the expected functions that court mediation is designed to serve in the future and offers a starting point for the reform of China’s court mediation.

b. Mediation and Efficiency

A question for contemporary times would be whether, notwithstanding its normative claims, there is an economic rationale for mediation. This rationale has been supported by the conclusions of some surveys conducted in the West, which concluded that mediation provides a cheaper, faster and more satisfactory dispute resolution by its capacity of maximizing resources and minimizing costs. Therefore, mediation claims to be an efficient form of dispute resolution.³⁶ However, this rationale has never been examined in China. Although it has been alleged that court mediation has achieved considerable success, and has had the effect of reducing litigation and conserving judicial resources,³⁷ the only proof is the inflated percentage

³⁵. Stanley B. Lubman, “Methodological Problems in Studying Chinese Communist Civil law” in Jerome A. Cohen ed., *Contemporary Chinese Law: Research Problems and Perspectives* (Cambridge, Mass. : Harvard University Press, 1970) at 258.

³⁶. J Brown & I Ayres, “Economic Rational For Mediation” (1994) 80 Virginia L. Rev. 323; S Shavell, “Alternative Dispute Resolution: An Economic Analysis” (1995) J. Leg. Stud. 1.

³⁷. Jun Ge, “Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China” (1996) 15 UCLA Pac. Basin L. J. 122 at 128. [hereinafter “Mediation, Arbitration and Litigation”]

of successful mediations. Whether the high rate of mediation proves the alleged success and effects has never been questioned or demonstrated. In fact, it remains highly rhetoric.

The analysis of efficiency aims to disclose the truth behind the rhetoric. It focuses on two aspects of court mediation: cost-saving and time-saving. The former refers to direct expenditures on litigation, including the expenses borne by litigants and the cost of operating the litigation system. It assesses whether the cost of court mediation is lower than that of litigation and whether the use of mediation can actually reduce the cost of the entire litigation, for example, by reducing the number of cases or streamlining case processing. The second refers to the process of mediation. It tries to demonstrate whether the process is time-consuming or time-saving.

The purpose of this analysis is not merely to lift the veil of China's court mediation, revealing its underlying problems, but for the most part, to explore how legal rules affect the efficiency of court mediation and how to improve efficiency by adjusting these legal rules.

c. Mediation and Fairness

Mere efficiency is not a sufficient reason to carry out mediation if it cannot provide justice. Nevertheless, justice can be understood in different concepts. One concern about mediation is that it provides "second class" justice for those who cannot afford

“first class” justice model, justice through the court.³⁸ Another concern about mediation is that it offers privatized justice instead of public justice.³⁹ A response to these concerns is that although mediation does not uphold the principles of court-based justice, it is based on an alternative set of values by which a form of justice results more from individual preferences than from external imposed standards because parties are invited to act creatively and pursue their personal sense of fairness based on non-legal values such as culture, morals, and individual ethics.⁴⁰ This represents an alternative conceptualization of justice, justice as fairness, which is distinguished by its responsiveness to peculiar needs and interests of the parties.

By examining those factors affecting the fairness of court mediation, this analysis attempts to question whether procedural fairness has been concerned in China’s court mediation and how it should be safeguarded.

Section 3: Methodologies of Analysis

Focusing on efficiency and fairness, this article employs economic analysis of law to discuss issues of efficiency and John Rawls’ theory of justice to issues of fairness.

³⁸. Richard L. Delgado et al., “Fairness and Formality: Minimizing the Risks of Prejudice in Alternative Dispute Resolution” (1985) Wis. L. Rev. 1359 at 1402.

³⁹. J. A. Scutt, “The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation” (1988) 11 Women’s Studies International Forum 503; see also O Fiss, “Against Settlement” (1984) 93 Yale Law Journal 1073.

⁴⁰. Supra note 2 at 61.

a. Economic Analysis of Law

In General

Prior to 1960, economic analysis of law mainly paid attention to antitrust law, although some economic study arose from tax policy (Henry Simons), corporate law (Henry Manne) and public utility regulation (Ronald Coase and others) (sometimes referred to as “old” law and economics). Beginning in the early 1960s, the field of economic analysis of law was expanded to almost every aspect of the legal system starting from Guido Calabresi’ first article on tort law⁴¹ and Ronald Coase’s article on property law⁴², followed by Richard Posner’s comprehensive text on a vast range of legal issues.⁴³ In a contrast to the ‘old” law and economics, the “new” law and economics deals with non-market behavior as well as market practices. In the meantime, different schools of thought, such as Public Choice Theory⁴⁴ and Transaction Cost Economics⁴⁵, have emerged to the economic analysis of law.

⁴¹. Guido Calabresi, “Some Thoughts on Risk Distribution and the Law of Torts” (1961) 70 Yale L. J. 499.

⁴². Ronald Coase, “The Problem of Social Cost” (1960) 3 J.L. & Econ. 1.

⁴³. Richard Posner, *Economic Analysis of Law*, 5th ed., (New York : Aspen Law & Business, 1998) [hereinafter “Economic Analysis of Law”].

⁴⁴. Public Choice Theory Model refers to collective decision-making e.g. politics, in a rational, self-interested actor framework. See e.g. Dennis Mueller, *Public Choice II*, (Cambridge : University Press, 1989); Daniel Farber & Philip Frickey, *Law and Public Choice*, (Chicago: University of Chicago Press, 1991).

⁴⁵. Transaction Cost Economics attempts to explain alternative contractual and organizational structures in terms of the relative costs of economic coordination associated with each. See e.g. Oliver Williamson, *Markets and Hierarchies*, (N.Y.: Free Press, 1975); Williamson, *The Economic Institutions of Capitalism*, (N.Y.: Free Press, 1985).

The main concern of economics is the science of rational choice in our world in which resources are limited in relation to human wants. Economics assumes that individual is a rational maximizer of his desired ends – his self-interest. Given scarcity, the concept of people as rational maximizers of their self-interest implies that people attempt to maximize their interests by doing the best they can with the limited resources. The central preoccupation of economics is the question of choice under condition of scarcity.⁴⁶ Behavior is held to be rational when it conforms to the model of rational choice. This requires the alteration of a person's behavior when his surroundings change in such a way that he could increase his interest by doing so the legal system, to an extent, structures the model of rational choice available to individuals and groups by setting up a variety of legal rules in important ways. The task of economic analysis of law is, therefore, to analyze the issues of choice under conditions of scarcity and constraints imposed by the legal system.

Two Styles of Analysis

The application of economic analysis to the law is based on the preposition that economic efficiency is useful for examining legal rules and institutions in two senses. First, it is useful in explaining the actual structure of the law. This type of analysis, which is known as *positive analysis*, suggests that the law tends to evolve in the direction of greater efficiency, not necessarily as a result of the conscious choices of

⁴⁶. Thomas J. Mileli, *Economic of the Law* (Oxford University Press, 1997) at 3; see also Michael J. trebilcock, " Law and Economics" (1993) 16 Dalhousie L. J. 360 at 361-363 [hereinafter "Law and Economics"]

judges or other participants in the legal process, but by the accumulation of the decisions of rational agents in their own self-interests.⁴⁷ For this reason, positive analysis conventionally means descriptive or predicative analysis. The presumption of this analysis is that that most individuals are motivated by rational self-interest in maximizing their individual utilities according to whatever constraints imposed on the choices available to them. *Positive analysis* tends to predict the likely economic impacts of a legal policy if it is adopted under the preposition that people do respond to the particular incentives or disincentives created by this policy. By predicting the incentive effects of these various legal regimes, the *positive analysis* seeks alternative policies that might be employed to pursue the same or alternative social goals.

The second sense in which efficiency is useful for examining the law is in suggesting how legal rules and institutions can be improved, or, more specifically, how they can be made more efficient. This type of *normative analysis*, which is conventionally referred to as welfare economics, views efficiency not as a theory for explaining how the law has evolved or will evolve in the future, but rather as an ethical foundation for prescribing how it ought to be structured.⁴⁸ It tends to ask whether a particular transaction, proposed policy, legal change will be likely to make individuals affected by it better off in terms of how they perceive their own welfare (not as some external party might judge that individual's welfare). In this context, two concepts of efficiency are of great importance: *Pareto efficiency* and *Kaldor-Hicks efficiency*.⁴⁹ The former seeks to

⁴⁷. "Law and Economics", supra note 46 at 362.

⁴⁸. Ibid. at 363.

examine whether a transaction or change will make somebody better off while making no one worse off.⁵⁰ The latter, on the other hand, seeks to examine whether a collective decision (change in legal rules) will generate sufficient gains to the beneficiaries of the change that they could, hypothetically, compensate the losers from the change so as to render the latter indifferent to it but still have gains left over for themselves. It is effectively a form of cost-benefit analysis.⁵¹

Although the positive and normative approaches to the economic analysis of the law can be quite distinct, much of the law and economic literature has elements of both. However, many economists prefer notions of Pareto efficiency to Kaldor-Hicks efficiency. They attach strong normative values to regimes of private exchange and ordering. To them, if two parties enter into a voluntary private exchange, the presumption is that they both feel that the exchange is likely to make them better off; otherwise they would not enter into it. However, this presumption is refutable in the real world in case of market failure or contractual failure. It also ignores possibly affected third parties.

Limitation of Economic Perspectives⁵²

⁴⁹. Pareto efficiency is named after an Italian economist writing late in the 19th century and Kaldor-Hicks efficiency is named after two British economists writing in the inter-war years in last century. Ibid. at 363.

⁵⁰. Robert D. Cooter & Thomas S. Ulen, *Law and Economics*, 3d ed. (Reading, Mass.: Addison-Wesley, 2000) at 12.

⁵¹. Ibid.

⁵². See e.g. Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987).

The emergence of economic analysis of law has not only attracted many followers, but also provoked intense controversy. Both positive and normative analyses have aroused considerable antagonism. The most frequent criticism is that normative underpinnings of the economic approach are so repulsive that it is inconceivable that the legal system would (or should) embrace them. Law and economics is also criticized for ignoring "justice".⁵³ A conventional external critique of the concept of *Pareto efficiency* is that it takes existing preferences, of whatever kind, as given and provides no ethical criteria for disqualifying morally monstrous or self-deductive preferences as unworthy of recognition. It is also argued the *Pareto efficiency* is wholly insensitive to the justice or injustice of the prior distribution of endowments that parties bring to an exchange, but rather takes these endowments as given in evaluating the welfare implications of a given exchange.⁵⁴ Some of these objections are also directed against the concept of *Kaldor-Hicks efficiency*; it accepts all existing preferences as equally valid; and to the extent that cost-benefit analysis reflects only willingness-to-pay measures of value (rather than underlying utility functions), disparities in endowments will bias cost-benefit judgments in distributively unjust ways.⁵⁵ Positive analysis is also criticized for its limitations in explaining the important principles, institutions, and outcomes of the legal system.

⁵³. For an exposition and critique of the normative justifications for *Pareto efficiency*, see Jules Coleman, *Markets, Morals, and the Law* (Cambridge: Cambridge University Press, 1988) at 97-129.

⁵⁴. See e.g. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University press, 1982); see also C.B. Macpherson, *Democratic Theory* (New York: Oxford University Press, 1973); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

⁵⁵. "Law and Economics", supra note 46 at 366-366; see also "Symposium on Efficiency as a Legal Concern" (1980) Hofstra L. Rev.; Richard Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981).

Although some of these criticisms are misplaced, most of them have substantial force. Yet they cannot constitute valid challenges to the theories of law and economics movement as a whole. As Robin West sees it, the law and economic movement is grounded in the postmodern skeptical conviction that neither general legal norms themselves nor philosophical verities can be usefully employed as the basis for the rational criticism of law, and hence strives to provide "objective knowable standards" from economics.⁵⁶ Although it is questionable that these economic standards are capable of totally replacing the traditional legal rationales and excluding other approaches, they do, however, provide a way of thinking that will shed new light on evaluating particular laws. As Posner argues, economics not only explains the rules and institutions of the legal system but also provides the most ethical guide to improving the system.⁵⁷ The analysis of efficiency of Chinese court mediation system in this study is largely based on the theories of law and economics, particularly the Coase Theorem and Posner's economic analysis of civil procedure.⁵⁸

The Coase Theorem and its Critiques

In his 1960 article, *The Problem of Social Cost*, Coase formulated the thesis that "if . . . market transactions are costless, . . . a rearrangement of rights will always take place

⁵⁶. Robin West, "Disciplines, Subjectivity, and Law" in Sarat and Kearns, ed., *The Fate of Law* (Ann Arbor: University of Michigan press, 1991) at 127, 149.

⁵⁷. "Economic Analysis of Law", supra note 43 at 29.

⁵⁸. Posner's economic analysis of civil procedure will be discussed in *infra* chapter II, section 2.

and it would lead to an increase in the value of production"⁵⁹. Coase constructed an economic model by which he demonstrated a phenomenon that many legal theorists subsequently extolled it as a prescriptive tool that lawmakers could use to bring about the optimal allocation of scarce resources and, by so doing, advance the greater welfare. This model has become commonly known as the Coase Theorem.⁶⁰ Coase's relevant postulation can be restated generally as that if all parties to be affected by a given situation could bargain costlessly, and if each potentially-affected party could come to the table with complete knowledge of all relevant factors, then the parties, in pursuing their preferences, would reach an agreement that would allocate their respective rights, obligations, and entitlements in a manner that would maximize the situation's total output.

Coase's ideas have been widely discussed in both economic and legal literature and have also been the focus of some of the most spirited debate in both legal and economic literature. The Coase Theorem has been attacked from both the left and the right on moral and equitable grounds. For the most part, they attack perceived weakness in the Coase Theorem's assumptions and theoretical structure. One of the harshest criticisms has been that the Coase Theorem places efficiency above other values that are equally if not more important.⁶¹ Charles Fried criticizes Coase's reasoning for removing the

⁵⁹. "Problem of Social Cost", *supra* note 42 at 15.

⁶⁰. George J. Stigler, *The Theory of Price*, 3d ed., (New York: Macmillan, 1966) at 113. Coase credits Stigler with being the first person to call the ideas in *The Problem of Social Cost* "The Coase Theorem".

⁶¹. See e.g., Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978) at 81-107 [hereinafter "Right and Wrong"]; Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1981) 33 Stan. L. Rev. 387; Laurence H. Tribe, "Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality" (1973) 46 S. Cal. L. Rev. 617.

consideration of moral and distributional objectives from the determination of rights. He points out that the economic analysis of rights uses a concept of efficiency that is removed from distributional questions and argues that while economic analysis may tell us what is an efficient allocation of resources, it does not consider whether that distribution is fair or just.⁶² Opponents of the Coase Theorem have also suggested that it is invalid because it does not hold true in the long run.⁶³ Posin attacked the Coase Theorem for not taking account of risk, but his article was also widely criticized because it failed to consider opportunity cost.⁶⁴ Others point out that the Coase Theorem depends on the existence of economic rents to be true,⁶⁵ it depends on the convexity of the production function⁶⁶, it does not take account of the possibility of strategic behavior⁶⁷, it does not truly reflect consumer behavior⁶⁸, and it raises the

⁶². "Right and Wrong", supra note 61 at 92-94.

⁶³. See e.g., Guido Calabresi, "The Decision for Accidents: An Approach to Nonfault Allocation of Costs" (1965) 78 Harv. L. Rev. 713; Donald h. Regan, "The Problem of Social Cost Revisited" (1972) 15 J. L. & Econ. 427 [hereinafter "The Problem of Social Cost Revisited"]; William Schulze & Ralph C. D'Arge, "The Coase Proposition, Information Constrains, and Long-Run Equilibrium" (1974) 64 Am. Econ. Rev. 763.

⁶⁴. Daniel Q. Posin, "The Coase Theorem: Through a Glass Darkly" (1985) 61 Tenn. L. Rev. 797 at 832-844; see also Posin, "The Coase Theorem: If Pigs Could Fly" (1990) 37 Wayne L. Rev. 89.

⁶⁵. The economics rent that an activity creates "consists of the difference between what a factor of production earns in a given activity and what it could earn in the best alternative activity." Coase, "Notes on the Problem of Social Cost" in Ronald Coase, *The Firm, the Market, and the Law* (Chicago ; London : University of Chicago Press 1988) at 165; "The Problem of Social Cost Revisited", supra note 63 at 433; David L. Shapiro, "A Note on Rent and the Coase Theorem" (1974) 7 J. Econ. Theory 125.

⁶⁶. See e.g., A. Mitcell Polinsky, "Economic Analysis As a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law" (1974) 87 Harv. L. Rev. 1655 at 1675-76; David A. Starrett, "Fundamental Non-Convexities in the Theory of Externalities" (1972) 4 J. Econ. Theory 180; Kenneth R. Vogel, "The Coase Theorem and California Animal Trespass Law" (1987) 16 J. Legal Stud. 149 at 154-60.

⁶⁷. "The Problem of Social Cost Revisited", supra note 63 at 429-430.

⁶⁸. Mark Kelman, "Consumption Theory, Production Theory, and Ideology in the Coase Theorem" (1979) 52 S. Cal. L. Rev. 669 at 678-95.

possibility of extortion.⁶⁹ Meanwhile, Coase's defenders have responded to these articles by pointing out the weaknesses in the critiques and the ways in which they misstate or misunderstand the Coase Theorem.⁷⁰

Even though, it is generally agreed that the Coase Theorem provides a powerful economic tool for considering questions of efficiency and preference maximization. It allows for a derivation of agreements that parties would reach if they could bargain under a set of assumed conditions. Although these assumptions never hold true in real markets, examining what would happen if they were true allows us to comprehend and formulate policies and rules designed to promote efficient dispute resolutions.

b. Rawls's Theory of Justice

In contrast to the late-twentieth-century emphasis on justice as efficiency is the claim of justice as fairness. At earlier times, notions of justice have centered primarily on form and process, on dispensing justice "according to the rules."⁷¹ More recently, the focus on fairness has included a greater emphasis on a perceived need to use the law

⁶⁹. See e.g., George Daly & J. Fred Giertz, "Externalities, Extortion, and Efficiency" (1975) 65 Am. Econ. Rev. 997.

⁷⁰. See e.g., Ronald H. Coase, "The 1987 McCorkle Lecture: Blackmail" (1988) 74 Va. L. Rev. 655 at 671; Robert D. Cooter, "How the Law Circumvents Starrett's Nonconvexity" (1980) 22 J. Econ. Theory 499; Steven G. Medema, "Through a Glass Darkly or Just Wearing Dark Glasses? Posner, Coase, and the Coase Theorem" (1995) 62 Tenn. L. Rev. 1041; G. Warren Nutter, "The Coase Theorem on Social Cost: A Footnote" (1968) 11 J. L. & Econ. 503; Matthew Spitzer & Elizabeth Hoffman, "A Reply to Consumption Theory, Production Theory, and Ideology in the Coase Theorem" (1980) 53 S. Cal. L. Rev. 1187.

⁷¹. "Justice Without Law", *supra* note 8 at 143.

to redressing and adjusting inequalities of both the opportunities for seeking society's scarce resources and the resulting allocation of those resources.⁷²

Within this discipline, John Rawls uses a model of social contract⁷³ to explain issues of justice, suggesting that individuals come together from their original positions and agree to transfer a portion of their individual liberties into a social arrangement that will promote their mutual self-interest. Rawls emphasized the mechanism of a social contract and thus extended the works of earlier social contract theorists, particularly Hobbes⁷⁴, Locke⁷⁵, and Rousseau⁷⁶. Rawls' *A Theory of Justice*⁷⁷ has been the most refined version of the notion of an initial consensus as being the predicate for and means of deriving fundamental social principles.

Rawls' book *A Theory of Justice* begins with the proposition that a society is a

⁷². See e.g. H Haywood Burns, "Law and Race in America", in David Kairys, *The Politics of Law: A Progressive Critique* (New York : Pantheon Books, 1982) at 172 [hereinafter "The Politics of Law"]; see also Nadine Taub & Elizabeth M. Schneider, "Perspectives on Women's Subordination and the Rule of Law" in "The Politics of Law" at 117.

⁷³. The origins of social contract theory as well as natural law can be found in the Roman Stoicism of Cicero and in the system of Roman law. See Peter Laslett, "The Social Contract" in Paul Edwards ed., *The Encyclopedia of Philosophy* (New York : Macmillan 1967) at 467.

⁷⁴ See generally Thomas Hobbes, "Human Nature", in Ferdinand Tönnies ed., *The Elements of Law: Natural and Politic*, 2d ed., (London Frank Cass Pub, 1969); see also Sir Ernest Barker ed., *Social Contract: Essays by Locke, Hume, and Rousseau* (Westport, Conn. : Greenwood Press, 1980).

⁷⁵. See generally John Locke, *An Essay Concerning Human Understanding* (Clarendon Press, 1990); John Locke, *Two Treatises of Government* (Cambridge Univ. Press, 1960).

⁷⁶. See generally Jean Jacques Rousseau, *The Social Contract or Principles of Political Right*, 3d ed. (London, Allen and Unwin., 1948).

⁷⁷. Ronald Rawls, *A theory of Justice*, revisited edition, (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) [hereinafter "A Theory of Justice"].

cooperative venture of human beings structured for their mutual advantages well-ordered not only when it advances the good of its members, but also when it is effectively regulated by a public conception of justice. In such a society everyone accepts and knows that the others accept the same principles of justice; basic social institutions generally satisfy, and are generally known to satisfy, these principles.⁷⁸ The principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. They will regulate all further agreements, specifying the kinds of social cooperation which can be entered into and the forms of governments that can be established. This way of regarding the principles of justice is referred by Rawls as “justice as fairness”.⁷⁹

The universal acceptance of preordinate principles presupposes an earlier consensus on those principles, which in turn presupposes that members of the society possess the capability of rational thought. Thus, when parties are engaging in social cooperation, they are capable of choosing together, in one joint act, principles assigning basic rights and duties and determining the division of social benefits. The underlying reason for this capacity is that any rational person with a coherent set of preferences among available options will rank those options as to how well they will further his or her purposes.⁸⁰ Rawls expands the means-ends reasoning in his hypothetical original

⁷⁸. “A theory of Justice”, supra note 77 at 4.

⁷⁹. “A Theory of Justice”, supra note 77 at 10.

⁸⁰. Ibid. at 142-143.

position, arguing that by means of rational reflection, participants in the original position will come to understand the desirability of reaching a consensus on ranking principles that allow them to maximize their collective preference.⁸¹ With this ability to rationally assess alternatives, the nature of people's rationality and intuition will allow a consensus to be reached.⁸² He then set out two conditions for reaching consensus.

Original Position

This condition requires that agreement on the principles must be made within what Rawls labels "the original position," a hypothetical situation where participants capable of rational reflection come together to rank and agree upon the controlling principles.⁸³ This ensures that the parties in the original position are equal. They all have same rights in the procedure for choosing principles and making proposals or submitting reasons for their acceptance. No one is advantaged or disadvantaged in the choice of principles by the outcome of nature chance or the contingency of social circumstances. Since they are all similarly situated and no principles can be designed in favor of any particular condition, the principles of justice are the result of a fair agreement or bargain. This explains the name of "justice as fairness" which conveys the idea that the principles of

⁸¹. Ibid.

⁸². In his later book, Rawls expands his discussion of rationality by noting that rational agents are not limited to means-ends reasoning, but that persons' "may balance their final ends by their significance for their plan of life as a whole..." Rawls makes a distinction between what is reasonable and what is rational. To be reasonable is to agree to abide by norms of cooperation applicable to all, where to be rational is an individual's use of one's powers of judgment and deliberation in seeking one's own ends and interests. See Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 48-51.

⁸³. "A Theory of Justice", supra note 77 at 17-22.

justice are agreed to in an initial situation that is fair.⁸⁴

Veil of Ignorance

The idea of the original position is to set up a fair procedure to remove the situational bias of each participant coming into the original position so that any principle agreed to will be just. In order to do so, parties are situated behind what Rawls calls a “veil of ignorance”, under which they do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.⁸⁵ The reason for setting these broad restriction is because, in order to carry through the idea of the original position, the parties must not know the contingencies that set them in opposition and must choose principles the consequences of which they are prepared to live with, without considering any specific personal position. However, on the other hand, each participant in the original position would know certain facts about human society generally. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate.⁸⁶

The function of this limited veil of ignorance is that the rationality of each person is

⁸⁴. Ibid. at 11-17.

⁸⁵. Ibid. at 118-119.

⁸⁶. Ibid.

unaffected by his or her situational bias. Because the differences among the participants are unknown to the participants, and because everyone is equally rational and similarly situated, each participant is convinced by the same arguments. No one will favor principles of justice designed to be more responsive to one situation than another. Therefore, the principles of justice will result from a fair agreement, untainted by situational bias. By using fair to describe the results of such a hypothetical consensus, Rawls emphasizes that justice as fairness results only when no party knowingly seeks an advantage at the expense of others.

Two principles of justice

Given these various conditions on both the principles and the parties choosing them, Rawls believes two principles of justice will be selected. First, each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all. Second, social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁸⁷

Arguments and Critiques

Rawls' hypothetical assumptions and two principles of justice have raised numerous

⁸⁷. Ibid. at 53, 83.

critical responses. Thomas Nagel and Milton Fisk claimed that some form of bias exists in Rawls' "original position" and that these bias undermine its ability to serve as a fair device for selecting principles.⁸⁸ Instead of challenging the justificatory role of Rawls' "original position", Ronald Dworkin distinguished three types of theories, goal-based, rights-based and duty-based and argued that only right-based theories are compatible with the contract model. He then suggests that the particular right which lies at the heart of Rawls' deep theory is the right of each individual to equal concern and respect. This right is not a product of contract but a preposition of Rawls' use of the contract.⁸⁹ Lyons and Baber both asked why we should view the results of choice in the original position as the selection of principles of justice, rather than as the selection of principles governing self-interested departures from just egalitarian arrangements.⁹⁰ Lake noted that Rawls is intuitionist who acknowledges that many moral decisions rest merely on rational and reasonable arguments.⁹¹ Waldrop has suggested that the maximizing assumption can have serious effects.⁹² Other critiques have also made

⁸⁸. Nagel alleged that Rawls used a "thin" theory of primary social goods as a sufficient basis for parties to act on choosing a conception of justice. If full conceptions of good were allowed, no unanimity in principle would result. Thomas Nagel, "Rawls on Justice" (1973) Vol. LXXXII *Philosophical Rev.* at 220-234 [hereinafter "Rawls on Justice"]; Fisk argued from his Marxist point of view, claiming that Rawls' justificatory device is based on parties natural characteristics of freedom and equality. These characteristics, however, reflect a particular ideological bias. See Milton Fisk, "History and Reason in Rawls' Moral Theory" in Norman Daniels ed., *Reading Rawls* (Basil Blackwell, Oxford, 1975) at 53.

⁸⁹. Ronald Dworkin, "The Original Position" (1973) 40 *Univ. Chicago L. Rev.* 500 at 533.

⁹⁰. David Lyons, "Nature and Soundness of the Contract and Coherence Arguments" in *Reading Rawls*, supra note 88 at 141; Benjamin baber, "Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls" in *Reading Rawls*, supra note 88 at 292.

⁹¹. Peter F. Lake, "Liberlism Within the Limits of the Reasonable Alone: Developments of John Rawls' Political Philosophy, Its Political Position, and the Limits on its Applicability" (1995) *Vt. L. Rev.* 603 at 612.

⁹². "Real human beings are neither perfectly rational nor perfectly predictable.... In nonlinear system – and the economy is most certainly nonlinear – chaos theory tells you that the slightest uncertainty in your knowledge of initial conditions will often grow inexorably. After a while, your predictions are nonsense."

important remarks about Rawls' theory of justice.⁹³

In spite of these critiques, Rawls' theory maintains a significant position in discussing issues of justice. His theory of justice is actually a part, perhaps the most significant part, of the theory of rational choice. Rawls attempts to show that principles of justice can be viewed as the result of a selection of procedure that all people can agree it fair, thus, justice as fairness. It indicates that it is fair to require people to submit to procedures and institutions if they have been given opportunities to agree in advance on the principles to which they must submit. It requires a respect of people's autonomy or freedom and a society with policies to satisfy the principles of justice as fairness, under which a consensual agreement can be voluntarily achieved.⁹⁴ When people justify a policy on the ground that the affected parties would have (or even have) agreed to it, much depends on the reasons for their agreement, not motivated by ignorance, fear, helplessness, or a defective sense of what is reasonable. Therefore, all interference with people's voluntary selection should be avoided and prohibited. These understandings provide meaningful tools for examining the fairness of court mediation and for pursuing fairness by improving existing legal rules.

C.M. Mitchell Waldrop, *Complexity, The Emerging Science at the Edge of Order and Chaos*, (New York : Simon & Schuster, 1992) at 142.

⁹³. For critics about Rawls' theory of justice, see generally Thomas W. Pogge, *Realizing Rawls* (Cornell University Press, 1989); Robert Paul Wolff, *Understanding Rawls* (Princeton University Press, 1977); David Lewis Schaefer, *Justice or Tyranny?* (National University Publications, Kennikat Press, 1979); Chandran Kukathas & Philip Pettit, *Rawls: A Theory of Justice and its Critics* (Polity Press, 1990).

⁹⁴. "Rawls on Justice", *supra* note 88.

Chapter II Exploring the Rationale Underlying Court Mediation

Section 1. Goals, Purposes of Court Mediation

From economic perspective, the objective of a civil procedure is to minimize the sum of two types of costs: the social cost generated when a judicial system fails to carry out the allocative or other social functions assigned to it, the so-called “error cost”, and the “direct cost” of operating the legal dispute resolution machinery such as lawyers’, judges’, and litigants’ time and money spent on litigation.⁹⁵ Within this framework, an important purpose of substantive legal rules and other features of a civil procedure is to reduce the direct costs and maximize economic efficiency.⁹⁶ It is generally understood that settlement costs are normally much lower than litigation costs, the proportion of cases settled is thus an important determinant of the total direct costs of legal dispute resolution.⁹⁷ Therefore, procedural rules are usually expected to boost the settlement rate, which in turn reduces the direct cost.

In the West, the innovation of court mediation stems from a number of perceived deficiencies with traditional adjudication. Although these deficiencies may be less evident in some jurisdictions, depending on the complexity and conflict in litigation

⁹⁵. Richard Posner, “An Economic Approach To Legal Procedure and Judicial Administration” (1973) 11 J. Leg. Stud. 399 at 399-340.

⁹⁶. Ibid.

⁹⁷. “Economic Analysis of law”, supra note 43 at 417-418.

processes, they are nevertheless universal because of the combative nature of litigation. Thus, exploring the merits of attaching mediation to traditional litigation may benefit all judicial systems searching for more efficient and productive dispute resolution.

The common complaints about civil procedure can be lumped into three categories: the high cost of money and time spent to resolve disputes, the process relating to the participation of the parties in both the fact finding and decision-making process, and the results relating to the imposition of an unsatisfactory “remedy” by a “stranger” from a predetermined and limited range of options.⁹⁸

a. Concerns about the high cost of litigation

The high cost in money and time involved in litigation derives from two sources. One is institutional, from the operation of the procedural system; another accrues to litigants who participate in it. Expenses arising from litigation process include judges’ and administrative staff salaries, courtrooms, etc., largely paid by society and thus representing a public subsidy to those who use the judicial process. Although the parties may bear part of the cost, usually the loser of the lawsuit, the real costs of litigation may in fact be much higher than those borne by the parties, considering the various expenses by the courts. For disputants involving in a highly competitive and adversarial process, money paid to lawyers, experts, and to collect evidence is just another financial burden. Apart from the high cost of money, the judicial process is

⁹⁸. “A Conceptual Overview”, supra note 4 at D-5 to D-10.

also time-consuming. This is partly due to the complex and adversarial nature of litigation, partly to the increasing caseload faced by courts. As a result, the process tends to be slow, cumbersome and riddled with delays. Moreover, the high cost makes many individuals and companies who can not afford the costly litigation feel that dispute resolution unavailable to them.

One might argue that in theory nothing seems wrong with a costly process provided that the process is cost-effective, in the sense that similar or better results cannot be achieved more cheaply and provisions are adopted to ensure that fairness and access concerns are met. Nevertheless, this raises some serious questions: Can the parties and society afford the cost in light of the results? Can society afford the cost of a process that is inaccessible to a large segment of society?

b. Participation in Litigation

When a dispute has occurred and issues of law become involved, many individuals and businesses feel paralyzed in dealing with and resolving it. At this point, the matter is often taken to a lawyer and dressed in legal clothing which makes it unrecognizable to the person who brought it to the lawyer. The lawyer then takes over conduct of the legal research, legal analysis, and facts gathering, and the dispute is gradually taken out of the disputants' world and transported into a legal world which is under control of the lawyer. Although the lawyer does not act without instruction from his client, the litigants' participation in litigation is indirect. Not only do the parties not speak on their

own behalf - that is done by hired professionals - they do not speak to each other. Parties lose control of the dispute and may never know what alternatives available outside the world of formal dispute resolution might be.⁹⁹ As the supposed decision-makers, their direct face-to-face contact is replaced by third party decision-makers, the hired legal professionals whose training and orientation emphasizes competition and confrontation. Eventually, the parties are pushed out of the middle ground and forced to accept extreme “win” or “lose” positions. Such a process discourages compromise and offers few opportunities for the parties to fashion a result that expands or enhances their relationships.

c. Unsatisfactory Results of Litigation

Another criticism of the adjudicative process is that it often fails to satisfy the needs of the parties, and thus of society. In terms of economic efficiency, the result of litigation is not *Pareto Efficiency*.¹⁰⁰ It always tends to be in favor of one party's interests, and against another's. Since the judicial process has limited remedial options, there are, therefore, few opportunities for creative, innovative solutions. Although in theory, adjudicated decisions result from the application of predetermined legal rules and principles, the real outcomes are less certain and less predictable than theory would suggest because cases are always fact specific and legal rules may vary from one case to another.

⁹⁹. Richard H. McLaren & John P. Sanderson, Q.C., *Innovative Dispute Resolution* (Carswell, 1998) at 1.2 [hereinafter “Innovative Dispute Resolution”].

¹⁰⁰. See supra note 49 and accompanying text.

All of this exhausts disputants financially and emotionally. Not only is it slow and expensive, but there is a growing sense that the process is inefficient and counterproductive. Many find the process intimidating and inaccessible. Nobody eventually wins with litigation.¹⁰¹ This thus triggered a diverse range of efforts among legal academics and professionals toward searches for alternative dispute resolution.¹⁰² The innovation of court mediation seeks to remedy those dysfunctions and reform, improve or even expand adjudication to a more efficient means of dispute resolution.

Section 2. Search for Efficiency

Given the objective of a civil procedure, the immediate question is how should procedural rules be designed to affect the settlement rate in order to produce efficiency. Before answering this question, it is necessary to understand what factors affect parties' decisions on whether to settle or to litigate.

Posner suggests that a principle cause of litigation is "mutual optimism" - both parties believe they have a good chance of winning.¹⁰³ A divergence of estimates of the likely outcome of the litigation results from parties' possession of different information about

¹⁰¹. W. Bogart & N. Vidmar, "Problems and Experience with the Ontario Civil Justice System: A Preliminary Report" in *Proceedings of Conference on Access to Civil Justice* (Toronto, Ontario Ministry of the Attorney General, 1988). Bogart and Vidmar found that approximately 33% of the people surveyed experienced a serious civil justice problem over the three-year period of the study.

¹⁰². D. Bok, "Law and Its Contents", *Bar Leader* (March-April, 1983) 21 at 28.

¹⁰³. "Economic Analysis of Law", *supra* note 43 at 422.

the strengths of their respective cases, which is unknown to each other. When one party thinks his case is stronger than it really is or, what amounts to the same thing, his opponent's case is weaker than it really is, the minimum price he would accept to compromise on his claim is then greater than the maximum price his opponent is willing to pay. The larger the settlement range, the more the parties will stand to gain from hard bargaining and the likelier the parties are to end up with litigation because they can not agree on how to divide the available surplus.¹⁰⁴

Consequently, the settlement negotiation will fail and litigation will ensue. This suggests that a crucial element in reducing the likelihood of litigation is to reduce parties' "mutual optimism". To achieve this, parties need to fully exchange the information possessed by each of them. This will enable each to form a more accurate, and thus convergent, estimate of the likely outcome of the litigation and make their offers or demands more credible and realistic.¹⁰⁵ Upon the disclosure of all relevant information, parties will be then more likely to move away from their original positions and toward a compromise necessary for a mutual agreement if settlement negotiation is allowed to occur. So the immediate question is when should such settlement negotiation occur.

a. Timing of Mediation

¹⁰⁴. "Economic Analysis of Law", supra note 43 at 608.

¹⁰⁵. Ibid. at 611.

In court mediation, mediation is only triggered after litigation has been engaged. The question is then at which point should mediation be injected into adjudicatory process?

One point of view suggests that mediation should intervene as early as possible after a suit is filed. Mediation session should occur following the close of pleadings and shortly after all documents have been received by courts.¹⁰⁶ The choice of this timing has several merits. First, when resolution is successful at this stage, it eventually reduces the number of cases proceeding to formal hearings, increasing efficiency by eliminating unnecessary expenditure of time and money on litigation. Second, even if an agreement is not reached, the mediation session may help narrow issues and clarify facts otherwise difficult to recognize, thus streamlining the remaining stages of litigation and making it more convergent and efficient.¹⁰⁷

However, this choice of timing raises another concern: is mediation at too early a stage likely to be successful? It is fair to assume that the parties have already tried to negotiate, that their failure to an agreement has brought them to pursue litigation. If mediation is timed to occur after the close of pleading, as a practical matter, it seems unlikely that parties or their counsel would be willing, in most instances, to seriously consider settlement. The parties have already proven adverse to any kind of compromise, and the strength or weakness of their case, i.e., their litigation risk, has

¹⁰⁶. “Innovative Dispute Resolution”, supra note 99 at CAP-12; see also James J. Alfini, “ Trashing, Bashing and Hashing it Out: Is This the End of “Good Mediation?” (1991) 19 Fla. St. U.L.Rev.47 at 61.

¹⁰⁷. “Innovative Dispute Resolution”, supra note 99 at 1.1.

not yet been exposed. Automatic referral at too early a stage generally results in a waste of resources and may compromise the potential for success.

If mediation occurs as a lawsuit progresses through preparatory stages and on into trial, it seems that the probability of settlement would rise because the parties would be obtaining more and more information about the strength of their cases and therefore their predictions of the likely outcome would be more and more convergent.¹⁰⁸ Many cases in fact are settled on the eve of trial. However, this ignores the fact that as a lawsuit progresses and more information is disclosed, on the other hand, the cost of litigation is increased and the perceived benefits of settlement are declining. By the time of compromise, the vast majority of costs have been incurred. Certainly it is too late if compromise comes on the eve of a trial.

In general, mediation should be available to the parties at any time during the proceeding; however, as a matter of policy, the preferable timing should be at some point after there has been sufficient opportunity to conduct meaningful discovery but before the case goes on to trial. At this point parties have obtained sufficient knowledge of their situations and are more open to compromise. The potential success of mediation is greater while the cost is lower. As regards the duration of a mediation session, it may vary from hours to days or even longer, depending on the circumstances of each case. Nevertheless, it should not be prolonged simply in order to procure an agreement.

¹⁰⁸. "Economic Analysis of Law", supra note 43 at 615.

b. Financial Costs

Although the settlement process is likely to reduce the divergence of parties' estimates of trial risks and facilitate a mutual agreement, this is not a sufficient condition to incent parties to participate in mediation,¹⁰⁹ because the best offer each party can put on the table during the settlement process will partly depend on the cost of litigation relative to that of settlement.¹¹⁰ In other words, the costs of settlement significantly affect the successful rate of settlement. This can be better explained by a discussion of the Coase Theorem.

The Coase Theorem contains a number of underlying assumptions.¹¹¹ The most important assumption is the existence of zero transaction cost. The term "transaction costs" embraces many ideas, including "search and information costs", "bargaining and decision costs", and "policing and enforcement costs".¹¹² Given the proposition that there should be no impediments (transaction costs) in the marketplace of legal relations, an agreement can then be reached by rational bargaining in order to foster efficiency and maximization. The underlying reason is that, as rational individuals, parties will not ignore opportunities to increase their welfare by way of a bargain when the transaction cost is zero. Additionally, since some transaction costs due to lack of information, both

¹⁰⁹. Ibid. at 608.

¹¹⁰. Ibid.

¹¹¹. For a comprehensive analysis of the assumptions underlying Coase Theorem, see Elizabeth Hoffman & Mathew L. Spitzer, "The Coase Theorem: Some Experimental Tests" (1982) 25 J. L. & Econ. 73.

¹¹². Pierre Schlag, "The Problem of Transaction Costs" (1989) 62 S. Cal. L. Rev. 1661 at 1673-1674.

parties should give all relevant information of their situations to each other so that they could come to the table to negotiate with perfect knowledge of relevant situations and thereby a mutual agreement could be reached.

In the context of mediation, his theory can be restated as follows: if the cost for mediation between two parties in a given situation is zero, and each potentially-affected party, with the knowledge of all relevant factors, could come together to mediate in order to pursue their interests, then the parties would reach an agreement to allocate their respective rights, obligations, and entitlement in a manner that would maximize the situation's output. Any agreement so reached would be wealth-maximizing within Pareto Efficiency.

The Coase Theorem suggests that the financial cost of mediation can create a huge barrier both to the access and success of mediation. Therefore, legal policies should keep the cost of mediation as low as possible in order to encourage parties to participate in mediation and increase the rate of successful mediations. There is no question that if mediation succeeds at the earlier stage of litigation, parties would pay a smaller amount of mediation fees. But in case of the failure of mediation, the total cost of the dispute resolution will then be higher than it would have been if the parties had not tried mediation first. The cost of mediation then becomes an extra burden. This is particularly true in mandatory mediation where parties are forced to try mediation first. The Multi-Door Courthouse Model¹¹³ suggests that a single entry fee should provide

¹¹³. "Varieties of Dispute Processing", supra note 12 at 130-132.

access not only to adjudication but also to other processes including mediation. This provides a good example supported by the theory of transaction cost.

Section 3. Process and Fairness

Parties choose courts to resolve their disputes because they expect what courts have to offer - dispute resolution based on principles of law. The claim or assertion of legal rights is usually what brings them to court in the first instance. For this reason, court mediation should be judged by a different standard than non-court mediation.¹¹⁴ In addition to considering efficiency, it must concern itself with fairness.

What, then, are the necessary components of a concept of fairness against which to assess whether court mediation policies support or hinder it? There are two required dimensions: a substantive aspect and a procedural element.

The substantive aspect of fairness embraces a conception constituting the functional equivalent of the different principles in Rawls' scheme. Stated very generally, if the outcome achieved through a mediation process leaves one or some parties much worse off from their starting (original) positions than they would have been had they participated in any other dispute resolution process, such a process would not be fair.¹¹⁵

¹¹⁴. Jacqueline M. Nolan-Haley, "Court Mediation and the Search for Justice Through Law" (1996) 74 Wash. U.L.Q. 47 at 89.

¹¹⁵. "A Theory of Justice", *supra* note 77 at 75-83.

Substantive fairness actually results from the selection of a procedure that all people agree is fair. In other words, a fair result comes from the end of a fair procedure.¹¹⁶

In the context of court mediation, the procedure may not necessarily guarantee the fairness of the mediated agreement in its substantive meaning.¹¹⁷ In providing the alternative of mediation, courts offer the litigants the possibility of a creative and private outcome based on 'individualized' justice, because the litigants are invited to pursue their personal sense of fairness based on non-legal values such as culture, morals, and individual ethics. When the parties are the decision-makers in a dispute resolution, they are responsible for all their decisions including their settlement terms.

For example, in arriving at their decisions, they may have regard to any considerations they choose. For some litigants, conserving time may be more important than receiving an award of money. For others, the opportunity to vent may be more important than the right to void a contract. Those choices of non-legal values may influence or determine the outcome of court mediation.

Thus, court mediation does not necessarily guarantee the fairness of the outcome agreed between the parties.¹¹⁸ However, it must be managed in such a way that both or all parties can pursue their personal sense of fairness through a fair process. When people

¹¹⁶. Maurice Rosenberg, "Resolving Disputes Differently: Adien to Adversary Justice?" (1988) 21 Creighton L. Rev. 801 at 189.

¹¹⁷. Cecilia Albin, "The Role of Fairness in Negotiation" (1993) 9 Negotiation J. 223 at 225-226.

¹¹⁸. Ibid.

refer to mediation being a “fair” process, it is this quality of procedural fairness to which they refer and not necessarily the fairness of the substantive outcome.¹¹⁹ The fairness of a process implies a number of requirements that corresponds with the underlying implications of Rawls’ theory.

a. Consensual agreement

Rawls’ theory implies that there should be respect for people’s autonomy or freedom, under which a consensual agreement can be voluntarily achieved.¹²⁰ Thus, all interference with people’s own choices should be avoided. This may raise a question as to whether mediation can be mandatory. Providing there is no coercion to settle, but merely a requirement to try the process, mandatory mediation is not necessarily a contradiction in terms, and it is not inherently unfair to stipulate procedures that require parties to try in the first instance to resolve their disputes. However, the controlling principle of negotiation must be self-determination.¹²¹ Parties must not be induced by fear or duress to arrive at settlement terms. To ensure parties’ exercise of self-determination, any procedural rules interfering with parties’ autonomy and freedom should be prevented. The mediator may provide information and may in some models help with evaluation; but none of this allows a mediator to unduly influence the parties in their decision-making.

¹¹⁹. Supra note 1 at 464.

¹²⁰. “Rawls Theory on Justice”, supra note 88.

¹²¹. Robert A. B. Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Employment and Recognition*, (San Francisco, CA : Jossey-Bass, 1994) at 12.

b. Prerequisite for Exercising Self-Determination

Court mediation requires parties to become active participants in the resolution of their own disputes. To engage fully in this decision-making process, parties must be positioned to make conscious, informed choices.¹²² Although parties in court mediation may actually resolve their dispute based on their ethics, culture, sense of morality, personal fairness, and the like, instead of legal principles, they should be able to freely and consciously disregard their legal rights.¹²³ In doing so, they must know their legal rights before choosing to abandon them. Therefore, relevant, not perfect, knowledge of legal rights, is a necessary prerequisite to the exercise of self-determination in court mediation. Without such knowledge, the fairness of mediation and its outcome are suspect, especially for cases involving parties not represented by legal professionals.¹²⁴

c. Mediator

The mediator is critical to the success of the mediation since he or she will have the task of uncovering potential compromises for the parties and facilitating the resolution of the dispute. The conduct of the mediator also determines, to a large extent, the fairness of the mediation process because it is the mediator who directs the whole

¹²². Supra note 114 at 91.

¹²³. Judith L. Maute, "Mediator Accountability: Responding to Fairness Concerns" (1990) J. Disp. Resol. 347 at 360.

¹²⁴. This is not saying that parties are able to obtain the resources to exercise their rights or the knowledge of legal rights can guarantee fairness. Supra note 114 at 93-96.

process. Therefore, the qualifications of the mediator are of great importance. First, it is essential that the mediator must be a neutral third party.¹²⁵ This neutrality will eliminate any perception of bias and raise the confidence level of the parties in the dispute.

Second, mediators must be even-handed and impartial in their dealings with parties. This requires that the mediator must have no interest in the outcome nor be associated or connected with any of the disputing parties in a way what would inhibit effective, even-handed intervention.¹²⁶

Third, mediators should not unduly influence the parties in their decision-making, either directly or indirectly. The mediator may provide information and may in some models help with evaluation; but none of this allows a mediator to unduly influence the parties in their decision-making or impose their decision on the parties. To ensure that this does not occur, a general rule is that a mediator should not have authority to make a determination.¹²⁷ In court mediation, a judge, master, registrar or any other court official who mediated where a settlement was not reached should not have any future involvement in the same matter. If a mediator has authority to make a binding determination of the issues following an unsuccessful attempt to mediate, parties would not feel free to participate in mediation, to exchange information, and to express their opinions.

¹²⁵ . "Innovative Dispute Resolution", supra note 99 at Cha-9.

¹²⁶ . Supra note 1 at 128.

¹²⁷ . Ibid. at 130.

d. Confidentiality of Mediation

Given that mediation is conducted in the context of a dispute - often hotly contested and charged with emotion - the participants ordinarily approach one another with a great deal of distrust. Under such circumstances, a disputant is understandably hesitant to give his adversary information that could be used to his detriment.¹²⁸ Confidentiality is essential to the functioning of mediation. It engenders frankness and facilitates a complete exploration of the issues underlying the parties' dispute.¹²⁹ Parties usually work more cooperatively in an atmosphere of privacy and discretion. They generally resist disclosing information, personal needs, and strategies if there is concern that such disclosure can be used against them later.¹³⁰ Mediation should create conditions that are conducive to discussion, negotiation and the exploration of settlement options and possibilities. Parties need to be able to negotiate freely in the expectation that they will be disclosed neither publicly nor to a court in the event of the process not resulting in an agreed outcome. Thus, confidentiality is of considerable importance to court mediation processes.

¹²⁸. Kent L. Brown, "Confidentiality in Mediation: Status and Implications" (1991) 2 J. Disp. Resol. 307 at 310.

¹²⁹. Karen A. Zerhusen, "Reflections on the Role of the Neutral Lawyer: The Lawyers as Mediator" (1993) 81 Ky. L. J. 1165 at 1170.

¹³⁰. Supra note 128 at 310.

Chapter III Court Mediation In China: Past and Present

It is well known that the Chinese traditional preference for dispute resolution by extra-legal means is profoundly influenced by Chinese legal culture, which was dominated by Confucianism, a philosophical model emphasizing harmony and peace.¹³¹ However, legal culture cannot be treated in isolation from politics. Indeed, they intersect, for example, in the choice of vehicles for dispute resolution.¹³² As some Western scholars have observed, the emphasis on using mediation as the principal means of settling disputes by courts exposes the Chinese government's inclination to keep dispute settlement politicized.¹³³ As a result of the legal reforms taking place in the last two decades, both mediation and courts have greatly changed. Political influence is gradually less evident in civil cases where the Communist Party and the state generally have little or no interest in the outcome.¹³⁴ Mediation is no longer emphasized as a primary means of dispute resolution by courts in legislation. The growing sense of legal-consciousness has increased the search for rights-oriented solutions rather than informal means. Nevertheless, mediation still remains the dominant position in practice. By examining some common practical problems of court mediation, this chapter suggests that preferences for mediation over adjudication are actually lingering within

¹³¹. See Sybille Van Der Sprenkel, *Legal Institutions In Manchu China* (New York, Humanities Press, 1966) at 30-31.

¹³². Pitman B. Potter ed., *Domestic Law Reforms In Post-Mao China* (Armonk, N.Y.: M.E. Sharpe, 1994) at 12. [hereinafter *Domestic Law Reforms*]

¹³³. James V. Feinerman, "Legal Institution, Administrative Device, or Foreign Import: The Roles of Contract in the People's Republic of China" in "Domestic Law Reforms", supra note 132 at 236.

¹³⁴. Edward J. Epstein, "Law and Legitimation in Post-Mao China" [hereinafter "Law and Legitimation in Post-Mao China"] in " Domestic Law Reforms", supra note 132 at 41.

courts themselves, despite the decline of Communist ideology generally and the frequent extolling of rights-related adjudication in the courts as a matter of policy.

Section 1: Historical Background of Court Mediation

a. Chinese Legal Culture and Mediation

Chinese legal culture is deeply rooted in Confucian philosophy, in which the feeling among relatives, friends, and community members were much more important than the rights and interests of individuals, rules of morality are superior to rules of material interests, and harmony and “no litigation” was the ideal social order.¹³⁵ The precepts of Confucianism are consistent with the modern Chinese legal theory, profoundly influenced by Marxist legal theory, which evolves from the application of dialectical materialism to a series of political and legal duality.¹³⁶ Under Marxist theory, the law serves the function of creating and maintaining a social order that is advantageous to the ruling class of a society.¹³⁷ Social control cannot be maintained solely by means of law, but must be supplemented by morality and the policies of the ruling party. By adjusting relations among friends, relatives, community members, morality affects a broader range of personal relationships. Although courts may apply the laws by relying on the coercive power of the state, mediation provides a more appropriate forum for the exercise of morality that finds its support in public opinion, custom, tradition,

¹³⁵. Supra note 131 at 30-31.

¹³⁶. Robert F. Utter, “Dispute Resolution In China” (1987) 62 Wash. L. Rev. 383 at 391.

¹³⁷. Ibid.

persuasion, and education.¹³⁸ Law was never perceived as a means of preserving rights, freedom, and justice, according to traditional ideas, but rather a tool of suppression and also one of the countless methods of governing, which could be used and re-constituted at the will of the ruler.¹³⁹ Influenced by Marxist legal theory, Mao referred to law as an instrument of class struggle to be used by the broad working masses against antagonistic elements.¹⁴⁰ He favored peaceful means for dealing with conflicts among the masses, thus underscoring the traditional use of persuasion and education in resolving civil disputes, and using mediation as an instrument of social control.¹⁴¹ This legal tradition utilized mediation as a political instrument that insidiously controls the individual, usually without his or her awareness, and cannot be rejected.

The use of mediation by Chinese courts was also closely associated with the politicized function of the judicial system, the courts in particular, which availed the widely spread of court mediation. It is generally assumed in the West that courts are established by the state to protect and vindicate rights, among other functions.¹⁴² Courts in China have the same function. Besides that, however, courts are particularly used as instruments in implementing political missions and party policies. Mediation was anticipated to

¹³⁸. Ibid.

¹³⁹. Liang Zhiping, "Explicating 'Law': A Comparative Perspectives of Chinese and Western Legal Culture" (1989) 3 J. Chinese L. 55 at 89.

¹⁴⁰. Mao Tse-Tung, "On the Correct Handling of Contradictions among the People" in *Five Essays on Philosophy* (Peking : Foreign Languages Press, 1977) at 79-133.

¹⁴¹. Dong Biwu, "Speech to the English National People's Congress" (1958) quoted in " On the People's Democratic Dictatorship and the People's Democratic Legal System" (1969) 2 Chinese L. & Govt., 2 at 13.

¹⁴². Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) at 3 -17.

produce politically desirable results such as promoting the unity of the people, maintaining social stability, and furthering socialist modernization. Courts certainly functioned to help support such political goals. Thus, court mediation played the function of problem solver for the ordinary people on the one hand, and political tool on the other.

Additionally, China's previously planning economy also provided a market facilitating the practice of court mediation, which in turn, helped maintain the economic order. China has a long history of "central planning" economics, which established ideal economic goals to be achieved by enterprise-level decisions, but which co-existed with mandatory, administratively enforced economic goals. This model viewed the state as essentially one giant vertically integrated productive firm - "China Inc."¹⁴³ Within this firm, various ministries are divisions and enterprises are factories. Contracts between suppliers and purchasers had earlier been planned and implemented by administrative order.¹⁴⁴ The structure of the planned economy often made disputes easier to resolve by means of mediation because courts were encouraged to conduct mediation by involving the administrator with authority over both plaintiff and defendant. Since they were all entities within the planned system and served the same economic goal, the primary concern of the lawsuit was to take action that would best fulfill the goals of the plan. The outcome of the lawsuit would not cause substantive conflict between the

¹⁴³. Donald Clarke, "What's Law Got to Do With It? Legal Institution and Economic Reform in China" (1991) 10 UCLA. Pac. Basin. L.J. 1 at 5-6; see also Barry Naughton, "China's Experience with Guidance Planning" (1990) 14 J. Comp. Eco. 743.

¹⁴⁴. Richard M. Pfefler, "The Institution of Contracts in the Chinese People's Republic" (1963) 14 China Quarterly at 153-77.

parties nor would it bring any personal interest for either party. Under such circumstances, a mediated agreement can easily be reached through the support of administrative structures.¹⁴⁵

All these factors encouraged the role of mediation as an ideal vehicle in resolving civil disputes and furthering political missions in Chinese legal history. Either separately or in association with courts, mediation formed unique feature of China's judicial system.

b. Historical Transition of Court Mediation

1) Mediation First, Litigation Second (prior to 1982)

Before the People's Republic of China (PRC) was founded, the Communist Party developed the People's Mediation system in its liberated areas.¹⁴⁶ Since then mediation was highly encouraged to be used to resolve civil disputes. This dispute resolution mechanism was later employed by Ma Xiwu, a trial judge in a people's court in Shanxi province, in the court system. He successfully resolved numerous civil cases by means of mediation. In 1944, an article in "The Liberation Daily", a popular newspaper sponsored by the Communist Party, praised highly Ma's use of mediation in resolving civil disputes and promoted the "Ma Xiwu Trial Model" as a successful

¹⁴⁵. John A. Spanogle, et al., "Chinese Commercial Dispute Resolution Methods: The State Commercial and Industrial Arbitration Bureau"(1987) 35 Am. J. Comp. L. 761 at 764-65.

¹⁴⁶. *Supra* note 24 at 363.

example of court mediation.¹⁴⁷ The use of mediation to resolve civil disputes then spread widely.

After the foundation of PRC in 1949, court mediation was further institutionalized in Chinese courts as part of a valuable legal heritage. The use of mediation was formally affirmed as a fundamental principle guiding Chinese courts in deciding civil cases.¹⁴⁸ Through years of practice, mediation became the mainstream in Chinese society in resolving civil disputes both inside and outside conventional courts.

In 1979, the Supreme People's Court issued a preliminary regulation regarding civil procedure,¹⁴⁹ which stipulated that courts should insist on using mediation as the primary means to resolve civil disputes. Adjudication was not to be encouraged when mediation was available. Even cases requiring adjudication should also go through mediation first.¹⁵⁰ Mediation was mandatory for divorce cases.¹⁵¹ In addition, courts were required to conduct mediation in the places where disputes occurred, which could aid them in leaning upon local governments and communities to investigate the disputed matters and carry out legal education and propaganda.¹⁵² Mediation could then be conducted based on a formula of "unity-criticism-unity".

¹⁴⁷. *Dangdai zhongguo de shengpan gongzuo* (The trial work in contemporary China) (1993) at 267.

¹⁴⁸. Ibid.

¹⁴⁹. "Zuigao renmin fayuan guanyu renmin fayuan shenpan minshi anjian chengxu zhidu de guiding (Shixin)", (Regulation Regarding the Procedure in Civil Trial) (for trial implementation) 1979. [hereinafter the Regulation of 1979]

¹⁵⁰. The Regulation of 1979, part 4.

¹⁵¹. Ibid.

Although the regulation paid mention voluntariness of mediation, participation in mediation, as a matter of fact, could not be voluntary because the edict of this policy was “mediation first, litigation second”. It was not within disputing parties’ discretion to decide whether they would like to mediate or go to trial directly when courts insisted on using mediation first. Only when mediation failed, could the case go to trial. In this sense, “ mediation first, litigation second” actually suggested that mediation was mandatory.

2) Stress Mediation (1982 - 1991)

In 1982 when the Civil Procedure Law (for trial implementation) was adopted, the previous principle regarding court mediation was changed to an injunction to “stress mediation”. Later, the Supreme People’s Court issued a detailed regulation concerning the implementation of the law. As regards mediation, it stated that people’s courts should stress mediation when deciding civil disputes. Mediation should be based on voluntariness and lawfulness. Courts should rely on disputants’ employers and local governments as well as their relatives to resolve the disputes. Coercive and lengthy mediation should be avoided.”¹⁵³

¹⁵². Ibid.

¹⁵³. See Part 3 of “ Zuigao renmin fayuan guanyu guanche zhixin mingshi susong fa (shixing) ruogan weiti de yijian” (The Supreme Court’s Opinions on implementing the Civil Procedural Law) (for trial implementation), issued on August 30, 1984.

The policy of “stress mediation” made no significant change to the previous one simply because mediation was still the first priority. “Stress Mediation” actually implied that courts should always attempt mediation in the first place. Again, in spite of the emphasis of “voluntariness and lawfulness”, the essence of this policy determined that parties’ voluntary participation was impossible since it conflicted with the principle of “stress mediation”. The mandatory nature of mediation remained the same and the change was substantially meaningless.

3) Mediation in Accordance with Voluntariness (after 1991)

In 1991 when the Civil Procedure Law was revised once more, “stress mediation” was changed to “conduct mediation in accordance with the principles of voluntariness and lawfulness. When mediation fails, adjudication should be prompt.”¹⁵⁴ In 1992, the Supreme People’s Court once again issued its opinions on implementing the new law, which clarified that “courts should conduct mediation according to both parties’ assent.”¹⁵⁵ This made it clear, for the first time, that mediation is a truly voluntary process. Participation in mediation must be based on parties’ willing participation.

The 1991 Civil Procedure Law (CPL) made significant changes to the guiding principle of court mediation. Above all, mediation is no longer emphasized, at least in legislation, as the primary means of dispute resolution. The dominant position of

¹⁵⁴. The Civil Procedure Law of 1991 [hereinafter PRC Civil Procedure Law], art. 9.

¹⁵⁵. *Zugao renmin fayuan guanyu shiyong zhonghua renmin gonghe guo minshi sushong fa ruogan wenti de yijian* (Opinions on Questions Concerning the Implementation of CPL), issued on July 14, 1992 by the Supreme People’s Court. [hereinafter the Supreme Court’s Opinions] .

mediation has been largely weakened in theory. This signifies the government's intention to revive adjudication and formalize legal institutions. Furthermore, that participation of mediation should be based on parties' assent means that mediation is no longer mandatory. Courts cannot force parties to go through mediation of its own accord.

Nevertheless, the change is said to be intended not to weaken court mediation as a dispute resolution institution, but to cure coerced and illegal mediation.¹⁵⁶ Because of the traditional emphasis of using mediation as the primary means of dispute resolution, courts have habitually relied on mediation instead of adjudication to resolve the majority civil disputes. This inevitably resulted in growing complaints about coerced and illegal mediations in practice, which made people lose confidence in and respect for the legal system. The change of the guiding principle of court mediation in the 1991 CPL reflects law reformers' expectation for greater procedural regularity. However, whether the changed policy can actually make a big difference is highly questionable, as will be analyzed below.

Section 2 Statutory Framework of the Current Court Mediation

The CPL, together with "the Supreme Court's Opinions", are currently the primary sources of law in the area of court mediation, which provide a general framework of the

¹⁵⁶ Wang huaian ed., *Zhongguo minshi susong fa jiaocheng* (Textbook of Chinese Civil Procedural Law) (1994) at 316-327; see also "Mao and Mediation Revisited", *supra* note 30 at 338.

current court mediation, as described below. Although the Criminal Procedure Law and the Administrative Litigation Law also contain relevant provisions concerning the use of mediation, these provisions simply guide the application of mediation in certain cases without modifying the general principles stipulated in the CPL.¹⁵⁷

a. Principle of Voluntariness

Art. 9 of CPL provides that “courts should mediate in accordance with voluntariness and lawfulness; when mediation fails, adjudication should be prompt”.¹⁵⁸ However, this provision is ambiguous in terms of whether “voluntariness” means “voluntary participation of mediation” or “agreement must be reached voluntarily” and whether “when mediation fails” refers to the “failure to participate in mediation” or “failure to reach a voluntary agreement”. The vagueness is clarified by the Supreme Court’s Opinions. It states that “courts may conduct mediation on the basis of parties’ assent to participate”.¹⁵⁹ It further emphasizes that mediation should be conducted by “ascertaining the facts and distinguishing right from wrong”.¹⁶⁰

No provision requires that parties should file a written form or pursue any specific procedure indicating their assent to participate in the mediation process. The willingness to attend mediation is normally expressed orally upon court’s enquiry.

¹⁵⁷. See *infra* note 162, 163.

¹⁵⁸. PRC Civil Procedure Law, art. 9.

¹⁵⁹. The Supreme Court’s Opinions, art. 91.

¹⁶⁰. PRC Civil Procedure Law, art. 85; The Supreme Court’s Opinions, art. 92.

The lack of formal confirmation of the parties' assent raises serious problems in practice, which will be discussed below.

b. Jurisdiction

Basically, all civil cases, once accepted by the courts, can be mediated without regard to the type of dispute or monetary amount in controversy. Commercial matters such as disputes involving economic contracts are included in the meaning of "civil".¹⁶¹ In the context of mediation, civil matters do not involve administrative or criminal matters in principle. However, the Criminal Law provides that certain minor offenses, which may be privately prosecuted, that is, the victim can serve as the prosecutor in bringing the accused to court, can be mediated under the auspices of the court.¹⁶² The Administrative Law provides for mediation in cases in which damages are sought but not in appeals of an administrative decision.¹⁶³

Courts at all levels can conduct mediation if they have jurisdiction over a given case. Although most mediations are carried out at first instance, mediation is also possible on appeal.¹⁶⁴

¹⁶¹. PRC Civil Procedure Law stipulates that " This law applies to civil disputes between or among citizens, legal persons, or other legal entities involving their monetary or civil relationships." PRC Civil Procedure Law, art. 3.

¹⁶². PRC Criminal Procedure Law, art.13, art 127.

¹⁶³. PRC Administrative Litigation Law, art. 67.

¹⁶⁴. PRC Civil Procedure Law, art. 128, art. 155.

c. Commencement

The CPL merely emphasizes courts' active referral to mediation, but does not mention whether mediation can be initiated by motion of a party. Since mediation is a voluntary process, it is assumed that if one party requires mediation while the other party agrees, there is no reason for courts to refuse to conduct mediation. However, the CPL does not restrict the times at which mediation may be initiated. This indicates that mediation can actually be started at any time, either by a motion of one party or by court's referral, before a judgment is finally rendered.¹⁶⁵

In practice, courts often conduct mediation at two stages. First, after a case has been formally accepted, the trial judges normally identify the legal issues and the facts of the disputes in the first place simply by reading and examining the file materials. If they consider that the facts of the case are clear and the legal issues are not in question, they can immediately conduct mediation before an open trial. When mediation succeeds, the case is closed.¹⁶⁶ If mediation is not available or fails at this stage, it can be referred to during an open trial.¹⁶⁷ Normally an open trial ends with a concluding statement by each party after a court debate. The case may go to mediation after the court debate.

¹⁶⁵. PRC Civil Procedure Law, art. 128.

¹⁶⁶. See *Diyi shen jingji jufei anjian shiyong putong chengxu ka ting shenli de youguan guidi* (Regulation regarding the application of general procedural rules in open trial of economic disputes in the first instance), November 16, 1993, art.6. [hereinafter The Regulation Regarding Application of General Procedural Rules]

¹⁶⁷. The Regulation Regarding Application of General Procedural Rules, art 37-40.

The trial judge may inquire of each party whether they wish to mediate. With all parties' assent, mediation can then start.¹⁶⁸

d. Process

The informality and flexibility of mediation procedures is evident in the Chinese system. No specific procedural rules have been set up for mediation. The mediation conference is informal, and the choice of location is virtually unrestricted - it may be held in the judge's chamber, a hearing room, or any other suitable place, such as a location relating to the dispute. Judges may call for a conference by notifying both parties of the date, or may interview each party separately. Mediation may be conducted in the courtroom during the trial or outside of the courtroom after an open trial. During the mediation, each party may propose a solution. In case of a big gap between proposals, the trial judge may propose his own resolution for parties' reference, or he may communicate with each party respectively and shuttle between them in order to bring a mutually acceptable solution.¹⁶⁹

The most notable feature of the mediation process is that it is not separated from adjudication; thereby it is not an independent dispute resolution. This inevitably results in the dual role of judge and the non-confidentiality of mediation session as indicated below.

¹⁶⁸. PRC Civil Procedure Law, art. 128, art. 155.

¹⁶⁹. Ibid.

e. Mediator

As previously mentioned, after a case is filed, a single judge or the collegiate bench will be assigned for the case, depending on the complexity of the case. Mediation may be done by either.¹⁷⁰ They may invite relevant units and people to assist the mediation, and those who are invited are obliged to do so.¹⁷¹ The judge or the collegiate bench who conduct the mediation will continue on to try the case if mediation fails. Sometimes court secretaries mediate, since they are well educated, but the corresponding judges are eventually responsible for the results. The most distinguishing factor is that judges taking charge of a suit play dual roles as both mediators and ultimately judicial decision-makers.

f. Confidentiality

No provisions in the CPL prevent the parties to mediation from using statements of opposing parties or interested persons made during the proceedings as evidence in subsequent litigation. No provisions prohibit the disclosure of information obtained in mediation. On the contrary, courts can actually use the information acquired from mediation instead of further investigation and render judgments relying on such

¹⁷⁰. PRC Civil Procedure Law, art. 86.

¹⁷¹. PRC Civil Procedure Law, art. 87.

information.¹⁷² An agreement proposed by the court during mediation can also become the basis for the final decision.¹⁷³

g. Mediated Agreement

Theoretically, an agreement reached by the parties must be based on the parties' mutual concession and the parties should not be coerced to do so. Courts only examine the legality of the agreement.¹⁷⁴ If it does violate any law, courts will make proper corrections. An agreed settlement must be recorded in a formal agreement prepared by the court and signed by the judge and secretary. It becomes legally effective when delivered to the parties and accepted by them.¹⁷⁵ Such agreements are required in all but divorce cases ending in reconciliation, adoption cases that maintain the adoptive relationships, cases involving immediate performance, or other cases in the discretion of the judges.¹⁷⁶ Consequently, an agreement in mediation is effectively a final and conclusive judgment. No appeal is available. If the parties fail to reach an agreement or either of them refuses to accept the agreement, courts must promptly adjudicate the matter.

¹⁷². The Regulation Regarding Application of General Procedural Rules, art.6.

¹⁷³. Donald C. Clarke, "Dispute Resolution In China" (1992) 5 J. Chin. L. 245 at 336. [hereinafter "Dispute Resolution in China"]

¹⁷⁴. PRC Civil Procedure Law, art 88

¹⁷⁵. PRC Civil Procedure Law, art 89

¹⁷⁶. PRC Civil Procedure Law, art. 90

h. Petition For Retrial

Once a civil action is concluded with a mediated agreement, the only way to reopen the case is through petition for retrial. However, the petition for retrial must satisfy the requirements that either the mediation process violated the principle of voluntariness or the contents of the agreement must contravene an existing law. The petitioner must prove the requirements are met by showing sufficient evidences. Only when these complaints are confirmed by courts can a retrial be carried out.¹⁷⁷ The petition must be brought within two years after the mediated agreement comes into force.¹⁷⁸

¹⁷⁷. PRC Civil Procedure Law, art. 180.

¹⁷⁸. PRC Civil Procedure Law, art. 182.

Chapter IV Evaluating Court Mediation in China

The role of court mediation in China's legal system has been a controversial issue. Some view it as a successful model in developing precedents of mediation and an effective means of reducing litigation and saving judicial resources.¹⁷⁹ The fact that the majority of civil and economic cases have been handled by courts through mediation seems to support this view. On the contrary, some see court mediation as increasingly dangerous and problematic.¹⁸⁰ This may be true when a number of serious problems arising from the practice of court mediation, such as coerced and illegal mediation, have been observed and criticized.

Although both of them reflect different aspects of court mediation from different perspectives, they are, nevertheless, both focused on superficial phenomena rather than the essentials of the institution itself. Indeed, before some fundamental questions are examined, any final assessment must be incomplete and inaccurate. First, what are the functions or purposes of the Chinese court mediation? Without clarifying the starting point of court mediation, any assessment of it is misleading. Two further questions concern two important aspects of court mediation respectively. One relates to efficiency and another to fairness. This chapter explores how procedural rules affect the efficiency

¹⁷⁹. "Mediation, Arbitration and Litigation", *supra* note 37 at 128.

¹⁸⁰. "Mao and Mediation Revisited", *supra* note 30 at 336-339.

and fairness of Chinese court mediation, which in turn, reflects its function and performance.

Section 1 Recognizing the function

a. Function in History

In the first thirty years since the foundation of PRC, court mediation was used as a primary means to maintain public order by ending disruptions of the social fabric and ensure the function of economic activity. It also served to articulate and apply the ideological principles, values, and programs of the Communist Party and helped to mobilize people to increase their commitment to party policies and goals.¹⁸¹ Additionally, it aimed at suppressing disputes, which were regarded as harmful social conflicts that interfered with the construction of a strong socialist China.¹⁸²

During the Cultural Revolution, Chinese legal institutions were completely destroyed. The damage done to Chinese legal institutions made Chinese leaders and many ordinary peoples to believe that the regularized formulation and application of established rules should have a prominent role in the government of China. Starting from 1978, the focus of Chinese politics shifted from political struggle to economic construction and establishment of formal legal institutions. An era of reform began, which dramatically

¹⁸¹. See Stanley B. Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China" (1967) 55 Calif. L. Rev. 1284 at 1339.

¹⁸². Ibid. at 1346-1349.

changed the social context of mediation.

b. Current Functions

Economic reform brought about a reduction in the scope of the centrally planned economy. Private and collective enterprises were encouraged, state-centralized economic planning was relaxed, and various means were sought to make public enterprises more efficient, or wind them up. In the past ten years, many new forms of economic cooperation among private, collective, and public enterprises have been legalized. The very system of ownership has been challenged by allowing private companies to incorporate.¹⁸³ Now state-owned and collective enterprises are allowed to capitalize privately by issuing stocks and bonds.¹⁸⁴ As a result, many old economic relations have been broken down and new ones put in their places. This has caused dramatic change in the nature of disputes. As economic relationships grow more numerous and more complex, new kinds of disputes increasingly arise out of them. Furthermore, disputes today increasingly involve parties from different locales, parties without prior relationships, and higher monetary stakes than those centered on residence, family or small transactions among relatives or acquaintances. A direct result is that effective court mediation tends to be more difficult and support from local communities seems less possible.

¹⁸³. Allison E. W. Conner, "China's Provisional Regulations Governing Private Enterprises" (1988) 9 East Executive Reports 19 at 19.

¹⁸⁴. Howard H Chao & Yang Xiaoping, "Reform of the system of Enterprise Ownership" (1987) 23 Stanford J. Int'l L. 2 at 365-97.

In the meantime, in order to regulate the new economic relations and protect market order, legal reform was also launched during the 1980s, which has seen law rise to greater prominence. Apart from introducing many new laws regarding economic matters, legal reform has gradually moved from changes in substantive laws alone to the realm of procedural laws in order to ensure certainty and stability in legal processes. This has resulted in the promulgation and revision of civil and criminal procedure laws. The legal expression of these new economic relations increasingly emphasizes the autonomy of the individual, private property rights and the role of market. Civil and economic law are couched more clearly in terms of rights and obligations. All of this has stimulated growing rights-consciousness and an emphasis on legal rights. Since new economic policies gave enterprise managers more power over the property of their enterprises, and the managers become more personally interested in the economic outcomes of their disputes, parties begin to conduct their relations with each other in legal forms rather than through administrative relations. As to disputes concerning private matters, people are more willing to view their world in terms of individual rights and increasingly pursue private economic interests. This leads to less interest in contributing to a commonwealth generally. An individualistic and competitive mentality has displaced past notions of socialist harmony and stability.

Additionally, Chinese courts and disputes today are far less politicized than at any time since the PRC was founded.¹⁸⁵ Respect for the independence of judicial work has been recognized from the highest political level. Although political interference with courts

¹⁸⁵. "Mao and Mediation Revisited", supra note 30 at 366.

is still legend in criminal, administrative, and some economic cases, the use of mediation has become less politicized.¹⁸⁶ The way of conducting mediations tends to focus more on educating citizens to obey state laws, regulation, rules and policies.¹⁸⁷ The party and state generally show little or no interest in the outcome of civil cases.¹⁸⁸ The means with which disputes can be resolved becomes solely a judicial concern instead of political concern.

Section 2 Examining Efficiency

a. Cost of Time

As discussed above, the CPL provides very flexible rules for the timing of court mediation. In general, it can be at any time after a suit is filed and before a trial judgment is rendered. For cases not involving complicated issues, where the facts are relatively clear, mediation is encouraged to occur after a filing of statement of defense. The CPL does not provide a pre-discovery procedure by which parties can exchange information and discuss relevant issues regarding their dispute, but it requires both plaintiff and defendant to present relevant evidence supporting their arguments when filing their statements of claims or defense.¹⁸⁹ This assists parties to obtain information

¹⁸⁶. Ibid. at 277.

¹⁸⁷. Ibid.

¹⁸⁸. “Law and Legitimation in Post-Mao China”, *supra* note 134 at 41.

¹⁸⁹. PRC Civil Procedure Law, art. 110.

and prepare their arguments prior to trial or mediation. Therefore, it seems to be optimal if mediation occurs at this stage. It has the advantages of streamlining cases, reducing costs and saving judicial resources, if mediation succeeds, and narrowing facts and clarifying issues even when it fails. The limitation is that it mainly applies to simple cases.

However, as a routine, courts normally direct parties to mediate after the close of open trial and before judgments are rendered.¹⁹⁰ The choice of this timing is apparently undesirable. It is reasonable to assume that a more convergent solution will be likely to be formed at this stage and settlement success, while it ignores the time and money that have been spent on the whole litigation process.

Indeed, the most disadvantageous feature of the timing of Chinese court mediation is that it is too flexible. It is not intentionally inserted at a fixed point in the litigation process with the conservation of judicial resources in mind. The duration of a mediation session is also too flexible. A mediation session sometimes can last as long as a trial or even longer and repeat as many times as is necessary to procure a settlement. Too much flexibility turns out to produce arbitrary and eventually inefficient results.

b. Financial Costs

¹⁹⁰. See *supra* note 168 and accompanying context.

The common assumption is that the cost of settlement is lower than the cost of litigation. For this reason, settlement is encouraged in order to reduce the total cost of a procedural system. However, this is not always true. In Chinese court mediation, the cost of mediation is the same as that of adjudication. To initiate a lawsuit, the plaintiff has to advance a litigation fee, together with a statement of claim, to the court.¹⁹¹ For cases involving monetary claims, the amount of the litigation fee depends on the total sum of money the plaintiff claimed. The more money the plaintiff claims, the higher the litigation fee he has to pay. For non-monetary cases, there are fixed litigation fees for each type of case.¹⁹² If the plaintiff wins, the litigation fee will be reimbursed by the defendant. If each party wins part of the suit, courts will apportion the litigation fee up respectively according to the extent of their responsibilities. These are the general principles for all civil and economic cases handled by courts regardless of whether they are actually adjudicated or mediated. In mediated cases, if the parties merely fail to reach an agreement on the division of litigation fee, courts will normally impose a solution on them.

That mediation costs the same as litigation might be explained thus. Hypothetically, if court mediation is rigorously separated from adjudication, parties might try mediation first by paying a small processing fee. If mediation failed and the court decided to try the case, then they would have pay large litigation fees. This assumes that the mediation fee is separated and less than the litigation fee. However, in practice, Chinese court mediation is not separated from adjudication and the mediation process actually

¹⁹¹. Renmin fayuan shoufei banfa (Regulation Regarding Litigations Fees), art. 5.

¹⁹². The Supreme Court's Opinion, art.128-138.

constitutes part of the judicial service, especially when judges act as mediators. Therefore, it seems reasonable that cases coming to the court should bear the same cost no matter in which way their dispute is resolved, simply because they are using the same judicial service. In this sense, the system of court mediation does not have any concern with producing efficiency. It does not encourage parties to actively participate in mediation and parties see no incentive in doing so.

The above analysis indicates that unlike the court-annexed mediation in most Western countries, where mediation is used as a cheaper, faster and more effective means of dispute resolution, Chinese court mediation is neither faster nor cheaper. In another word, it is not cost-effective.

Section 3. Examining Fairness

a. Voluntariness and Self-determination

Court mediation in China is voluntary-based mediation, which means the parties should participate and reach agreement voluntarily. The CPL prohibits compulsory mediation and allows parties to appeal a mediated agreement if it violates the principle of voluntariness.¹⁹³ However, in practice, this principle is no better than an ideal. Coerced mediation has long been a well-known phenomenon.

¹⁹³. See supra note 177, 178 and accompanying text.

From a historical perspective, coerced mediation may derive from courts' ingrained habit of relying on mediation as the primary means to resolve disputes, since they were encouraged to do so for many years. Apart from that, the determinative element, viewed institutionally, is the lack of adequate procedural rules to ensure voluntariness. For example, in spite of the reiterated emphasis on voluntariness, the CPL has never set up a formal procedural through which parties can freely express, without courts' interference with their decision, whether or not they are willing to mediate. Instead, such expression is usually presented by parties orally in a very informal way and in response to the direct inquiries of courts. Since parties are not free of curial influence, whether or not their decision is really made voluntarily is often suspicious. Very often a parties' participation in mediation is at best reluctant, and the acceptance of a mediated agreement results from undue pressure. To relieve parties from outside influences and secure their exercise of self-determination requires the removal of the sources generating such pressure. This brings another key issue of Chinese court mediation: the role of mediator.

b. The Dual Role of Judge

The fairness of a mediation process, to a large extent, depends on the role of mediator, which is also crucial to the success of mediation as well. Parties must trust and have confidence that the mediator is impartial, even-handed and neutral. This implies an essential prerequisite, i.e., the mediator should not have judicial authority over the dispute he or she is mediating if the mediation fails. As noted above, one of the most

notable feature of Chinese court mediation is the involvement of the mediator in the subsequent judicial decision-making process once the mediation fails. China has a vast population of mediators, nevertheless, but these mediators are only for People's Mediation. Court mediation can only be conducted by judges. This inevitably results in dual roles of judges as both mediators and judicial decision-makers on a same dispute. This raises serious issues of legality.

First, the participation of a judicial decision-maker may affect parties' free expression during mediation. Parties will be more likely to stick to their original legal positions in fear that any compromise made during mediation may later constitute the basis of a judicial decision should mediation fail and the case go to trial, because it might give the judge some hints of the parties' anticipation of the outcome of the dispute, compromising their legal expectations on trial. As a result, parties will not be open to compromise and the success of mediation become less likely.

On the other hand, the judicial authority mediators hold over the disputes provides more opportunities for them to influence or even impose their decisions on parties, especially when mediators have an interest in the outcomes of mediated agreements as shall be discussed below. Even when mediators are not motivated by self-interest, their comments, suggestions or evaluation given during mediation also unconsciously affect parties' decision-making. Such comments, suggestions or evaluations may indicate judicial leanings on the dispute and bring pressure to bear on parties' decision-making.

Consequently, to what extent the mediated agreement reflects the parties' self-determination is doubtful.

To say that mediators have more opportunities to put pressure on parties does not necessarily mean they are always keen to do so. However, when mediators are motivated by self-interest, their dual role as both mediators and judicial decision-makers allows them to take advantage of their positions and turn these opportunities into reality. In China, judges' preference for mediation is largely determined by their self-interests triggered by various factors of the court system to which we now turn.

c. Non-confidentiality

Because of the dual roles of judges, mediation cannot be separated from adjudication. Therefore, it is impossible to keep mediation confidential. The information disclosed during mediation will be known inevitably to judges while acting as adjudicators. If mediation fails and the court decides to try the case, it may rely solely on the information acquired by the judge during mediation without conducting further investigation.¹⁹⁴ Furthermore, a solution proposed during mediation may also become the basis for a judgment without further judicial participation.¹⁹⁵ In fact, the mediation process is neither confidential nor independent. It actually constitutes part of adjudication process. This makes due process of both mediation as well as adjudication doubly suspect.

¹⁹⁴ . "Mao and Mediation Revisited", *supra* note 30 at 337.

¹⁹⁵ . *Ibid.*

d. Legitimacy

Parties coming to courts expect their disputes to be resolved in terms of formal legal rules. Therefore, when they make a compromise it is important that the compromise is consciously made within full knowledge of their legal rights. This is not to say that parties should know exactly what they could gain from the dispute since it is itself in question. However, they should be informed of their basic legal rights at least. This will not be a problem for parties represented by their lawyers. But for those cases without lawyers involved, what should the mediators do in terms of parties' legal rights? Are they obliged to inform parties of such rights? If so, will the knowledge of legal rights become barriers of mediation? How should mediators deal with this situation then? None of these are answered in the CPL.

e. The nature of settlement: concession

As for the method of mediation, a distinguishing feature of China's court mediation is the coercion of the parties to give up a portion of their rights in order to procure an agreement. The assumption underlying judges' thinking is that mediation can never succeed if both parties stick to their original positions and insist on their legal rights without backing down an inch. Therefore, in order to settle a case, a common method adopted by many judges is to urge one party, usually the plaintiff, to make concessions by giving up part of their claims. As one judge pointed out, almost all cases that are

alleged successfully mediated end up with plaintiff's compromise.¹⁹⁶ This can be seen from the outcomes of the following cases.

Case 1 ¹⁹⁷

The plaintiff engaged in an auto repair service by a special arrangement with Shanghai VM and thereby obtained the exclusive right of using Shanghai VW trademark while conducting its business. The defendant, who also provided auto repair service in the same area, used VW trademark in its advertisement without being authorized by Shanghai VW, thus misleading customers to believe that the defendant has exclusive right to provide auto repair service for VW vehicles. As a result, the plaintiff's suffered loss of customers and business. The plaintiff sought for an injunction to inhibit the defendant from conducting unfair competition and claimed for damages. This case was finally resolved by court through conducting mediation. The defendant agreed to stop conducting unfair competition while the plaintiff abandoned its claim for damages.

Case 2 ¹⁹⁸

In 1993, the plaintiff entered into an agreement with a third party to buy a piece of land at the price of 30,000 RMB from the third party. Upon payment for this land, the

¹⁹⁶. Xiang Jianxin, "Qiantan jingji jiufen anjian de fu tiaojian jie jue" (The Conditional Mediation of Economic Cases), 1 Renmin sifa (People's Judicature) 1993 at 23.

¹⁹⁷. This case is cited from Li Changdao ed., '96 *Shanghai fayuan anli jingxuan* (Collection of Cases Tried by Courts in Shanghai in 1996) (Shanghai renmin chubanshe, 1997) at 106.

¹⁹⁸. Ibid. at 187.

plaintiff applied to the defendant, who is the local government responsible for registering the land, for land using right. The defendant ratified this transfer of land and issued a certificate of land using right to the plaintiff, who then began to invest in this land. While in 1995, the plaintiff was informed by the defendant that his certificate of land use right was cancelled because the defendant later found out that the third party had no right to transfer this land; therefore, the transfer was void. The defendant then corrected its mistake by canceling the wrongfully issued certificate, which caused loss of plaintiff's investment. The plaintiff then claimed for losses of investment 47,856 RMB. During the trial, the court conducted mediation over this dispute and assisted the parties to reach an agreement, as a result of which, the plaintiff only obtained 12,000 RMB, approximately a quarter of its original claim.

Although the above cases do not show exactly how the courts conduct mediation, from the outcomes of the mediation, it is evident that the plaintiffs in both cases apparently made considerable concession by abandoning part of their rights even though they could legally argue for that. This indicates that the essence of court mediation is that the plaintiff normally has to compromise his or her original claims.

Given the above factors of China's court mediation system, it is not surprisingly to see the following problems co-existing in the practice of court mediation.

Section 4. Common Problems In Practice

a. Mediation Prevails Over Adjudication

In the mid-1980s the Ministry of Justice expected the courts to conclude at least eighty percent of all civil disputes by means of mediated settlement.¹⁹⁹ It was assumed that when mediation is no longer emphasized as a primary means of dispute resolution, it would lose its predominant position. However, statistics from 1990 to 1996 shows that although the percentage is now lower, but still well over half of all the civil and economic disputes brought to the courts are mediated. Comparing with the number of adjudicated cases, mediation still maintain the dominant position, as shown in Figure 1.

Figure 1²⁰⁰

Civil Cases Concluded from 1990 to 1996

Year (%)	Cases Concluded	Mediated (%)	Adjudicated (%)	Other Transferred
1990	1,849,728	1,194,350 (64.6)	353,940 (19.1)	301,438 (16.3)
1991	1,910,013	1,128,465 (59.1)	456,000 (23.9)	325,548 (17.0)
1992	1,948,989	1,136,970 (58.3)	460,932 (23.6)	351,047 (18.0)

¹⁹⁹. Michael Palmer, "The Revival Of Mediation in the People's Republic of China: (2) Judicial Mediation" in W. E. Butler ed., *Yearbook Of Socialist Legal Systems* (1989) at 143, 145.

²⁰⁰. The statistics shown in this figure are taken from *Zhongguo falu nianjian* (China Law Year Book) (1990-1996).

1993	2,091,651	1,224,060 (58.5)	854,227 (40.8)	13,364 (0.6)
1994	2,382,174	1,392,114 (58.4)	977,773 (41.0)	12,287 (0.5)
1995	2,714,665	1,544,258 (56.9)	1,156,823 (42.6)	13,584 (0.5)
1996	3,084,464	1,672,892 (54.2)	1,395,061 (45.2)	16,511 (0.5)

The figure raises a curious question: why has mediation remained so popular? Several sources indicate that, besides the previously legislative emphasis on mediation and the current pressure from courts' swelled caseloads caused by the changes in economic policy affecting legal rights and obligations, the decisive factor is most judges' preference for mediation which is motivated by both the judges' self-interest and structural pressures within the bureaucratic judicial system.

1) Mediation Benefits Judges on Promotion and Economy

Because of its informality, simplicity and flexibility, mediation is generally thought to be a speedy dispute resolution, which enables judges to resolve more cases in the same period. This is particularly meaningful when many courts use the successful rate of mediation as a standard to evaluate judges' performance and determine their promotions. The more cases judges successfully mediate, the more praise they receive, and the more economic benefit they obtain.²⁰¹ This bureaucratically generated

²⁰¹. For an example, see "Yi er shen jingji juifen anjian banan shuliang guanli guize" (Administrative Rules on the Number of Concluded Economic Cases), in Zhu guozhi ed., *Shenpan Guanli Caozuo Guifan* (Administrative Rules for Trial Work). Art. 19 of this regulation stipulates that judges who have resolved more cases will be given priority in promotion, praise and bonus. Art. 20 goes on to state that

pressure obviously encourages judges to choose a faster and easier way to dispose of a high caseload.

2) Lack of Judicial Independence Lengthens the Judicial Decision-making Process

It is official policy that “judicial independence means not that the particular judge or judges hearing the case should be independent from outside pressures, but at most that the court as an institution should be free from outside pressure.”²⁰² In practice, before the court’s judgment is finally issued it may be reviewed by several different internal levels.²⁰³ First, a judge’s decision may be reviewed by the chief of his chamber. After the collegiate bench (*he yi ting*) has heard the case, the judge in charge will write a report and a draft opinion, which is then sent to the chief or deputy chief of his chamber for approval. Second, if a case is considered to be very complicated by trial judges, it may be sent to the Adjudication Committee, the highest decision-making organ in a court, which may study the case before it goes to trial and render its guidance for trial.²⁰⁴ Third, lower courts also seek instruction from higher courts. A case may not be

those who have not accomplished their work will not be considered in promotion and praise within one year, and their bonus will be discounted.

²⁰². “The view that the collegiate bench and the trial judge can independently adjudicate and that the chamber president and the court president can have no say in the matter is in opposition to the principle of independent adjudication by courts mandated by the laws of our country.” *Zuigao renmin fayuan yuanzhang jianghua tan renmin fayuan duli shenpan wenti* (The Present of the Supreme People’s Court’s Discussion on the Issues of Independent Adjudication), *Fazhi ribao* (Legal Daily), May 29, 1981 at 1.

²⁰³. “Mao and Mediation Revisited”, *supra* note 30 at 319-324.

²⁰⁴. The Organic Law of the People’s Courts requires courts to establish Adjudication Committees whose tasks are to “sum up judicial experience, discuss major or difficult cases and discuss other issues of judicial work.” See art. 11 of the Organic Law of the People’s Courts, adopted on July 1, 1979, last amended on Dec.2, 1986, in *Laws Of The People’s Republic of China (1983-1986)* (Beijing: Foreign Languages Press, 1987).

heard or decided until the trial court has obtained instructions on deciding a specific matter from its superior-level court.²⁰⁵ This is a normal practice that lower court judges call ‘buying insurance’.²⁰⁶ Any level conducting an internal review has the power to override the decisions of judges who actually heard the case and conducted the trial and to order them to enter a different decision. This results in the well-known pattern that “those who try the case do not decide it, and those who decide the case do not try it” (*Shenzhe bu pan, panzhe bushen*).²⁰⁷

In addition to internal reviews, numerous extrajudicial influences also affect the outcomes of specific cases.²⁰⁸ Judges can be threatened with various unpleasant consequences if they do not decide as expected.²⁰⁹ The lack of judicial independence deprives judges of their rights to render judgments based on their own opinions and inevitably lengthens the whole process of adjudication.

²⁰⁵. This is partly because Chinese courts have traditionally been managed by administrative method, lower courts always look for guidance from higher court; partly because the quality of judicial personnel has not been high. See “Mao and Mediation Revisited”, supra note 30 at 322; “Law and Legitimation in Post-Mao China”, supra note 134 at 40.

²⁰⁶. Since Chinese system limits appeal only to the next higher judicial level, requesting instructions from higher courts helps bring about the correct application of the law and reduce the odds of a judgment’s being reversed. “Mao and Mediation Revisited”, supra note 30 at 323.

²⁰⁷. “Dispute Resolution In China”, supra note 173 at 260.

²⁰⁸. For example, important and new social developments discovered in the course of adjudication, individual cases involving important social and political influences should be actively reported to the Party Committee to seek guidance and support. In economic cases, officials of the local Party-state frequently seek to influence outcomes either to prevent local enterprises from suffering losses that would reduce the revenue of the local government or to protect parties to the dispute with whom they have personal or economic relationships. See “Mao and Mediation Revisited”, supra note 30 at 323; see also “Dispute Resolution in China”, supra note 173 at 266.

²⁰⁹. “Dispute Resolution in China”, supra note 173 at 262.

By contrast, the mediation process and its results are totally within the control of judges. Once a mediated agreement is reached, the case is finalized. In particular, while a judgment has to state the facts of the dispute, such as the controversial issues of the case, the allegations of both parties and their lawyers' submissions, the results of the court's investigation, the application of proper laws, the judgment and its legal reasons. A mediated agreement only requires the statement of the disputed matter and the mediated results. Some cases do not even require a formal agreement.²¹⁰

3) Lack of Advanced Legal Education Makes Adjudication Hard Work

Mediation enables judges to avoid making hard decisions on some difficult cases. From the subjective aspect, judges may simply lack the education necessary to do the job competently. Throughout the 1980s most of China's judges came to their positions through transfer from Party and military posts. Most lacked a university education, and very few had received formal legal education.²¹¹ Starting from the beginning of the 1990s, more formal training programs have been established by the Supreme People's Court in order to raise the educational level of judges.²¹² However, the content and the effectiveness of the courses intended to raise the legal sophistication of the judiciary is

²¹⁰. PRC Civil Procedure Law, art. 90.

²¹¹. On legal education at the beginning of the 1980s, see generally Timothy A. Gelatt & Frederick Snyder, "Legal Education in China: Training for a New Era" (1980) 1 China L. Rep. 41; James Kraus, "Legal Education in the People's Republic of China" (1989) 13 Suffolk Transnat'l L.J. 75.

²¹². Some training programs were established at Beijing University and People's University where judges attend courses for a period of from one to three years. A Judicial Training College was established in Beijing in 1997. See "Foreign Broadcast Information Service, Daily Report, China", November 10, 1997. (available at WNC Website)

questionable.²¹³ Even though these training efforts have raised the educational level of judges considerably, overall levels remain low.²¹⁴ Law schools are producing graduates in unprecedented numbers, but throughout most of the 1980s, only a small portion of these new law graduates were appointed to courts each year. The most recent law graduates are still too young and too few to play a significant role in the system. The low salary and long waiting lists for promotions makes courts less attractive, especially for recruiting law graduates.

4) Shortage of Technical Support

From the objective aspects, finding the appropriate laws and applying them in a proper manner can be extremely challenging for judges, especially those who are untrained or poorly-educated. Since laws and numerous regulations are promulgated by a bewildering variety of governmental and quasi-governmental bodies, no comprehensive and up-to-date official indexes are available. There is no regular system of case reporting that would allow judges to see how other courts have handled similar problems; however, though the Supreme People's Court Gazette (a periodical containing directives, interpretations, and cases), does publish decided cases, it has been challenged as employing non-legal means for rendering court opinions and quite

²¹³. One judge who had completed a two-year part-time course told an interviewer that " many of the students, including me, at that time wanted only to get a diploma. At present, few verdicts or reports summarizing cases are well written." See "Mao and Mediation Revisited", supra note 30 at 311-312.

²¹⁴. See He Weifang, "*Tongguo sifa shixian shehui zhengyi: duizhongguo fayuan xianzhuang de yige toushi*" (Obtaining social justice through adjudication: A look at the current situation of Chinese judges) in Xia yong ed., *Zouxiang quanli de shidai: zhongguo gongmin quanli fazhan yanjiu* (Toward A Time Of Rights: perspectives on the development of Chinese civil rights) (1995).

often there may be no statutory rule directly on point, or there may exist contradictory rules.²¹⁵ Under such circumstances, it is certainly easier to draft a mediated agreement than render a judgment.

5) Avoiding Making Risky Decisions

Judges prefer mediation because it is a less risky form of dispute resolution. An adjudication may be appealed if parties are not satisfied with the decision. Judges' chances for promotion will be influenced by the number of cases that are subsequently reversed or retried because it may reflect poor quality of their judgments,²¹⁶ while mediated agreement is not appealable once accepted by parties. According to standard supervisory procedures, it is not within the power of the president of the trial court nor the superior court to order a retrial.²¹⁷ The possibility of a party's petition for a retrial is considerably minimized since it requires sufficient evidence to prove the existence of a violation of voluntariness.²¹⁸ Because of the informality of the mediation process, the task of demonstrating such proof is extremely onerous for parties. Such petitions rarely occurs in reality.

²¹⁵. See Liu Nanping, "An Ignored Source of Chinese Law: The Gazette of The Supreme People's Court" (1989) 5 Connecticut Journal of International Law 271; see also Liu Nanping, "Legal Precedents with Chinese Characteristics: Published Cases in The Gazette of The Supreme People's Court" (1991) 5 J. Chinese Law 107.

²¹⁶. See "Shenpan jiandu zhiyue guanli guize" (Administrative Rules of the Supervision of Trial). This regulation stipulates a number of rules designed to penalize those judges who render a wrong decision or with poor quality.

²¹⁷. For more details about the supervision system, see generally Liu Nanping, "A Vulnerable Justice: Finality of Civil Judgments in China" (1999) 13 Colum. J. Asian L. 35.

²¹⁸. See *supra* note 168 and accompanying text.

6) Pressure from Local Protectionism²¹⁹ and The Difficulty of Enforcement of Judgments²²⁰

The well-known phenomenon of “local protectionism”, and the difficulty of executing civil judgments, also create much pressure on judges’ choices of the mode of resolution when a dispute involves a local party in the place where the court is located. The local court is normally expected to render a judgment in favor of the local party of a dispute. This pressure stems from the dependence of local courts upon local governments for their jobs and finances, because “every aspect of local courts, including personnel, budgets, benefits, employment of children, housing and facilities, is controlled by the local communist party and government organs, as are promotions and bonuses.”²²¹ If a judgment rendered by a local court is unfavorable to the local party, especially when a large amount is involved, the local court will face insuperable barriers from the local communist party as well as government in executing such a judgment.

b. Coercive Mediation

²¹⁹. For details about “local protectionism”, see Donald Clarke, “Power and Politics In the Chinese Court System” (1996) 1 Columbia J. Asian Law 41.

²²⁰. For details about “enforcement of civil Judgments”, see Donald Clarke, “ The Execution of Civil Judgments in China” (1995) China Q. 65.

²²¹. Chen Youxi & Xue Chunbao, “*Zaocheng fayuan zhixing nan de jiben yinsu*” (The fundamental elements causing the difficulty in execution of courts’ decision) , Zhejiang fazhi ribao (Zhejiang Legal Daily), August 16, 1990, at 3.

A concomitant outcome of judicial preference of mediation is coerced mediation by the courts. Although the CPL and the Supreme People's Court have repeatedly emphasized the importance of the voluntariness of mediation, various evidence suggests that coercive mediation has long been a widespread problem.²²² Generally, judges will not directly coerce parties in mediation or to accept proposal. Coercion is always implied through various judicial behaviors. By dropping hints, judges indirectly coerce parties to participate in mediation or accept proposed agreement. The following description illustrate some general patterns common in coercive mediation.

1) Coerce Mediation by Persuasion

Judges may repeatedly encourage one party to mediate or consider a solution either presented by the opposite party or by the judges themselves. Such persuasion indeed implies judges' preference for mediation or a proposed agreement and creates much pressure on the parties who are afraid of losing the suit, especially when one party is required to make a concession. Refusal to do so may result in a worse decision.²²³

2) "Mobilize" Mediation by Delaying Adjudication

Judges may indicate that if the disputing parties refuse to mediate or insist on their claims, the case may take much longer to adjudicate. Under such circumstances, the

²²². Critics are too numerous to list here. For a good general treatment of coercive mediation, see *supra* note 32 at 57-60.

²²³. *Ibid.*

parties have to consider accepting mediation as a better and faster way if they are eager to have the dispute resolved.²²⁴

3) Indication of Possible Results

In other cases, judges may imply that the possible decision may be more disadvantageous to the parties if mediation fails. Given such indications, parties usually have to follow judges' directions, however reluctantly, in order to avoid worse results.²²⁵ A statistic shows that in 1994, amongst 34,567 administrative cases, 44.31 percent of these cases were finally withdrawn by the plaintiff. This high percentage of withdrawals is partly due to the judicial indication of the possible results, which discourage parties to stay with litigation.

4) Misrepresentation of Legal Information

Additionally, in order to bring parties to mediate, sometimes judges may misrepresent information to parties and make them believe that mediation can better protect their legal rights than adjudication. Since parties normally rely on judges' interpretation of law and their opinions on the disputed matters, these misrepresentation undoubtedly affect parties' predication of the results of their suit and mislead them to voluntarily give up litigation and actively participate in mediation.²²⁶

²²⁴. Ibid.

²²⁵. Ibid.

c. Judicial Ignorance of Law

Theoretically, the essence of mediation is self-determination. When parties decide to dispose of their rights in a particular way, it is not the court's business to intervene. However, self-determination should be based on two preconditions. One is the assurance that parties' disposition of their rights does no harm to any third party or public interest, and that it does not violate existing laws.²²⁷ In this sense, courts bear obligation to scrutinize the legality of the mediated agreement. The second precondition, also the most important, is that parties' self-determination must be based on full knowledge of their legal rights and obligations.

A popular complaint about court mediation is that judges always "plaster over" the disputes (*huo xi ni*) without defining and resolving the parties' rights and duties.²²⁸ Their sole motivation is to dispose of the disputes as soon as possible. Whether the parties' legal rights have been properly protected seems less important. Parties are persuaded to make concessions without fully understanding why a compromise is necessary or what advantages they could obtain from mediation, compared to adjudication. This indicates that judges simply do not really understand why and how they mediate. The lack of technical skills makes it difficult for them to protect legal rights on the one hand and conduct mediation on the other.

²²⁶. Ibid.

²²⁷. PRC Civil Procedure Law, art. 88.

²²⁸. "Mao and Mediation Revisited", supra note 30 at 337-339.

Take an example on a case regarding trademark right of publications tried by a Shanghai court.²²⁹ In 1953, the defendant published a juvenile periodical named "Juvenile Literature". In 1976, the plaintiff published a juvenile periodical with a similar name and later changed it to the same name "Juvenile Literature". Both of them obtained rights of publication. On March 28, 1987, the plaintiff took the lead in applying for the registration of "Juvenile Literature" as the trademark of its publication and obtained the certificate of trademark registration on November 10. On June 22, 1987, the defendant applied for the same trademark registration but was objected. Later, the plaintiff asked the defendant stop using "Juvenile Literature". The defendant ignored such request and continued publishing the periodical by using the same name. The plaintiff sought an injunction to prohibit the defendant from continuously using its trademark and claimed for remedy of 96,000 RMB. However, the defendant argued that it primarily published the first juvenile periodical with the name of "Juvenile Literature" and this periodical has gained considerable popularity before the plaintiff used the same name to publish the similar juvenile periodical. Although the plaintiff applied for the registration of trademark in advance of the defendant, it has violated the defendant's existing legal rights.

During the trial, the court concluded that, according to the principle of "first apply, first register" in trademark registration, the plaintiff applied first and registered the trademark first, therefore, the defendant should not be allowed to use the same

²²⁹. Supra note 197 at 183.

trademark; however, if this principle applied and the defendant was prohibited from using the same name to publish juvenile periodical, it would be of great detriment to protecting the well-known publications, especially when the defendant actually used the name first and also published the periodical first, and this periodical has gained great popularity before the plaintiff published the same juvenile periodical with the same name. Eventually, the court decided to conduct mediation. Through efforts of court mediation, the defendant agreed to recognize the fact that the plaintiff registered the trademark first and the plaintiff agreed to recognize the fact that the defendant published this periodical and used the name first. As a result, the plaintiff abandoned all claims and both of them agreed that the two juvenile periodicals would co-exist friendly.

This case may give an explanation that how courts use mediation to "plaster over" the disputes instead of making clear-cut decisions in resolving difficult cases. In this sort of cases, using mediation can certainly help courts to resolve the disputes easily. Nevertheless, it has at least three detriments. First, it fails to define the disputing parties' rights and duties and thereby fails to protect their legal rights. Second, it loses opportunities to bring the legal issues in light, failing to provide useful reference for future adjudication. Third, it allows courts to rely on mediation and avoid making hard decisions.

d. Potential Opportunity for Corruption

Corruption is one of the principal complaints, which has been recognized officially by the government.²³⁰ The informality and flexibility of court mediation exposes judges to more opportunities for corruption. This is particularly serious in economic cases. Mediation allows judges to use judicial pressure to force one party to compromise to a certain point that is favorable for another party with whom the judge obtained various forms of gifts or has special personal relationship. Although the government has attempted to prohibit judicial corruption through legal sanctions as well as party discipline, it is unclear, however, whether these directives will have any long-term effects in curbing corruption.

It is obvious that the problems arising from the performance of court mediation are closely associated with a diverse range of shortcomings embedded into the court system. No doubt judicial self-interest is a paramount element. Nevertheless, judges are not the only ones to blame. Under the veil of their self-interest is the bureaucratic system, which originally triggers the motivation. Thus, it is unrealistic to solely reform court mediation alone without overcoming the obstacles generated by the problematic court system.

Summary

²³⁰. See generally Richard Levy, "Corruption, Economic Crime and Social Transformation Since the Reforms: The Debate in China" (1995) 33 *Australian J. Chinese Aff.* 1; Julia Kwong, *The Political Corruption in China* (1997).

To sum up, the above analysis reveals a number of prominent shortcomings underlying China's current court mediation institution. It demonstrates that the alleged success of China's court mediation is misleading and the high rate of mediation does not actually represent high quality of mediation.

First, the current function of court mediation is uncertain and unclear. China's court mediation system was established almost half a century ago according to the specifically historical, social-economic, political, cultural and legal conditions existing at that time. Chinese society has experienced dramatic changes during the past half-century, especially since China opened its doors to the world, which has deeply altered almost every aspect of Chinese society. Although court mediation has been revised twice since 1982, the revision did not thoroughly reflect those changed values and demands. Along with the collapse of those supporting conditions, the traditional values promoted by court mediation have collapsed and its functions become less evident and meaningful. In the meantime, a new system of court mediation has not been established and its new functions have not been assigned, which makes the continued existence of this traditional dispute resolution system paradoxical.

Second, as a means of dispute resolution, the current court mediation system does not have any advantages as an alternative dispute resolution. It is neither an alternative to litigation like People's Mediation, which prevents the occurrence of litigation, nor a pre-litigation procedure that can help to reduce the heavy caseload of courts and cost of

litigation. In terms of efficiency, it is neither time-saving nor cost-effective. It is, at most, a simple means to dispose of disputes and a substitute for litigation.

Third, the great disadvantage of the current court mediation system is its lack of procedural safeguards. The blending of mediation and adjudication processes inevitably forces dual roles upon judges. Judges directly intervene in and play a leading role in the mediation procedure, which gives them greater opportunities to abuse judicial authority

Furthermore, the non-confidentiality of mediation discussions profoundly affects both the substantive and procedural fairness of court mediation. The nature of its informality and flexibility make court mediation amorphous and arbitrary.

Chapter V Court Mediation in China: Time for Reform

Section 1 Introducing the Current Debate

With respect to the reform of court mediation, the question is not whether court mediation should be reformed but how to reform it. The current debate surrounding this issue involves two schools of thought.

a. Equalizing mediation and adjudication

The starting point of the first school of thought is to improve court mediation within the current framework by adopting a series of measures to monitor the implementation of the principles of “voluntarism and lawfulness”. First, because of the dominant position of mediation, it is critical to reduce the mediation rate by emphasizing the equalization of court mediation and adjudication. Secondly, coerced mediation must be prevented and restrained by truly implementing the principle of voluntariness. Thirdly, in order to intensify the protection of civil rights, mediation should be based on parties’ own choice of what is fair, instead of coerced concession. Finally, private mediation carried out before an open trial or outside of court should be changed to public mediation during an open trial in order to enhance the transparency of mediation and regulate judicial performance during mediation.²³¹ The underlying rationale behind this school

²³¹. Supra note 32 at 57-58.

of thought is that current court mediation system has been greatly improved since the revision of the Civil Procedural Law in 1991. There is nothing wrong with the system itself; rather, individual judges violate the principles of voluntariness and lawfulness, and cause problems in practice. Hence, the essential task is not to reconstruct the system of court mediation but to supervise and urge judges to truly comply and implement the established principles regarding the performance of mediation.²³²

b. Abolition of Court Mediation

On the other hand, another school of thought suggests the abolition of court mediation by segregating it from civil litigation and setting up an independent dispute resolution institution for the sole purpose of preventing litigation. By doing so, both the process of mediation and adjudication will be purified.²³³ The underlying rationale is that mediation and adjudication are two distinctive systems of dispute resolution, which require different treatment. Adjudication involves the direct application of established legal rules and a rigid procedure, the result of which is authoritative and compulsory; while the nature of mediation is self-determining through an informal process, in which the essential concern is not to vindicate each party's legal rights but to settle the case in a mutually accepted way. However, the Civil Procedural Law blends two essentially different dispute resolution institutions, creating much tension and conflict between the two of them. It not only confuses the function of both mediation and adjudication but

²³². Ibid.

²³³. Wang Yaxin, "Lun mingshi jingji shenpan fangshi de gaige" (Discussion of the Reform of the Civil and Economical Trial Model) (1994) 1 Chinese Social Science 17 at 18-20.

also inevitably results in the distortion of civil procedure through the withering of adjudication and the expansion of mediation, which eventually led to the current mediation-dominated trial model in China's civil procedure. Reform without separation only simplifies the existing problems of court mediation but ignores the inherent deficiencies of the system. The purpose of the separation model is to convert the mediation-dominated trial model to a purely adjudicative trial model, and in doing so, accomplish the historical transition of Chinese litigation system from the traditional emphasis of mediation to adjudication based on law. Only by these means can the deficiencies of court mediation be ultimately eradicated. This view is widely supported by many young academics.²³⁴

In spite of the suggestions given by different schools of thought, some fundamental questions, which constitute the core of the reform, have not yet been answered. The current debate overemphasizes the correction of perceived deficiencies of court mediation while ignoring the exploration of its underlying principles and the desirable values it is expected to produce. Indeed, without clarifying the expected functions of court mediation or the point of its reform, all suggestions seem to be premature. It may temporarily cure one or more problems but leave or generate more potential problems for the future. Accordingly, the starting point of the reform is to consider the goals or purposes of court mediation that policy-makers wish to achieve. If the decision is made

²³⁴. See Ji Weidong, "Fazhi yu tiaojie de beilun" (The Contradiction of mediation and legality) (1989) 5 Faxue yanjiu (Case Journal of Law) 28; Jiang Wei & Wang Qiangyi, "Wanshan woguo minshi susong lifa de ruogan wenti" (Several Issues concerning the improvement of the legislation of China's Civil Procedure Law) (1991) 5 Zhongguo shehui kexue (Chinese Social Science); Jiang Wei & Li Hao, "Shichang jingji yu fayuan tiaojie zhidu de wanshan" (Market Economy and the Improvement of Court Mediation) (1995) 3 Zhongguo renmin daxue xuebao (Chinese People's University Journal).

to pursue different goals, the reformer should establish priorities among them to provide participants with guidance in the process. For this reason, a brief analysis of the current status of various dispute resolution institutions in China is helpful.

Section 2 The Allocation of Dispute Resolution Institutions

China currently has three significant dispute resolution systems: mediation, arbitration and litigation, which will be analyzed in order as below.

a. People's Mediation in Decline

People's Mediation is a traditional way Chinese have always used to resolve civil disputes, particularly those involving marriage, inheritance, support, alimony, debts, property disputes, production and management, tortuous damages as well as other civil and economic disputes and minor criminal cases.²³⁵ It has been well received by the masses in Chinese society and the state also attached great importance to the People's Mediation work in promoting the unity of the people, maintaining social stability and furthering the construction of socialist modernization.

²³⁵. "Mediation, conciliation, Arbitration and Litigation", "Mediation, conciliation, Arbitration and Litigation", "Mediation, Conciliation, Arbitration and Litigation", supra note 24 at 363; "Mediation, Arbitration and Litigation", supra note 37 at 128-129.

In 1989, China issued a new regulation regarding People's Mediation committees, which replaced the 1954 one.²³⁶ The new regulation sought to revive the nationwide network of rural dispute resolution system as an instrument to maintain public order and to alleviate an otherwise intolerable burden on courts. It made significant changes in terms of the functions, guiding principles and rules.

The primary function of People's Mediation today has shifted to resolving civil disputes non-politically, although those old functions continue to compete with and may sometimes overwhelm this basic function.²³⁷ The new rules speak of "propagandizing state laws, regulations, rules and policies through mediation work" and "educating citizens to obey law and discipline, and to respect social ethics" instead of "conducting propaganda-education".²³⁸ Laws, regulations, rules and policies now become the guiding principles for mediation committees and legal rules more prominently shape the outcome of mediation.²³⁹ The level of formality of mediation procedure has been increased and more support, such as judicial assistants, township or village legal services, and appropriate subsidies are now provided.²⁴⁰ The new regulation reflected changing demands on People's Mediation and attempted to reshape

²³⁶. The old one referred to the "Provisional General Rules for the Organization of People's Mediation Committees", issued in 1954 [hereinafter the 1954 Regulation]; The new regulation referred to the "Organic Regulations for People's Mediation Committees", issued in June 17, 1989 [hereinafter the 1989 Regulation]

²³⁷. The 1989 Regulation, art. 1.

²³⁸. The 1989 Regulation, art. 4; The 1954 Regulation, art. 3.

²³⁹. The 1989 Regulation, art. 6.

²⁴⁰. The 1989 Regulation, art. 14.

the role of mediation committees from vehicles for overtly disseminating propaganda to institutions for dispute resolutions.²⁴¹

In spite of the institutionalization of People's Mediation, as fundamental changes in Chinese society brought on by reforms stimulated rights-consciousness and the use of courts to protect rights and seek compensation for infringement of legal rights, the authority of People's Mediation has declined. This can be seen from the weakness of the organizational network of mediation committees.

The urban control network is showing signs of decay driven by new social values and economic pursuits. Although the population to be served by each neighborhood committee has increased, the quality and quantity of committee members has declined. Most urban mediators are still retired workers or housewives who had been members for decades and were "illiterate or semi-illiterate". Because of the low stipends paid to residents' committee members, running profitable businesses has become more important than performing duties related to dispute resolution. Changes in the physical configuration of large cities, a growing sense of privacy, and a transient population all diminish the ability of the mediation committees in urban areas.²⁴²

In townships or villages, although more resources and functions were given to the rural people's committees than to urban residents' committees, village heads and party

²⁴¹ For a comprehensive overview of People's Mediation in China, see Fu Hualing, "Understanding People's Mediation in Post-Mao China" (1992) 6 J. Chinese L. 211.

²⁴² "Mao and Mediation Revisited", *supra* note 30 at 285-286.

secretaries still exercise much power over many matters, including dispute resolution, which inevitably affects the justice they dispense.²⁴³

With respect to the workplace, as work units' dominance over many aspects of the lives of its members has declined with the restructuring of most state-owned enterprises, fewer disputes are likely to be mediated by the work units, especially when labor disputes are initially dealt with by labor dispute arbitration commissions.²⁴⁴

As reforms have transformed the cultural and structural face of Chinese society, the nature of disputes, the traditional value system, and the people's rights-consciousness have been profoundly changed as well. This makes mediators powerless and their job meaningless. The legalization and professionalism of people's mediator itself remains largely rhetorical. The rationale of the existence of People's Mediation has been eroded. As one observer indicated, Chinese are no longer waiting for their rights as they did before.²⁴⁵ Indeed, "the Chinese are fully inclined to assert their rights when institutions are available for the purpose".²⁴⁶ As a result, mediation is no longer considered a glorious work. It is a hard and thankless task, which people tend to avoid.

2. Immaturity of Domestic Arbitration System

²⁴³. Ibid. at 287

²⁴⁴. Ibid. at 288

²⁴⁵. Ann Kent, "Waiting for Rights: China's Human Rights and China's Constitutions" (1991) 13 Hum. Rts. Q. 170 at 210.

²⁴⁶. James D. Seymour, "Cadre Accountability to the Law" (1989) 21 Austl. J. Chinese, Aff. 1 at 18.

Today, arbitration is an important and frequently used method for settling disputes in China. Chinese arbitration can be divided into two types: international arbitration and domestic arbitration. Each type has its own law or rules and regulations.

With respect to international arbitrations, they are almost exclusively handled by China International Economic and Trade Arbitration Committee (CIETAC) and China Maritime Arbitration Committee (CMAC).²⁴⁷ The existing arbitration forums, rules, and regulations dealing with international business transactions have been further developed.²⁴⁸ As of March 12, 1994 and September 4, 1995, CIETAC made a series of major changes to its arbitration rules.²⁴⁹ One of the most important changes introduced by the 1994 and 1995 CIETAC Arbitration Rules relates to the scope of CIETAC's jurisdiction, which is extended to "disputes concerning international or foreign economic relations and trade bounded or not bounded by contracts as arising between foreign legal persons and/or natural persons and Chinese legal persons and/or natural

²⁴⁷. China's international arbitration organs were first set up in 1954 and 1958 in accordance with the "Decision of the Government Administration Council of the Central People's Government concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (CCIT)", adopted by the former Government Administration Council (now State Council) of the Central People's Government on May 6, 1954; and the "Decision of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission with CCPIT", adopted by the State Council on Nov. 21, 1958. These organs were called "Foreign Trade Arbitration Commission" and "Maritime Arbitration Commission". Later the former was renamed as "Foreign Economic and Trade Arbitration Commission" and now "China International Economic and Trade Arbitration Commission" (CIETAC); and the later was renamed as "China Maritime Arbitration Commission" (CMAC).

²⁴⁸. Arbitration Rules of CIETAC (1994), revised and adopted by China International Chamber of Commerce (CCPIT) on Sept. 4, 1995, effective as from October 1, 1995 [hereinafter CIETAC Arbitration Rules].

²⁴⁹. Of the eighty-one articles contained in CIETAC Arbitration Rules, 38 are entirely new. Of the forty-three articles found in the 1988 CIETAC Arbitration Rules, more than one-third has been amended to a greater or less extent.

persons, among foreign legal persons and/or natural persons or among Chinese legal persons and/or natural persons.”²⁵⁰ Disputes arising between Chinese parties and/or parties from Hong Kong, Macao or Taiwan, or between Chinese-foreign joint ventures and Chinese parties, are now clearly within CIETAC’s jurisdiction. CIETAC’s authority is no longer limited to contract disputes alone. Other major breakthroughs include permitting foreign arbitrators to be included in the Panel of Arbitrators²⁵¹, the use of English as an optional language and representation by non-Chinese attorneys for foreign parties.²⁵²

CIETAC Arbitration Rules reflect China’s years of efforts to bring its international arbitration practice and procedures in line with recognized international standards. The disputes submitted to CIETAC arbitration in recent years tend to be more complex and involve increasingly larger claims.²⁵³ It is expected that CIETAC will in the near future achieve a higher status in the international community in terms of both the quantity of the cases it handles and the quality of the cases it decides. Nonetheless, because of the definition of its jurisdiction, disputes that can be submitted to CIETAC only occupy a small part of the total disputes, compared with cases dealt by courts and People’s Mediation.

²⁵⁰. CIETAC Arbitration Rules, art. 2.

²⁵¹. CIETAC Arbitration Rules, art. 10. See also “CIETAC Arbitrators”, a list of arbitrators issued by CIETAC.

²⁵². CIETAC Arbitration Rules, art. 75.

²⁵³. See Cheng Dejun, “Report on the Draft Amendment to the Arbitration Rules of the China International Economic and Trade Commission”, reprinted in Kaplan, Spruce and Moser eds., *Hong Kong and China Arbitration: Cases and Materials* (1994) at 833.

As regards domestic arbitration, the new arbitration forums, rules, and regulations dealing with domestic economic transactions and other affairs have emerged and received positive acceptance. Before 1995, China's domestic arbitration was mainly related to economic contract disputes handled by the Economic Contracts Arbitration Committee, a nationwide network under the control of the State Administration of Industry and Commerce and its local offices.²⁵⁴ Since these domestic arbitral bodies were the products of the rigid framework of the centralized planning economy, they were by nature no more than administrative organs. In reality, a substantial number of domestic economic contract disputes were put to arbitration at the direction of the SAIC and its local offices through their regulative and contract approval authority. These organs have exercised their dispute-solving function for more than a decade in Chinese domestic arbitration history.

Since 1995, a unified and independent domestic arbitration system has been established in China according to the 1995 Arbitration Law.²⁵⁵ Those arbitration organs have been dissolved, replaced or reorganized. The new arbitration commissions are formed by the relevant departments and chambers of commerce under the coordination of the governments. They are no longer set up according to administrative levels. Also, arbitration is not subject to the jurisdiction of administrative departments at any level and region. Most importantly, arbitration commissions are no longer part of

²⁵⁴. The Regulations on Arbitration for Economic Contracts was promulgated on Aug. 22, 1983 by the State Council. They focused on economic contract dispute resolution. See "Mediation, Conciliation, Arbitration and Litigation", *supra* note 24 at 364.

²⁵⁵. Arbitration Law of China, adopted at the 9 th Session of the Standing Committee of the Eighth National People's Congress on Aug. 31, 1994. [hereinafter PRC Arbitration Law]

government organs and are independent of any of these organs. The commissions have neither a subordinate relationship nor any subordinate relations of their own.

Under the Arbitration Law, the jurisdiction of arbitration is substantially enlarged. Except for some cases expressly excluded by the new law, such as some family-related cases or disputes to be settled by administrative organs according to relevant regulations, most domestic disputes are arbitrable.²⁵⁶ An arbitral tribunal will not have jurisdiction unless the parties have reached a qualified arbitration agreement prior to the application for arbitration.²⁵⁷ To guarantee the impartiality of the arbitrators and their awards, the law adopted an arbitrator challenge system and provided for adversarial hearings.²⁵⁸ In addition, for the first time in Chinese domestic arbitration history, the law prescribes higher standards for arbitrators' qualifications.²⁵⁹ The adoption of the Arbitration Law marks a milestone in Chinese history in establishing an independent alternative dispute resolution institution. It is expected that the stronger the market mechanism becomes in China, the weaker the administrative involvement in business activities will become, and the role of the arbitration system will become even more important.

²⁵⁶. PRC Arbitration Law, art. 3.

²⁵⁷. PRC Arbitration Law, chapter 3. It sets forth the requirements an arbitration agreement must meet.

²⁵⁸. PRC Arbitration Law, art. 8.

²⁵⁹. PRC Arbitration Law, art. 13.

In spite of the expectation, the role of the domestic arbitration system arbitration remains suspicious ever since the promulgation of the Arbitration Law, because the relative proportion of disputes submitted to domestic arbitration is considerably low. Statistics indicate that less than 8.6 percent of domestic disputants chose arbitration in the first place after disputes occurred. Among those who did not consider arbitration as the first choice, more than 50 percent of disputants either lacked knowledge of arbitration or experienced difficulty in finding an arbitration committee.²⁶⁰ It reflects the huge gap between legislation and practice. Even though the law has been improved to a great extent, it simply remains an ideal rather than a reality. Unlike other new laws that are usually supplemented by detailed rules and regulations for the purpose of implementation, no corresponding rules or regulations have been introduced to direct the substantive implementation of the arbitration law ever since its promulgation. The law simply remains too abstract. Lack of sufficient popularity of arbitration is another reason for its unpopularity. In this sense, it may take a long time for the domestic arbitration system to become an effective dispute resolution mechanism.

c. Shortage of Other Dispute Resolution Institutions

In addition to the formal dispute resolution systems, few other alternative dispute resolution systems co-exist in China. Under the Labor Law promulgated in 1995, labor disputes are initially deal with by mediation conducted by commissions set up for this purpose and if mediation fails, the decisions made by Labor Dispute Arbitration

²⁶⁰. This survey was conducted by Beijin lingdian shichang diaocha he fenxi gongsi. See Guangming ribao (Light Daily), October 16, 1997 at 8.

Commissions may be appealed to courts. Another relates to traffic accident disputes. In China, the majority of traffic accident disputes are referred to traffic dispute resolution centers, which are set up under the control of the Administration of Traffic Control and its local offices. Surprisingly, statistics show that most traffic disputes are successfully resolved and that less than 10 percent of these disputes went to courts in 1995. Disputants prefer this traffic accident dispute resolution system to court because of its speediness, low cost and convenience, especially because the traffic police can offer expertise on these disputes. This eventually helps reduce the total number of tort cases from 51 million to 24 million in 1995.²⁶¹

It is clear that the proper use of alternative dispute resolution institutions can alleviate the burden of courts which would otherwise be overloaded. However, in China, there is no legislation or regulation stipulating or encouraging the involvement of various intermediate organizations or commercial associations or professionals in resolving disputes relating to specific areas. Although recently two private mediation committees-Beijing Mediation Center and Beijing-Hamburger Mediation Center-have been established in Beijing for the resolution of international commercial disputes, it might take a long time for them to be widely recognized and fully exploited.²⁶²

d. Overloaded Courts

²⁶¹. Wang Suyuan, "Lun woguo jiufen jie jue zhidu zhongde ziyuan peizhi xiaolu" (Discussion of the efficiency of allocating resources within China's dispute resolution institutions) (1998) 5 Chinese Legal Science 104 at 105.

²⁶². Ibid.

Given the current status of People's Mediation and arbitration, courts are apparently the primary forum for resolving civil disputes. It has become a trend that disputants influenced by the growing rights-consciousness are likely to seek rights-oriented solutions rather than culturally-dictated solutions. Chinese courts are facing rising workloads. From 1985 to 1992, the mediation committees handled over 5.26 million cases, almost five times the number received by courts during the same period and achieved a success rate of 91.6%.²⁶³ However, starting in 1990, the total number of cases handled by mediation committees has declined by 21% each year and fell to below 6 million for the first time in 1996. In the meantime, the number of cases handled by courts went from 1.85 million in 1990 to 3.08 million in 1996. Except for family and minor civil disputes that remain at the core of the mediation committees, disputes arising out of economic contracts have for the most part been channeled to courts or arbitration organs. The number of economic cases brought to courts rose from 588,143 in 1990 to 1,519,798 in 1996.

Apart from the overloaded court dockets, pressure on the courts is also generated by other factors such as the shortage of legal staff and insufficient financial resource. Against the rising number of cases, the number of judges has not kept pace in recent years. In 1989, Chinese courts had a total staff of 215,000, of whom 125,000 are judges.²⁶⁴ Its size has grown to 292,000 in 1995, of whom 156,000 were judges, with the reminder court police and other court staff. Yet the total number of civil and

²⁶³ The Statistical information in this paragraph is drawn from Stanley B. Lubman, "Mao and Mediation Revisited", *supra* note 30 at 275, 282-284.

²⁶⁴ "Dispute Resolution in China", *supra* note 173 at 254.

economic cases tried by courts in that year was 4,599,793. In fact, among the total number of judges, only those who work in the civil and economic chambers can actually try the civil and economic cases. This means that the average number of cases handled by each judge should have been much higher. By comparison, the number of mediation committees and mediators has been tremendously increased from about 950,000 mediation committees with 6,000,000 mediators in 1986 to over one million mediation committees and over ten million mediators by the end of 1992. However, the number of cases they handled in 1995 is only 602,870, which means every mediator had on average less than one case in that year.

Furthermore, although the majority of expenditures committed for operating the civil procedure system are borne by the state through its central and local financial departments, statistics show that the total expenses for courts in handling cases have increased by 25 percent each year from 1987 to 1995. This makes it difficult for the state to sustain the proper operation of the civil procedure.²⁶⁵ It is quite common that many cases can not be resolved because courts are short of financial support to handle the case; for example, to collect necessary evidence or to conduct investigation sometimes involve traveling to other cities or provinces, which usually requires extra costs. Moreover, judges' low income and courts' financial dependence on local governments also generate much pressure on judges to accept bribes or to make decisions in favor of local parties, which leads to the problem of judicial corruption.

²⁶⁵. Calculated according to the given statistics by China Law Year Book, 1996 and China Statistics Year Book, 1996.

Facing various pressures, the Supreme People's Court has convened a number of judicial conferences in recent years with respect to the reform of civil procedure and the improvement of judicial work. Seeking a more efficient civil procedure becomes an emerging task for Chinese courts.

The above discussion indicates that China is now facing two problems in terms of dispute resolution institutions. One is the difficult position caused by increasing cases and scarcity of resources for dispute resolution. Another is the unequal allocation of cases to different types of dispute resolution institutions. The decline of People's Mediation, the immaturity of domestic arbitration system, and the shortage of other dispute resolution systems all result in the overloaded courts. Meanwhile, courts themselves are suffering from difficulties, such as the lack of sufficient judges and financial resources, which adds more pressures to the already burdened courts.

Under such circumstances, to simply abolish court mediation would be a waste of existing dispute resolution resources. It also seems unrealistic, because many lower courts have habitually relied on mediation in resolving the majority of civil and economic cases. The complete abolition of court mediation will inevitably bring pressures on those courts without more qualified judges and other necessary supports, which may, on the contrary, eventually affect the efficiency of the whole judicial system. Therefore, the direction of the reform of court mediation should be toward

establishing a faster, cheaper, more satisfactory and fair dispute resolution by restructuring the framework of the current court mediation instead of abolishing it.

Section 3 Suggestions for reform

The first task of the reform of court mediation is to establish goals or purposes that court mediation is expected to achieve. These goals and purposes can co-exist providing they are not contradictory. The suggestions for the reform of China's court mediation in this section are based on the consideration of the following functions expected from court mediation: 1) to reduce the number of cases going to trial and the entire cost of litigation; 2) to provide a more satisfactory outcome for both parties based on their exercise of autonomy and self-determination through a recognized fair process; 3) to preserve traditional values of harmony, unity and social relationship by promoting an alternative dispute resolution to litigation.

In support of these functions of court mediation, reforms should particularly focus on two significant aspects of court mediation. In the first place, it is necessary to establish an independent court mediation system, which involves the establishment of an independent process of court mediation and a separate mediation system. Secondly, the restructuring of court mediation should carefully consider the balance between efficiency and fairness, because sometimes one might outweigh the other. The best

combination is to maximize the merits of both of them and minimize those disadvantages that may affect the output of either efficiency or fairness.

a. Relocating the Stage of Mediation

In relocating the stage of mediation, the guiding principle is that it must be separated from adjudication and become an independent alternative to litigation. In order to streamline cases and reduce the entire cost of litigation, it should be fixed at an earlier stage of litigation process and become a preliminary step to litigation. If mediation fails at this stage, cases should proceed to trial without delay and no more mediation should be conducted. The arbitrary use of mediation at all stages of litigation process, especially on the eve of a trial, should be prohibited. This does not preclude any settlement by parties through negotiation or conciliation without courts' intervention.

As for at what points should mediation session be injected into the litigation process, two stages can be considered. Mediation can either start after the filing of a statement of defense or before a suit is filed. In the former case, either the plaintiff or the defendant could make a motion for mediation. If and when mediation fails, the litigation process continues. In the latter case, a party can make a motion for direct mediation without filing a suit. If an agreement is not reached in a mediation procedure, the dispute will then be automatically transferred to a regular trial procedure. The party is considered to have filed a suit for trial at the time when he or she made the motion

for mediation. Mediation at both stages will have the merit of reducing both the number of cases that go to trial and the cost of litigation, permitting courts to process cases more efficiently, conserving judicial resources and allowing judges to give more attention to cases requiring their experience in resolving more complicated legal issues. Although it might be questionable whether mediation occurring before a suit is filed is premature, for cases not involving complicated issues, and where both parties agree to resolve the dispute with a simple procedure, mediation at this stage deserves consideration since there are no great disadvantages.

b. Voluntary vs. Mandatory

Whether participation in mediation should be mandatory or voluntary remains controversial. On the one hand, in order to divert more cases from courts and to expose more parties to the benefits associated with mediation, mandatory mediation seems necessary and more efficient if it does not create unreasonable obstacles to trial or undue pressures to settle.²⁶⁶ In the West, many mandatory mediation programs have been established for small claims and domestic matters, misdemeanors and other criminal matters between related people, truancy and delinquency problems, etc.²⁶⁷ The supporters for voluntary mediation criticize mandatory mediation for contradicting the emphasis placed on the consensual and participatory nature of the mediation process,

²⁶⁶. See supra note 7 at 5.02, 7.01, 7.06; Raymod J. Broderick, "Court-Annexed Compulsory Arbitration Is Providing Litigations with a Speedier and Less Expensive Alternative to Traditional Courtroom Trial" (1991) 75 *Judicature* 41 at 44; Lucy V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" (1993) *J. Disp. Resol.* 1 at 22-30.

²⁶⁷. Rogers & McEwen, supra note 7 at 7.02, Appl. B; Karla Fischer et al., "The Culture of Battering and the Roles of Mediation in Domestic Violence Cases" (1993) 46 *Smu. L. Rev.* 2117 at 2142.

and that coercion to participate in mediation can slip into coercion into settle.²⁶⁸ Even in voluntary mediation, the mediator's interpretation of the facts or applicable law, prediction of the likely outcome in court, or recommendations invoking social norms or values may create pressures to settle. Moreover, research indicates that mandatory mediation does not necessarily increase the settlement rates; on the contrary, in some situations, it produces a somewhat lower rate of settlement than voluntary processes.²⁶⁹

In China, it is neither necessary nor appropriate to establish mandatory mediation. First, one reason for making mediation mandatory is probably because voluntary mediation based on parties' willingness to participate attracts relatively few cases because of less familiarity or less interest in mediation among disputants and their attorneys. However, in China, mediation is deeply rooted in Chinese legal history; therefore, it is not necessary to promote mediation by making it mandatory. Second, because of the existence of coerced and illegal mediation, there is a growing sentiment against compulsory mediation. Finally, although one way to allay fears of coercion associated with mandatory mediation is the adoption of safeguards to assure that the mediation process is fair and effective, the provision or implementation of such safeguards would be a great challenge for China's mediation system, especially when voluntary mediation is itself in question. For all the above reasons, it might be better to retain the voluntary nature of China's court mediation.

²⁶⁸. Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L.J. 1545 at 1581; see also "Politics of Informal Justice", *supra* note 8 at 270-271.

²⁶⁹. Roselle L. Wissler, "The Effects of mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts" (1991) 33 Willamette L. Rev. 565 at 600.

c. Commencement

The CPL does not make clear when a mediation procedure should start. Very often courts directly order parties to attend mediation regardless of the parties' willingness. In order to assure parties' voluntary participation in mediation, the commencement of mediation must be based on parties' own choice. It can begin with either one party's motion or court order according to parties' written stipulation. When one party makes a motion for mediation while the other party does not agree to mediate, mediation should be disregarded and the case should go directly to trial. Only when both parties have already reached an agreement for participating in mediation or each has indicated a willingness to mediate, should courts order them to go through mediation first. Such agreement or indication must be made before any intervention by the court in order to free parties from undue influences. For this reason, they should be made in written form at the time when the suit is filed. Without such application or agreement, courts should not order or refer parties to mediation.

d. Limiting the time

Since there is no time limit for mediation sessions, currently mediation is considerably very time-consuming and inefficient. Mediation may last as long as a trial or even longer and can be conducted many times over. This is inconsistent with the intended function of mediation. To make mediation more time-efficient, a reasonable time limit must be imposed. If no agreement is reached after the time has expired, the mediation

should be closed. The time can be extended only with both parties' consent in the event that a settlement will very likely occur. The extension may depend on the complexity of the case and the progress of negotiation. However, whenever it is clear that parties are unable or unwilling to conduct meaningful mediation or where an agreement is unlikely, mediation proceeding should be instantly suspended or terminated to avoid wasting time.

e. Establishing an Independent Mediation System

In setting up an independent mediation program, it is essential to establish a separate mediator system. The fact that judges act as both mediators and judicial decision-makers not only affects the fairness of mediation but also imposes extra caseloads on judges who have already been burdened by the heavy litigation caseload. Accordingly, China may have to consider converting the present nature of the dual role of mediator to a purely independent mediator and prohibiting mediators from further involvement in judicial decision-making process.

The threshold question is who can serve as a mediator. Studies indicate that the success of mediation is largely dependent on the skills, training, and experience of the mediator.²⁷⁰ Mediators perform various functions at different times during the course of the mediation process. He or she is a manager, information gatherer, facilitator, evaluator, and settlement supervisor.²⁷¹ A successful mediator must know how to (1)

²⁷⁰. William D. Underwood, "Divergence in the Age and Cost in Delay Reduction: The Texas Experience with Federal Civil Justice Reform" (1994) 25 Tex. Tech L. Rev. 261 at 317.

manage the mediation process and exercise management skills and authority; (2) establish the issues by collecting and receiving available information; (3) create necessary conditions for the parties to meet and conduct negotiations or make settlement proposals; (4) test or help the parties to test the strength of their positions or viability of their proposals; (5) evaluate the respective merits of the issues between the parties; (6) assist in various ways with regard to the supervision or implementation of any settlement they parties may enter into.²⁷²

However, substantial disagreement exists regarding what qualifications should be required to be a member of the profession. Some suggest that judges are not suitable for mediators because the duty of judges is to decide cases by applying the law to the facts, while the role of mediator is primarily that of facilitator and negotiator. Some suggest that lawyers are poorly suited to serve as mediators because of their adversarial orientation.²⁷³ Opponents argue that the typical educational and professional experience criteria forced mediator to be lawyers or judges, or in some cases, related professionals. Indeed, many court mediation programs not only allow but require that mediators appointed by courts be attorneys.

Since modern mediation is still in the development stage, there is no consensus regarding the skills, knowledge base, and background that are suitable for mediators.²⁷⁴

²⁷¹. Supra note 1 at 347-351.

²⁷². Ibid.

²⁷³. Mori Irvine, "Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation" (1994) 26 Rutgers L. J. 155 at 156.

It has been suggested that mediators can be recruited from a diverse range of professionals including lawyers, judges, social workers and other related professionals with expertise in the field, if they are properly trained and have the ability to conduct an orderly meeting, identify issues and deal with people effectively.²⁷⁵

China has established a nationwide mediator system in association with the extra-judicial mediation institution. There are approximately ten million mediators working around the country now.²⁷⁶ Nevertheless, most of the mediators are usually poorly educated and non-professional.²⁷⁷ The Mediation Regulation issued in 1989 sought to improve the status of mediators. Standards have been set for the qualifications of mediators and for mediators' behavior. For example, mediators elected to the People's Mediation committees are to be "adult citizens who are fair-minded, linked with the masses, enthusiastic about mediation work and who have a certain level of legal knowledge and certain level of understanding about policies".²⁷⁸ Apparently, the standards for appointing mediators are too abstract to meet, especially when no specific mechanism or system has been set up to train mediators.

In spite of this, the existence of the people's mediator system at least provides a valuable source for developing professional mediators for court mediation. Courts can

²⁷⁴. Leonard L. Riskin, "Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29 at 42.

²⁷⁵. Robert B. Moberly, "Ethical Standards for Court Appointed mediators and Florida's mandatory Mediation Experiment" (1994) 21 Fla. St. U. L. Rev. 702 at 707.

²⁷⁶. "Mao and Mediation Revisited", *supra* note 30 at 275.

²⁷⁷. *Ibid.*

²⁷⁸. The 1989 Regulation, art.4.

appoint mediators selected from people's mediators after giving them specific training. This will maximize judicial resources by avoiding many people's mediators being left unused because of the decline of People's Mediation, reduce the number of judges who may have to conduct mediation and allow them to try more cases.

In addition to people's mediators, judges can also be considered as court mediators, especially in small claims courts. Concern for the fairness of mediation is primarily caused by the dual role of judge, not that the judge cannot act as mediator. Judges in China have been traditionally conducting mediation, so they are more familiar and experienced with mediation. They should be considered as ideal candidates for court mediators providing they are not allowed to be involved in making binding decision on cases they have mediated.

Furthermore, mediators should also be recruited from among lawyers. Lawyers are now a increasingly growing profession in China. They tend to be well educated and highly qualified. Lawyers' training and experience in negotiating, consulting, researching, and conciliating make them well suited to serve as mediators because society and most individuals consider lawyers as protectors of their rights and the appropriate source of assistance in asserting and protecting such rights.

Additionally, substantive knowledge in the field of the disputes in question may enhance the mediator's ability to suggest options and possible settlement formats. Court

mediators can thus also be other professionals familiar with the subject matter of the dispute.

Apart from selecting qualified court mediators, it is crucial to stipulate appropriate standards for appointing court mediators and set up training programs for selected mediators. The training should emphasize general dispute resolution theory and mediation skills. The typical qualification requirements should include some combination of attending mediation training, participating in apprenticeship programs, and meeting specified educational or professional requirements. Only those qualified mediators should be appointed by courts or selected by disputants to conduct court mediation.

f. Confidentiality

The reform of China's court mediation should consider extending a privilege of confidentiality to each party involved in a mediation proceeding. The confidentiality should include the following requirements: 1) All oral or written communications in a mediation proceeding are to be kept confidential and inadmissible as evidence in any subsequent legal proceeding; 2) mediators must not disclose any information obtained in individual meetings unless the parties permit disclosure; 3) mediators cannot be called to testify regarding statements made during a mediation session unless all parties waive the privilege; however, in disciplinary proceedings for mediators violating the standards of conduct, exception to this privilege can be made, but only for the internal

use of investigation; 4) all information generated by the mediation process will go no further.

g. Methods of Mediation

As regards what method the mediator should adopt while conducting mediation, there are three broad mediation methodologies based on the level of the mediator's activism.

In "rights-based or predictive mediation", the mediator forges settlements by advising the parties regarding the strength of their cases and their conceptions of the likely outcome at trial.²⁷⁹ This version of mediation consciously considers what is likely to happen if the case is litigated, and therefore, necessarily considers the legal rights of the parties.

In "interest-based mediation", the mediator explores the needs, desires, and concerns of the parties, and assists them in pursuing an agreement which maximizes, to the extent possible, the interests of both parties.²⁸⁰ The central goal of this problem-solving mediation is to reach an agreement which "meets the needs and responds to the underlying interests of the parties" instead of focusing on legal rights and likely trial

²⁷⁹. Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv. L. Rev. 668 at 673.

²⁸⁰. Craig A. McEwen, "Pursuing Problem-Solving or Predictive Settlement" (1991) 19 Fla. St. U. L. Rev. 77 at 79.

outcomes. In economic terms, the goal is to assist the parties in achieving a joint gain or win-win solution to their dispute.²⁸¹

The third form of mediation is fairness mediation. Under the concept, the mediation is expected to forge an agreement between the parties that is substantively fair or which otherwise furthers some policy interest of the mediator or society in general.²⁸² The mediator is expected to take into account of both subjective and objective fairness.

In recent years, the emerging dominant model of mediation tends to be a blend of all these three types of forms and methodologies. In this hybrid model, the mediator emphasizes the techniques of one or the other as he deems appropriate, depending upon his style and the particular circumstances of the case. The mediator searches for the common interest of both parties and seeks to brainstorm creative alternatives to invent a settlement that will enhance the interests of the parties and will be agreeable to both of them. In the course of this process, the mediator also seeks to foster a sense of empowerment, self-determination, and mutual recognition.²⁸³

²⁸¹. Glen Sato, "The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance – A Proposal for Some Ethical Considerations" (1986) 34 UCLA L. Rev. 507 at 510.

²⁸². Supra note 281 at 527-28; Jacqueline M. Nolan-Haley & Maria R. Volpe, "Teaching Mediation as a Lawyering Role" (1989) 39 J. Legal Educ. 571 at 582; Lawrence Susskind, "Environmental Mediation and the Accountability Problem" (1981) 6 Vt. L. Rev. 1 at 4.

²⁸³. Stephen G. Bullock & Linda Rose Gallagher, "Surveying the State of the meditative Art: A Guide to Institutionalizing Mediation in Louisiana" (1997) 57 La. L. Rev. 885 at 903-904.

In spite of this diversity of methods, the role of mediator, the standards applicable to his conduct, and a myriad of other variables are profoundly influenced by the basic determination of what goals mediation is supposed to accomplish and how those goals are to be pursued. Therefore, in defining the method of mediation, Chinese legislators must clarify the goals or purposes of mediation again. Traditional mediation relied on conceptions of “emotion, reason, moral, social value” (*Qingli*) through means of education, persuasion, and propaganda. Courts often overemphasize concession but ignore personal concerns and needs. Therefore, litigants try to avoid it instead of pursuing it. To make court mediation more acceptable, China may have to convert the currently concession-based court mediation method to a method focusing more on personal concerns and needs.

h. Reducing Mediation Fees

Given that mediation is a preliminary step to litigation, the fee paid for mediation should be accordingly reduced. If the parties participate in mediation first, the fee required at this stage can be part of, say, one-quarter of the total litigation fee equally borne by each party. If mediation fails and the case goes to trial, the plaintiff is then obliged to make up the remaining three-fourth. Therefore, no extra financial cost will be added to the parties should they participate in mediation first. Indeed, if the mediation succeeds, both parties will be better off.

i. Completion

Under the current model of court mediation in China, mediation can conclude only in one of the two circumstances: settled or not settled. There is no provision for partial agreement. In fact, for many cases, especially those involving several legal issues, an agreement may be reached only on one or more, but not all, of the issues. It is unreasonable and wasteful to disregard a partial agreement. In this sense, one advantage of mediation - to narrow the issues - is lost. To maximize the output of mediation, any agreement reached during mediation, either regarding factual matters or legal issues, should be approved. The continuing trial can then solely focus on unsettled matters.

j. Is Mediation Necessary on Appeal?

The CPL provides that mediation is available not only in the first instance but also on appeal. The rationality of this is questionable. Logically, if the trial judgment is awarded to the plaintiff, he or she will not agree to mediate with the defendant on appeal and *vice versa*. Mediation is then unlikely to be carried out with the absence of one party's assent. Only when both parties are not satisfied with the trial judgment will they possibly consider mediation on appeal. However, if the case is mediated on appeal, the appellate court may lose the opportunity to correct any wrong decision made by the trial court and thereby, to clarify areas of law and bring policy issues to light. This will

be potentially harmful for the development of justice and law. The following case provides an exact example on this point.²⁸⁴

The plaintiffs are inheritors of Mr. Zhang, a famous caricaturist, who cartooned a boy with a big head, three hair and round nose, commonly known as "The Three Hair". This cartoon boy was used by Mr. Zhang in his several famous works " The Wandering Life of the Three Hair", "The Recruitment of the Three Hair", " New Stories of the Three Hair". Mr. Zhang died in September, 1993. In March 1993, the first defendant, a publishing company, entered into a contract with the second defendant, a teacher, to co-operate in publishing a serial of cartoon books. The second defendant then created a cartoon boy with a big head, three hair, round nose, big mouth and big ears. The first defendant thereafter published a serial of books called " The Collection of the Three Hair". These books were consecutively published in a number of provinces. Upon discovery of these books, the plaintiff brought an action against the two defendants for infringement of Mr. Zhang's copyright. Among other claims, the plaintiffs requested the defendants to publicly apologize for their infringement of Mr. Zhang's copyright in several popular newspapers.

The trial court overruled this claim by concluding that Mr. Zhang's personal rights could not be inherited by the plaintiffs; therefore, they did not have right to ask the defendants to apologize. By doing so the trial court misinterpreted that the protection of a copyright owner's personal rights ends after the copyright owner's death, so that the person who

²⁸⁴. Supra note 197 at 165.

infringes such right need not apologize. In fact, the protection of such rights is not limited to the copyright owner's life and his or her inheritors can act as protectors. However, when the case was appealed to the appellate court, it was resolved by court mediation. Although both parties eventually reached agreement, the trial court's wrong decision on this particular point remained uncorrected.

Conclusion

As a major dispute resolution mechanism in China, court mediation has served a significant social function in articulating and applying the ideological principles, values, and programs of the Chinese Communist Party and helping to mobilize Chinese people to increase their commitment to party policies and goals. These functions may overshadow the function of dispute settlement. Undoubtedly, court mediation has undergone a shift in emphasis. Yet the traditional forces underlying the use of mediation continue to exist even in today's Chinese courts, especially given that the court system is itself imperfect, which creates many opportunities for courts or judges to abuse mediation. As a result, the function of court mediation is ambiguous and questionable.

The paradox of court mediation in China reflects the conflicts between the traditional notion of Marxist ideology of conflict resolution and the growing consciousness of legal rights, between the need for informal dispute resolution in reality and the search for a legal order in ideology. To perfect this system, Chinese legal reformers must avoid those conflicts by reconsidering the purposes and functions they expect from court mediation. In doing so, they should not ignore the changing conditions affecting the use of court mediation, such as growing rights-consciousness, emphasis of personal interests, the nature and types of disputes, and people's attitudes toward traditional means of dispute resolution.

Legal reforms taking place in both the substantive and procedural law areas in recent years signify that Chinese government is making great effort to improve its formal justice system. However, this should not restrain itself from using traditionally informal means to resolve social conflicts. The reform of court mediation may have to search a balance between informal justice and state law, and between the law of “self-education” and “government control”.²⁸⁵ Either one favors formal law or informal justice, by taking an all-or-nothing position, we are left without a solution. In making a good society, as Braithwaite has suggested, “we should avoid the trap of assuming we must make a choice between a society of consensus and a society with conflict, between a culture oriented to duties and one oriented to rights... .” Justice cannot be achieved without law, but neither can it be achieved through formal law alone. In this sense, China may have to consider making a middle path between the need for alternative dispute resolution system and the need for legal order based on due process.

The worldwide flourishing of various alternative dispute resolution institutions, although often proceeding from a very different cultural base than in China, offers a broad perspective for China to rethink its own alternative dispute resolution institutions, which have unique historical roots in this country. In spite of the different judicial systems, the creation of court-connected mediation mechanism and its success in many Western countries provide valuable references for the reform of court mediation in China. It is reasonable to predict that, by restructuring the system and remedying its

²⁸⁵. Steven Spitzer, “The Dialects of Formal and Informal Control”, in “Politics of Informal Justice”, *supra* note 8 at 191.

deficiencies, court mediation will play a positive role in Chinese society in problem-resolving and become a more efficient and fair dispute resolution in the future.

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