

THE FUNCTION OF MEDIATION IN CHINA: EXAMINING THE IMPACT OF REGULATIONS GOVERNING THE PEOPLE'S MEDIATION COMMITTEES

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Ye Chengmei . . . was beaten by her husband Pan Chenggong over a trifling matter. Ye's brother brought 14 young men with wooden sticks and spades to teach his brother-in-law a lesson. Hearing the news, Pan Chenggong organized more than 20 young men to fight back. At this critical moment, 59-year-old Ye Bingyan, a mediator, appeared and persuaded them to stop the fight and sit down to talk. Under the persuasion and education on related legal regulations by the mediator, Pan admitted his wrongdoings and went to the home of his wife's parents to make an apology.¹

Ye Bingyan is one of the more than six million civil dispute mediators in the People's Republic of China (P.R.C.).² A member of his village's People's Mediation Committee, Ye is credited by China's official press with having resolved 154 civil disputes over the last seven years.³ His accomplishments include the prevention of fifteen gang fights, fourteen homicides or suicides, and five divorces.⁴

With more than 950,000 committees spread throughout the nation,⁵ China's civil mediation system is the largest dispute resolution program in the world. Over seven million disputes are resolved through the use of mediation each year in China,⁶ far surpassing the

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1. *Mediators Help Ensure Social Stability*, Xinhua News Agency, Oct. 31, 1989, available in LEXIS, Nexis Library, Xinhua File.

2. Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, 15 INT'L BUS. LAW. 395, 395 (1987).

3. *Mediators Help Ensure Social Stability*, *supra* note 1.

4. *Id.*

5. Ren, *supra* note 2, at 395. The cited statistics are available only in the official Chinese press. Due to their uncertain reliability, these figures are best viewed as general guideposts rather than as definitive indicators.

6. *Id.*

number of cases brought to Chinese courts⁷ and dwarfing the total number of cases resolved by American courts in the last twenty years.⁸ It is estimated that up to ninety percent of all civil disputes in China are settled by mediation.⁹ Moreover, the great majority of all cases are resolved without any judicial involvement at all,¹⁰ and are concluded with a minimum of expense or delay. Officials from around the world,¹¹ including former Chief Justice Warren Burger,¹² have expressed interest in how aspects of this uniquely Chinese model might be employed to stem the flood of litigation afflicting many court systems.

In 1989, the P.R.C. promulgated a new set of rules governing the nation's People's Mediation Committees.¹³ The new rules are important for several reasons. First, the new regulations reconfirm the government's support of the six million individuals involved in extrajudicial conflict resolution. In doing so, the P.R.C.'s leaders aim both to pragmatically preserve social order within China, and to idealistically promote the regime's Marxist political dogma.

More importantly, the 1989 rules reaffirm China's continued commitment to the development of a formal legal structure. The regulations, replacing those written in 1954,¹⁴ have a decidedly legalistic tone. They impose more structure on the mediation committees, yet allow greater independence from the domination of the Chinese Communist Party (the Party). In short, the 1989 rules effect the "legalization" of China's time-honored practice of mediation.

This article examines extrajudicial mediation in the P.R.C.

7. See *Civil Dispute Mediation Committees*, BBC Summary of World Broadcasts and Monitoring Reports, Oct. 19, 1991, available in LEXIS, Nexis Library, BBCSWB File.

8. There were "only" 208,000 civil suits filed in all U.S. District Courts in 1991, a five percent decrease from the previous year. David S. Savage, *Rehnquist Says New Cases Tax Federal Courts*, L.A. TIMES, Jan. 1, 1992, at A1, col. 4.

9. Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation*, in YEARBOOK ON SOCIALISTIC LEGAL SYSTEMS 219, 223 (W. E. Butler ed., 1987).

10. Ren, *supra* note 2, at 395-96.

11. Since 1982, the Xinhua News Agency has reported that a number of foreign delegations to the P.R.C., including those representing Pakistan, Brazil, Romania, Belgium, New Zealand, and the U.S., have expressed interest in the Chinese mediation system.

12. *U.S. Chief Justice in Shanghai*, BBC Summary of World Broadcasts and Monitoring Reports, Sept. 10, 1981, available in LEXIS, Nexis Library, BBCSWB File.

13. Organic Rules for People's Mediation Committees (1989), *broadcast in Rules Promulgated for Mediation Committees* (Xinhua Domestic Service news broadcast, July 2, 1989), microformed on J.P.R.S. No. CAR-89-088, Aug. 21, 1989, at 18 (U.S. Joint Publication Research Serv.) [hereinafter 1989 Rules].

14. Provisional General Rules of the PRC for the Organization of People's Mediation Committees (1954), reprinted in JEROME A. COHEN, CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA: 1949-1968 124 (1968) [hereinafter 1954 Rules].

Part I analyzes the function and the philosophic groundings of mediation in Imperial China and the early years of Communist rule. Part II investigates how the People's Mediation Committees operate in today's China. Part III compares the 1989 mediation regulations with those promulgated in 1954. Finally, Part IV explores the implications of the changes implemented by the new rules, suggesting that the 1989 regulations signal the government's affirmation that mediation play a new role in Chinese society.

As discussed in Part IV and reflected in the 1989 regulations, mediation no longer functions primarily as the socially preferred alternative to formal law (as in Imperial China) or as a vehicle of Party propaganda (as in post-liberation China). While elements of both earlier roles remain, in contemporary China mediation acts foremost as a control mechanism, complementing and bolstering the more formal aspects of the legal system in order to create the social stability essential for successful economic reform. The article concludes that China, while resolutely developing codified law and modern legal structures, has wisely elected to retain and update traditional mediation techniques as critical components of its legal system. As a result, a mediation system emerges which is more independent, professional, and efficient than before, and is of great value to the regime.

I. THE POLITICAL AND SOCIAL ROOTS OF CHINESE MEDIATION

Mediation by clan elders is a characteristic common to most traditional cultures.¹⁵ In this model, power resides in the authority of the group leader who maintains peace between disputants through his personal intervention. Yet as an increasingly organized state begins to encroach upon clan autonomy, mediation yields to law and thus to litigation, the legally favored mode of dispute resolution.¹⁶ Consistent with this analysis, one can observe (particu-

15. Mediation is best viewed not as a single process, but rather as a continuum of dispute resolution techniques featuring an intermediary encouraging compromise among disputants. See Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT'L LAW 15, 30 n.61 (1989). The degree of the intermediary's active participation differs in various models. For instance, in contrast to her relatively passive Western counterpart, the Chinese mediator plays an interventionist role which is common in traditional mediation systems. In this regard the Chinese mediator's use of intense badgering and other aggressive tactics can threaten to disturb the fine distinction between voluntary and coercive settlements.

16. The development of law can be viewed as an evolution of leaders' mediation powers. As kingdoms encompassed areas too large for personal control, rulers faced two options. The first, placing subordinates in charge of geographic subdivisions and allowing each to develop his own method of justice threatened social stability throughout the kingdom. In contrast, developing standardized law allowed the ruler to main-

larly in Western nations) a basic correlation between a nation's level of socioeconomic and political development and the complexity of its litigation system.

Confounding this analysis, China appears unique in its refusal to abandon mediation in the face of development.¹⁷ Although for centuries China boasted arguably the world's most advanced and complex legal system, its government continued to endorse the use of mediation at all levels of society. Perhaps equally intriguing, upon seizing control of China, Mao Zedong simply recast the mediation system according to Communist ideology. With Mao claiming mediation as the Party's invention and further emphasizing its role, the P.R.C. became the first modern nation to sanction mediation as the preferred method of dispute settlement.

A. Imperial China

The Emperor, considering the immense population of the empire, the great division of territorial property and the notoriously litigious character of the Chinese, is of opinion that lawsuits would tend to increase to a frightful extent if people were not afraid of the tribunals and if they felt confident of always finding in them ready and perfect justice I desire, therefore, that those who have recourse to the courts should be treated without any pity and in such a manner that they shall be disgusted with law and tremble to appear before a magistrate.

In this manner . . . the good citizens who may have difficulties among themselves will settle them like brothers by referring them to the arbitration of some old man —decree of Emperor Kang-Hsi (1662-1723)¹⁸

Confucianism was the dominant philosophic model in Imperial China. Confucian ideology centered on the concept of the *Li*, a world order dictating specified patterns of behavior based on social position.¹⁹ According to Confucian thought, serenity was main-

tain his personal imprint over the entire region, thereby promoting loyalty and social control.

17. Other nations also encourage mediation, but none systematically propagandize its use to the same extent as the P.R.C. Mediation is widely encouraged in many Third World nations unwilling or unable to devote limited resources to fully developed, and expensive, court systems. Notable among developed countries is Japan, which has a long mediation tradition. See Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U.L. REV. 339 (1982). Many other nations that have limited historical experience with sanctioned extrajudicial dispute resolution, including the U.S., are now embracing mediation. For instance, in Florida judges may order mediation in most types of cases before allowing the cases to proceed to trial. FLA. STAT. ch. 44.302 (1987). See Bruce W. Talcott, *Court-Ordered Mediation in Florida*, in LEGAL ISSUES AFFECTING THE PRACTICE OF MEDIATION 77 (Steven K. Erickson ed., 1989).

18. Frank J. Goodnow, *The Influence of Physical Environment on the History and Character of the Chinese People*, 51 NAT'L GEOGRAPHIC MAG. 661, 661-662 (1927).

19. SYBILLE VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 30-31 (1962). Confucius established five basic relationships defining social status: ruler and

tained through the individual's knowledge of and adherence to her place within society. Such consciousness was demonstrated largely by performing the requisite duties owed to those both higher and lower in the social strata. A parallel pyramidal structure existed within social classes based on patriarchal hierarchy. Because Confucianism stressed individual responsibility to the group, conceptually there was little need for laws and corresponding punishments.²⁰ Being inherently rational, most individuals naturally and dutifully sacrificed for the common good. Those who refused to conform lacked understanding, and it was the duty of the leader within the unit to educate them and correct their errors.

By 300 B.C., after years of civil wars which exposed the inadequacies of this purely Confucian outlook, a second, radically different philosophy gained popularity. Its proponents, commonly called the Legalists, argued that man is fundamentally untrustworthy and must be controlled by employing strict laws and equally harsh punishments uniformly applied.²¹ The Legalists viewed law as a means of maintaining control, rather than as a method of achieving justice.

By the time of the Han Dynasty (210 B.C.- 220 A.D.), an awkward synthesis of the two philosophies had occurred. Confucianism remained dominant, with the *Li* establishing the proper code of behavior. Yet some members of society were widely viewed as simply too "uncouth" to fully grasp Confucian ideals,²² and thus a strict code of law was developed to hold in check these barbarous few. Eventually, a bifurcated justice system featuring parallel structures for resolving disputes resulted from the convergence of the Confucian and Legalist philosophies.²³ "Civilized" citizens were expected to solve their problems in an appropriately refined manner, through heeding the sage advice of the communal elder. Conversely, those unable to follow Confucian ethics were subjected to the rigid judgments and painful punishments of a harsh penal system. Thus, in Imperial China the formal legal system was viewed not as a paramount achievement, but instead as a "regrettable necessity."²⁴ As Benjamin Schwartz noted, "while such laws appear

subject, parent and child, husband and wife, older brother and younger brother, and friend and friend. Using the family as the basic building block, social stability depended on each individual performing his proper roles. *Id.*

20. Benjamin Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27 (Milton Katz ed., 1957). This is not to suggest that Confucians neither had laws nor applied them. Yet laws were not emphasized in Confucian society, in stark contrast to the preeminent position given to law by the Legalists.

21. *Id.* at 35.

22. VAN DER SPENKEL, *supra* note 19, at 33.

23. *Id.*

24. Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1206 (1966).

in the law books, the general assumption is that respectable people will be able to settle such matters out of court."²⁵

In Imperial China, mediation was typically performed by a respected individual holding influence over all parties. If the dispute was between family members, the eldest male would mediate. If two unrelated villagers were at odds, often a member of the gentry was summoned to resolve the controversy.²⁶ In all cases, mediators stressed the Confucian ethic that yielding (*jang*) is better than standing on principle.²⁷ As such, mediators often sacrificed individual priorities in favor of perceptions of the common good. However, mediators did not evenly observe this ethic of individual subordination to the group, particularly in interclass struggles. Mediators commonly expected a disputant of lower social rank to yield broadly to her socially superior opponent.²⁸

In this manner, mediation served most of society in a way that the disfavored institution of litigation could not: as a mechanism of social control. While litigation sought to rid respectable society of its undesirables, mediation assumed the difficult task of enforcing the dictates of Confucianism upon proper citizens. In the absence of a viable and respected civil legal system, mediation was forced into the breach. The compromise between Confucians and Legalists had created an official legal system for the despised, lorded over by corrupt, cruel and lazy magistrates.²⁹ Meanwhile, social peace was kept by the authority of the mediator, the notion of individual sacrifice, and the hierarchical ethical structure embodied in the *Li*. In this light, although Jerome A. Cohen argues that mediation "significantly emasculated the growth of law,"³⁰ it seems more correct to say that Confucianism emasculated law and left to mediation the task of enforcing social order.

B. Maoist China

"The People's Mediation Committee is the first line of defense in political and legal work."

- Liu Shaoqi³¹

Even today the Party is loath to admit that mediation is anything other than a Communist invention. The official press vacil-

25. Schwartz, *supra* note 20, at 36.

26. Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1297 (1967).

27. VAN DER SPRENKEL, *supra* note 19, at 114.

28. Cohen, *supra* note 24, at 1208.

29. *Id.* at 1212.

30. *Id.* at 1225.

31. *Mediation Work is a Kind of Ideological and Political Work of a Mass Nature*, BBC Summary of World Broadcasts and Monitoring Reports, Jan. 10, 1986, available in LEXIS, Nexis Library, BBCSWB File [hereinafter *Mediation Work*].

lates between stories that establish the first use of mediation in China during the early soviet established by Mao and his Communist predecessors,³² and accounts that acknowledge mediation's role in Imperial China.³³ Yet in a significant way both versions are accurate, because the mediation structure created by the Party differs markedly from that devised under the emperors.

It is clear that the Party was very experienced in the use of mediation by the time of its 1949 conquest of the mainland.³⁴ While some commentators have traced mediation's origins under the Party back as far as the 1920s in the Jiangxi region,³⁵ all of the regions controlled by the Communists at the time of liberation had established mediation committees.³⁶ Furthermore, it is apparent that even at this early stage, the Party had redefined the role which mediation would play in China.³⁷

Consistent with Mao's theory of "mass line" participatory government, mediation assumed a new function of social mobilization. Mao, to a much larger degree than his Russian counterparts, saw that the success of his revolution relied on the active support of the lower classes, especially the rural peasantry. This insight was captured in the political slogan that the revolution was "coming from the masses and going to the masses." In theory, the Party acted merely as a filter, sifting and distilling the revolutionary fervor of the masses into the ideal political thinking that would guide the actual overthrow of the capitalist classes.

To this end, the Communists recognized that mediation could serve their cause in two fashions. First, by resolving the disputes of the lower classes and enlisting them as mediators, mediation could help win over the peasantry by empowering them with the belief that their concerns were being heard and that they were actually playing a part in the revolution. Second, the Party could employ mediation committees to mold and control the political thought of the masses. Viewing mediation as a tool with which to advance Communism, the Party encouraged settlements that promoted favored policies. Mediators no longer pressured disputants to settle for the good of the community, but instead pushed them to yield to "the interests of the revolution."³⁸ As Stanley Lubman states, "In each case, the disputants' personal grievances were transcended and

32. See, e.g., *Mediators Help Ensure Social Stability*, *supra* note 1 (states that mediation began "in the late 1920s as a spontaneous practice among the masses . . .").

33. *E.g.*, Ren, *supra* note 2, at 395.

34. COHEN, *supra* note 14, at 123.

35. Ross, *supra* note 15, at 31.

36. COHEN, *supra* note 14, at 123.

37. Cohen, *supra* note 24, at 1205.

38. Lubman, *supra* note 26, at 1344.

overwhelmed by a larger issue of political policy."³⁹

Reflecting this political emphasis, mediators were chosen not for their status within the community, but for their activism and ability to propagandize.⁴⁰ Many were Party members, affiliates, or cadres;⁴¹ those who were not were easily controlled by the Party, as they were often poorly educated and barely literate.⁴² As such, the mediators' authority extended largely from the prestige of the Party. Yet while individuals, especially those with "bad class origins," may have felt the system oppressive, it seems likely that the popularity of the Party in the years immediately following the revolution helped to make the mediators' decisions more bearable. This popularity was enhanced by settlements that rewarded the peasantry and punished their traditional landlords. Long victims of seemingly arbitrary government dictates, the lower classes for once became beneficiaries of administrative fiat.

As Lubman pointed out in his 1968 examination of post-liberation mediation, this emphasis upon political activism changed mediation's focus in significant ways.⁴³ For example, interclass compromise, the cornerstone of mediation in the Imperial era, was fundamentally incompatible with the Party's doctrine. For the Communist, conflict between social classes is not only desirable but also inevitable. Dialectical materialism dictates that history evolves only through oppression by, and eventual destruction of, the ownership classes.

In keeping with this theoretical structure, mediation in post-liberation China sought to exacerbate class divisions. Disputes were still resolved, but not through compromise. Instead, mediators frequently based their decisions upon the class background and political rectitude of the disputants. In that it favored disputants of a particular social standing, the Party's mediation system resembled that established under the emperors: both systems often based decisions on social status rather than on legal standards or notions of "justice." However, their purposes were markedly divergent. The Confucians sought to stabilize class structure, while the Communists sought to destroy it.

While acknowledging that mediation's practical application did not always reflect its underlying theory,⁴⁴ Lubman proposes further that post-liberation mediation served three functions besides

39. *Id.* at 1342.

40. *Id.* at 1327.

41. *Id.* at 1322-23.

42. *Id.*

43. *Id.* at 1287.

44. For instance, Lubman suggests that compromise would still be promoted if the disputants were of the same class background and no Party policy were at issue. *Id.* at 1351.

dispute resolution.⁴⁵ As discussed above, the most significant was mobilization through propagandist education. Lubman also argues that mediation served to suppress disputes.⁴⁶ Mediators often settled cases according to abstract government policies that were either seemingly inapplicable or beyond the comprehension of the disputants. Believing that the Party was sending a message to settle the dispute, the participants often would simply acquiesce. When others saw the result, they were more likely to settle arguments themselves without seeking mediation. Finally, Lubman states that mediation supplemented other means of control such as the police and the Party apparatus.⁴⁷

The Cultural Revolution (1966-76) was a disastrous period for all institutions in China, including mediation. All courts were shut down, as were many mediation committees.⁴⁸ Those that continued to operate became the sole method of resolving disputes in China. Moreover, disputants and mediators found themselves in the dangerous position of being criticized by the unruly and often violent mobs that controlled China's cities. Given Mao's propagandist use of mediation to exacerbate interclass conflict in the post-liberation period, it is ironic that some committees were accused by the Red Guards of being "tool[s] of class reconciliation."⁴⁹ Undoubtedly, fear of reprisal adversely affected the committees' work. Still worse, the reputation of the committees would suffer in the post-Cultural Revolution period, as they were accused of having excessively accommodated the militants.⁵⁰ While some of the committees thus struggled along, battered by both sides, mediation was not fully revived in the P.R.C. until 1978.⁵¹

II. THE USE OF MEDIATION IN THE P.R.C. TODAY

Mediation exists today in China in at least four forms. First, it is exercised informally by family members or friends,⁵² much as it is practiced throughout the world. Government officials also mediate disputes brought to their attention. As we shall see, courts are required by law to attempt mediation before allowing a trial to proceed. Yet the focus of this article is on the fourth and most

45. *Id.* at 1339.

46. *Id.* at 1346-48.

47. *Id.* at 1348.

48. Gao Aming, *China's Mediation System Unique*, CHINA DAILY, Oct. 10, 1989, at 4, col. 1, reprinted in *Mediation System Solves Legal Disputes*, F.B.I.S. DAILY REP.: CHINA, Oct. 16, 1989, at 27-28.

49. *Id.* at 28.

50. Ross, *supra* note 15, at 25.

51. Gao, *supra* note 48, at 28.

52. LAW IN THE PEOPLE'S REPUBLIC OF CHINA 87 (Ralph H. Folsom & John H. Minan eds., 1989).

pervasive form: non-judicial mediation as practiced by People's Mediation Committees.

Chinese law provides for the establishment of citizen committees at the village or neighborhood level.⁵³ At least theoretically autonomous from central government control, these Urban Neighborhood and Village Resident Committees are meant to provide a number of services, most involving social welfare.⁵⁴ Included in these powers is the capacity to establish People's Mediation Committees. Accordingly, over eighty-eight percent of the village committees and over ninety-two percent of the neighborhood committees have created at least one mediation committee.⁵⁵ In addition to the more than 820,000 of these committees, an additional 130,000 mediation committees exist in the workplace.⁵⁶ These mediation committees exist within government institutions and enterprises,⁵⁷ including factories, schools, and mines. The government aims eventually to have one mediator for each ten households in China, an ambitious target that already has been achieved in some regions.⁵⁸

According to the 1989 regulations, each mediation committee is to be comprised of three to nine members.⁵⁹ A large percentage of mediators are female.⁶⁰ In rural areas mediators tend to be middle-aged or elderly villagers, while housewives or retirees typically serve as mediators in the cities.⁶¹ Perhaps in reaction to this circumstance, a push is being made to recruit younger committee members. In one county it is reported that seventy-five percent of all mediators are under the age of forty-five.⁶² This effort is helped

53. The Organic Law on Urban Resident Committees in the People's Republic of China was promulgated in 1989, while its counterpart, the Village Committee Law, was promulgated on a trial basis in 1987.

54. See, e.g., Organic Law on Urban Resident Committees in the People's Republic of China, art. 3 (1989), reprinted in *Urban Neighbourhood Committees Law*, BBC Summary of World Broadcasts and Monitoring Reports, Jan. 22, 1990, available in LEXIS, Nexis Library, BBCSWB File.

55. Gao, *supra* note 48, at 28.

56. Liu Jinghui, *People's Mediation is a Legal System with Intensely Chinese Characteristics*, LIAOWANG OVERSEAS EDITION, Oct. 16, 1989, at 7, 7-8, microformed on *Role of People's Mediation Committees Discussed*, J.P.R.S. No. CAR-90-010, Feb. 7, 1990, at 68, 69.

57. *Id.*

58. *Id.* at 70-71.

59. 1989 Rules, art. 3, *supra* note 13, at 18. It appears that in the past some committees were considerably larger. For example, a 1987 article reported that Tianjin, a port city in Northern China, was served by 8,100 committees comprised of 150,000 members—an average of more than eighteen members per committee. *Tianjin Mediators Settle Civil Disputes*, Xinhua News Agency, Feb. 3, 1987, available in LEXIS, Nexis Library, Xinhua File.

60. LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 52, at 85.

61. Gao, *supra* note 48, at 27.

62. Palmer, *supra* note 9, at 268.

by the fact that increasingly mediators are being paid for their work,⁶³ and are allowed to serve full time or to take a temporary leave of absence from work.⁶⁴ While it is unclear why people choose to become mediators, at least one commentator has suggested that volunteers primarily seek to enhance their social status.⁶⁵

When mediating, committee members must accommodate a variety of interests. First and foremost stands the Party. Although the Party's intrusiveness and corresponding efforts to politicize the committees' work have lessened, the numerous Party members and cadres who continue to serve on the committees⁶⁶ ensure that the Party's interests are served. Second, all settlements must conform to legal standards.⁶⁷ Lawyers increasingly represent disputants in mediation,⁶⁸ and mediators handling contract disputes are expected to look to contractual provisions in guiding settlement.⁶⁹ Beyond these considerations, broad policies such as the Four Modernizations⁷⁰ seem to influence the mediators' decisions greatly.⁷¹ Yet if a particular dispute falls outside prescribed legal norms and the Party asserts no particular interest in the outcome, mediators tend to rely upon general notions of justice.⁷² In this light, yielding and compromise are once again favored tactics.⁷³

Disputes cover a wide array of topics. Over half (3.78 million) of the cases handled in 1984 related to the support of children or the

63. Gao, *supra* note 48, at 27.

64. Palmer, *supra* note 9, at 268. Zhang Donghua exemplifies the typical Chinese mediator. Zhang, who was profiled in *BEIJING REVIEW* after having been named one of China's top mediators, is fifty-eight years old and has resolved disputes for many years. She claims to have reconciled thirty-four married couples, and to have successfully mediated forty-two family quarrels and three dozen disputes among neighbors. Yang Xiaobing, *Mediation: A Defence Line Against Crime*, *BEIJING REV.*, Oct. 24-30, 1988, at 28.

65. Richard Abel, *Mediation in Pre-Capitalist Societies*, in 3 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 175, 179 (1983).

66. Palmer, *supra* note 9, at 268.

67. See 1989 Rules, art. 10, *supra* note 13, at 19.

68. Palmer, *supra* note 9, at 268.

69. Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 *STAN. L. REV.* 303, 330 (1986).

70. The term refers to the economic reform program introduced by Zhou Enlai that has become the cornerstone of the Deng government. The modernizations are science, agriculture, industry, and national defense.

71. See, e.g., *EAST CHINA INST. OF POLITICS AND LAW, The Procedure of Mediation*, in *LAW IN THE PEOPLE'S REPUBLIC OF CHINA*, *supra* note 52, at 114, 118 (mediation between two quarrelling families was successful when the parties realized that their argument distracted them from the "primary task," which included promoting the Four Modernizations).

72. See, e.g., Palmer, *supra* note 9, at 224 (mediators convinced a department store to refund a radio purchase. The purchase had caused a marital dispute that "adversely affect[ed] both [the] work and [the] mutual love" of the feuding spouses).

73. *Id.* at 261.

elderly.⁷⁴ Additionally, while the 1989 regulations appear to restrict mediators from handling criminal cases, it is clear that mediators often intervene in situations which potentially could escalate into crimes. A typical example occurred in the Guangxi Zhuang region, when a woman threatened to drown herself because of a dispute with her father-in-law. Her husband reacted by dousing their home with gasoline and locking himself and his father inside. Mediators managed to convince the man not to set the house on fire, and eventually patched up relations between the three.⁷⁵ In this vein, China's official press reports that mediators helped to prevent 680,000 suicides and homicides in the period from 1982 to 1988.⁷⁶ The government believes that suicide and homicide rates would be trebled without the contribution of mediators.⁷⁷

Michael Palmer has written the most comprehensive study of mediation in the post-Cultural Revolution era.⁷⁸ Through his observations it is possible to see how much mediation has changed since the post-liberation period examined by Lubman. Palmer portrays a system that has matured over time. Since the practice of categorizing citizens by class background was downplayed in 1979,⁷⁹ family background now is less critical to a disputant's chances of receiving a fair settlement.⁸⁰ More significantly, now that the upper classes have been "destroyed," there is no longer a theoretical need to demand struggle.⁸¹ What results is a system that relies more on compromise than antagonism.⁸² While there is great danger in sketching conclusive connections between contemporary and pre-revolutionary China (or as Lubman puts it, in assuming

74. *Ministry Explains Communities' Role in Mediating Civil Disputes*, Xinhua News Agency, Aug. 17, 1985, available in LEXIS, Nexis Library, Xinhua File. In 1989, Vice Minister of Justice Lu Jian reported the following distribution of cases: seventeen percent marital, fifteen percent family, thirteen percent housing, twelve percent between neighbors, and ten percent business and production. Liu, *supra* note 56, at 69.

75. *China's Mediation System Unique*, Xinhua News Agency, Oct. 10, 1989, available in LEXIS, Nexis Library, Xinhua File.

76. *Id.*

77. Yang, *supra* note 64, at 28.

78. Palmer, *supra* note 9, at 219.

79. *Id.* at 228.

80. However, to some degree the influence of one's family status persists. Both neighbors and government officials are quite aware of the each family's assigned class background. Further, all Chinese nationals are required to carry identification cards listing their class status. These classifications often derive from the occupations of family members prior to liberation and thus often relate minimally to the individual's current social position. Hence the daughter of a high government official might be classified as a peasant without ever having resided in the countryside. The government remains conscious of class background, but is unwilling to make decisions based on class in light of the new focus on economic reform and codified law. The Chinese are acutely aware that they are free from their family's history only until the government decides to emphasize political struggle once again.

81. Palmer, *supra* note 9, at 228.

82. *Id.* at 261.

that "if you scratch a Communist, you will find a Confucian"),⁸³ it seems true that mediators pressure parties to compromise for the communal good in a way that would seem familiar to a fifteenth century intermediary but make a Maoist very nervous. Certainly a Maoist mediator might be troubled by the Minister of Justice's 1988 statement that mediation "helps stop alienation among individuals, supports the traditions of friendship and living in harmony, and establishes a new style of people-to-people relationships."⁸⁴

Mediation has become less a way to mobilize the masses than a legitimate vehicle for resolving problems.⁸⁵ Accordingly, the ideal mediator has changed from the activist of the 1950s to "something akin to a professional dispute-settler."⁸⁶ Yet while disputes have become less politicized, the influence of Party dogma is still reflected in mediation decisions. For example, when a father refused to accept his daughter's marriage against his wishes, the mediation committee concluded that fault lay in the father's "feudal ideas," and attempted to educate him on marriage law.⁸⁷ However, even when encouraging settlements for policy reasons, mediators appear to make more of an effort to explain how the decision benefits the disputants.⁸⁸ A similar endeavor has been made to ensure that disputes are resolved rather than merely suppressed.⁸⁹

83. Lubman, *supra* note 26, at 1288.

84. *Wang Fang Urges More Civil Dispute Mediation* (Xinhua General Overseas News Service broadcast, July 12, 1988), available in F.B.I.S. DAILY REP.: CHINA, July 13, 1988, at 27.

85. Palmer, *supra* note 9, at 227-28.

86. *Id.* at 227. These conclusions are reflected in recent press accounts of presumably model mediation sessions. For example, a mediation committee in the province of Hebei was praised for ensuring that a widow received all that "she [was] legally entitled to" when her in-laws forced her from her home for financial reasons. *Council Mediation Successful in Hebei*, Xinhua News Agency, Sept. 21, 1988, available in LEXIS, Nexis Library, Xinhua File. In another dispute involving a woman and her father-in-law, a bloody fight between the families almost erupted when the woman's brother-in-law beat her severely for daring to argue with the older man. East China Inst. of Politics and Law, *supra* note 71, at 115-16. The mediators prevented violence by encouraging the father-in-law to apologize, even advising him on how to do so without losing face.

87. EAST CHINA INST. OF POLITICS AND LAW, *supra* note 71, at 116.

88. *See, e.g., id.* at 118 (while basing settlement on importance of unity and, implicitly, the Four Modernizations program, mediators gave examples of how quarreling between families had given rise to criminal charges in the past).

89. *See, e.g., id.* (mediators criticized for being "afraid of being in a tangle . . . the mediators were just trying to smooth things over without discerning between right and wrong"). Owen Fiss, a well known critic of mediation in the United States, argues that "settlements often produce peace but leave justice undone." Owen Fiss, *Justice Chicago Style*, U. CHI. LEGAL F. 1, 2 (1987). Fiss argues that judges and lawyers protect the interests of the weaker party in a dispute, and that their absence in mediation thus allows the stronger party to exploit his foe. While compromise is reached, the dominant party substantially dictates the terms. Certainly a similar case can be made regarding mediation in China; weaker disputants are often forced to take what they can get, regardless of their legal rights.

It is difficult to determine the level of popular support for the mediation committees. The official press suggests that the committees enjoy considerable support,⁹⁰ and Ren Jianxin, the current president of the Supreme People's Court, has written that they are "well received by the masses."⁹¹ Certainly it is arguable that given the expense and acrimony that litigation entails, most Chinese would prefer to have their disputes settled on a less formal basis, governed by mediators who are known and presumably trusted. In this light, it is significant that most mediators at the neighborhood and village level are elected by common citizens. Citizens who are unwilling to use the local committees may ask the township legal service stations⁹² to mediate. However, research in the province of Shandong suggests that the effectiveness and prestige of the appointed legal service mediators suffer because they have not been elected to their positions.⁹³

Despite their elective legitimacy, village mediators often are seen as nosy busybodies snooping in other people's business. Just as the housewives who have been empowered by the government to "persuade" married couples to abide by the nation's "one child one family" policy have encountered criticism,⁹⁴ mediation committee members visiting private homes have faced opposition. Liu Fenglin, a mediator in Beijing, admits that mediators called upon to break up quarreling are sometimes cursed and accused of meddling.⁹⁵

One convincing indication of the popularity of a dispute resolution technique is the degree to which participants believe decisions are collectively reached rather than imposed. Under this standard, mediation in China has a questionable legacy. In the past, Chinese mediators demonstrated a marked activism and willingness to pressure parties to compromise. In this light, A.H. Smith described mediation in traditional China as "a great deal of head knocking."⁹⁶ Similarly, with regard to post-liberation China Lubman wrote that "disputes often lead to sessions of exhortation and embarrassing public criticism in disputants' homes and places of work. It is not

90. Gao, *supra* note 48, at 27-28.

91. Ren, *supra* note 2, at 395.

92. As part of the effort to bring legal reforms to the countryside, such stations have been set up throughout rural China. The stations are staffed with at least one individual who has received legal training.

93. Ross, *supra* note 15, at 32.

94. See, e.g., Ann Scott Tyson, *Chinese Charged "Zealous" Officials with Abuses in Enforcing Birth Plan*, CHRISTIAN SCI. MONITOR, Oct. 31, 1990, at 5, col. 1 (Chinese government considering more moderate birth control policies after admitting that some workers have been too aggressive in encouraging abortions).

95. Ron Redmond, *Divorces Don't Come Easy in China*, UPI, Oct. 2, 1984, available in LEXIS, Nexis Library, UPI File.

96. ARTHUR H. SMITH, VILLAGE LIFE IN CHINA 302 (1899).

surprising, therefore, that some people try to avoid mediation by activists and cadres."⁹⁷

While modern mediation techniques have lost much of their patriotic fervor since the 1950s, local mediators remain persistent, intrusive and not above a little "head knocking." Mediators have been known to visit a bickering family more than two dozen times,⁹⁸ and to stay on a single case for eight months.⁹⁹ It is very common for mediators to involve the parties' work units,¹⁰⁰ and to inform the police in serious cases.¹⁰¹

Marital disputes are particularly susceptible to pressure tactics.¹⁰² As one mediator bluntly put it, "we believe people should stay married."¹⁰³ In a 1984 case involving a woman who deserted her husband and small child for another man, the mediation committee placed the child in a nursery and "invited" the couple to attend study sessions on "The Five Principles for a Good Family." Further, when the wife's lover refused to end the affair, the committee arranged for his transfer to another district.¹⁰⁴ Observers have noted this activism of mediators in marital cases. After studying a report of a large industrial operation with 55,000 workers and forty-eight mediation committees, Michael Palmer concluded that "unhappy couples are unlikely to be able for long to escape the attention and sanctions of the vigilant control apparatus of mediation."¹⁰⁵

Use of coercive tactics is not the only criticism leveled at the mediation system. Many of the proponents of the current push toward legalism are leery of mediation's populist nature. These critics deride mediation as an institution staffed by old women handling irrelevant disputes.¹⁰⁶ Furthermore, mediation detractors feel that mediators excessively stresses compromise to the detriment of legal standards.¹⁰⁷ Criticisms in the Chinese press indicate that local mediators sometimes rely upon dubious sources of authority. For instance, a 1986 article urged mediators to avoid threatening disputants with "administrative powers, feudal superstitious customs and

97. Lubman, *supra* note 26, at 1346.

98. R.V. Denenberg, *Keeping the Peace on Dong Jiadu Street*, 10 STUDENT LAW. 16, 33 (1981).

99. Christopher S. Wren, *Hot Tempers? Chinese Say, "Don't Sue, Mediate"*, N.Y. TIMES, Apr. 12, 1984, at A2, col. 3.

100. Denenburg, *supra* note 98, at 32.

101. Yang, *supra* note 64, at 28.

102. Palmer, *supra* note 9, at 258.

103. Denenberg, *supra* note 98, at 32.

104. Redmond, *supra* note 95.

105. Palmer, *supra* note 9, at 258.

106. *Id.* at 240.

107. *Id.* at 238.

seniority."¹⁰⁸

Yet detractors of the mediation system cannot deny that millions of Chinese voluntarily submit to mediation each year,¹⁰⁹ or that mediation remains the favored means of dispute resolution in China.¹¹⁰ Similarly, critics cannot dispute mediation's success rate. While some statistics published in the official press appear exaggerated,¹¹¹ outside studies support the contention that mediation significantly decreases the number of disputes that would otherwise be litigated.¹¹²

According to an analysis of the enormous Second Machinery Plant Factory located in Baotou City in Inner Mongolia, the factory's forty-eight committees mediated 521 disputes in 1984. Of these, 464 were deemed successfully concluded, a success rate of eighty-nine percent.¹¹³ In particular, the analyst noted that "the ability of mediators to achieve reconciliation of the partners of unhappy marriages is remarkable";¹¹⁴ one mediator resolved twenty-two of twenty-four such disputes.¹¹⁵ More generally, the legal system claims a success rate in marital disputes of eighty percent,¹¹⁶ although one mediator's admission of a success rate in her district of approximately one-third challenges the higher figure.¹¹⁷

Despite mediation's enviable success rate, Liu estimates that there are one million cases each year in which mediation fails or a party later breaches the agreement.¹¹⁸ In these cases the parties either call upon local government officials to mediate¹¹⁹ or resort to litigation. However, commencing a lawsuit does not terminate the mediation process. The Civil Procedure Law of 1982 mandates judicial mediation. The law provides that judges must attempt mediation before proceeding with a trial, and that any signed agreement

108. *Mediation Work*, *supra* note 31.

109. Yet it is also possible to argue that disputants do not voluntarily choose to mediate, given the lack of alternatives and the pressure applied by mediation committees and courts. As one article concludes, "the voluntariness of this decision may be rather illusory." David Zweig et al., *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L LAW 319, 336 (1987).

110. Ross, *supra* note 15, at 51.

111. For example, one press account claimed that civil disputes in Shanghai dropped eighty percent in one year due to the efficacy of mediation. *Mediation in Shanghai*, Xinhua News Agency, Apr. 1, 1985, available in LEXIS, Nexis Library, Xinhua File.

112. The government has claimed that 70,000 more civil cases would have been filed and 100,000 more deaths would have occurred in 1987 without the mediation system. *Mediation Solves Problems*, Xinhua News Agency, Jan. 13, 1988, available in LEXIS, Nexis Library, Xinhua File.

113. Palmer, *supra* note 9, at 257.

114. *Id.* at 250.

115. *Id.*

116. Redmond, *supra* note 95.

117. *Id.*

118. Liu, *supra* note 56, at 68.

119. *Id.*

resulting from court-ordered mediation is binding both upon parties and the court.¹²⁰

Demonstrating the impact of this law, Ren reported that 61.5 percent of all civil and economic suits¹²¹ filed in 1986 were resolved through judicial mediation.¹²² While an extensive exploration of judicial mediation lies beyond the scope of this article,¹²³ it is clear that disputants cannot avoid mediation through litigation. A court can repeatedly order mediation at each step of a suit, including on the second appeal.¹²⁴ In this light, a decision to litigate likely reflects a party's strategic preference for judicial rather than committee mediation.

The great changes that have occurred in mediation since the demise of the Cultural Revolution reflect the general rebirth of all legal institutions in China. For instance, the 1978 reopening of Peking University's law school after twenty-two years signaled the government's intention to strengthen the role of law in the country. The reforms in 1979 were in essence the first substantial codification of law in the P.R.C.'s history.¹²⁵ Considering that economic reform was of paramount concern to the new leadership, it is not surprising that contract law received particular emphasis.¹²⁶

Although the government has made impressive strides in codifying and publishing law, it has struggled to train legal professionals in numbers sufficient to meet the needs of China's enormous population. In a country of well over a billion people, there are only 50,000 lawyers.¹²⁷ The impact of this shortcoming is enormous; guaranteeing the theoretical right to sue lacks significance without judges or lawyers to try the suit. Similarly, while litigation is slowly becoming more accessible and less expensive,¹²⁸ other significant hurdles impede China's efforts to establish an effective legal sys-

120. PETER P.F. CHAN, *PEOPLE'S REPUBLIC OF CHINA: MODERNIZATION AND LEGAL DEVELOPMENT* 97-101 (1985).

121. Following the Communist model, China distinguishes between civil and economic law. Civil law concerns agreements between individuals, while economic law governs disputes involving the state or a state-owned entity.

122. Ren, *supra* note 2, at 396.

123. Perhaps the most complete recent examination of judicial mediation in China is Michael Palmer's companion article to his study of extrajudicial mediation. Michael Palmer, *The Revival of Mediation in the People's Republic of China: (2) Judicial Mediation*, in *YEARBOOK ON SOCIALIST LEGAL SYSTEMS* 145 (W.E. Butler ed., 1989).

124. EAST CHINA INST. OF POLITICS AND LAW, *supra* note 71, at 121.

125. Zweig et al., *supra* note 109, at 324.

126. *Id.* at 327.

127. If official statistics can be relied upon, the number of lawyers appears to be growing quickly. The National Bar Association of China reported that there were 50,000 attorneys at the end of 1990, a more than one hundred percent increase since 1988 and a ten-fold increase in nine years. *Legal Protection Demanded*, Business Law Brief, Nov. 1990, available in LEXIS, Nexis Library, BLB File.

128. Ross, *supra* note 15, at 63.

tem,¹²⁹ including a general mistrust of laws and lawyers.¹³⁰ Nonetheless, the government seems genuinely committed to its goal of legal modernization and reform.

III. THE NEW MEDIATION REGULATIONS

Codified regulations governing the work of the People's Mediation Committees were first promulgated in 1954. Typical of the cautious manner in which laws were introduced during the post-liberation period, the 1954 regulations are entitled "Provisional Organic Rules for People's Mediation Committees."¹³¹ Comprised of eleven articles, these regulations briefly state the purposes and basic organization of the local mediation committees. Evidently no attempt was ever made either to amend them or to give them a more permanent status. In fact, the 1954 regulations seemed to have simply disappeared during the Cultural Revolution together with many other laws, and were not republished until 1980.¹³² At that time, a call was made for the promulgation of new mediation regulations.¹³³ That process likely was begun by 1982.¹³⁴

Although the cause for the seven-year delay in the completion of the 1989 mediation regulations is uncertain, a series of initiatives passed between 1982 and 1989 provides the basic legal framework for contemporary mediation. For example, the 1982 constitution was the first to mandate the creation of mediation committees.¹³⁵ Moreover, the civil procedure code published in the same year empowered courts to overturn mediation committees' rulings that "vi-

129. Among the obstacles confronting China's goal of achieving a fully developed legal system are bureaucratic inertia, a lack of quality legal education programs, and the public perception that the new emphasis on legal matters is merely another of the government's ever-changing campaigns. Henry Pitney, *The Role of Legal Practitioners in the People's Republic of China*, 24 STAN. J. INT'L L. 323, 387 (1987).

130. The National Bar Association of China met in October 1990 to discuss ways to deal with those "who incorrectly evaluate the status and role of lawyers, discriminate against them and interfere in their lawful work." The problem is particularly acute for criminal lawyers. The Chinese seem not to have fully accepted the notion that a defendant is entitled to an effective defense by his attorney. In one case, lawyers assigned to defend the chairman of a chemical company were denounced by a legal journal for "having little basic knowledge of the law, distorting the facts and using lame arguments to call for redress for a criminal after an anti-corruption campaign had been declared by the Party's Central Committee." *Legal Protection Demanded*, Business Law Brief, Nov. 1990, available in LEXIS, Nexis Library, BLB File.

131. 1954 Rules, *supra* note 14, at 124.

132. *Rules for Urban Offices and Committees Republished*, BBC Summary of World Broadcasts and Monitoring Reports, Jan. 19, 1980, available in LEXIS, Nexis Library, BBCSWB File.

133. *Id.*

134. CHAN, *supra* note 120, at 95.

135. XIANFA [CONSTITUTION] art. 111 (1982) (P.R.C.), available in LEXIS, Intlaw Library, ChinaL File.

olate[] the law.”¹³⁶

The 1989 regulations, formally entitled “Organic Rules for People’s Mediation Committees,” are contextually modeled after the 1954 rules. Seventeen articles long, the 1989 regulations expand the role of mediation role, yet leave many procedural questions unanswered. Although the government frequently supplements major legislation with subsequent implementation guidelines,¹³⁷ the lack of procedural specificity in the 1989 rules may be intended to promote the flexibility essential to successful mediation.¹³⁸

Certainly by American standards, the regulations are very brief. The first two articles mirror the 1954 rules by setting out the purpose and description of the mediation committees. An article-by-article comparison becomes impossible after that point, however, as the two regulations diverge greatly in organization. Yet both versions address common themes: the composition and selection of the committees,¹³⁹ the requisite qualities and duties of the mediators,¹⁴⁰ the goals of mediation,¹⁴¹ authorities to which committees should refer in guiding settlements,¹⁴² the committees’ relationships with other bodies,¹⁴³ and specific prohibitions¹⁴⁴ restricting the mediators’ work. The impact of the 1989 regulations becomes apparent in comparing these common areas of emphasis.

The major themes of the new regulations are the preeminence of law and the resulting need for accountability to the law. The regulations clearly establish that mediators must observe legal standards in order to help create a stable society conducive to successful economic reform. In return for adherence to the law, the 1989 regulations endow the mediation committees with increased power and respect.

In comparing the article 1 purposes of the 1989 and 1954 regulations, one notes both a revealing addition and a significant omis-

136. CHAN, *supra* note 120, at 97.

137. Vice Minister Lu suggested that the first set of regulations to follow promulgation would concern the duties of the judicial assistants. Liu, *supra* note 56, at 70.

138. The absence of procedural provisions might also reflect the limited progress made in legal codification since the 1950s, or the government’s desire to keep the legal process open to manipulation.

139. See 1989 Rules, arts. 3, 15, *supra* note 13, at 18-19; 1954 Rules, arts. 4-5, *supra* note 14, at 124.

140. See 1989 Rules, arts. 4, 7-8, *supra* note 13, at 19; 1954 Rules, art. 8, *supra* note 14, at 125.

141. See 1989 Rules, art. 1, *supra* note 13, at 18; 1954 Rules, arts. 1, 3, *supra* note 14, at 124.

142. See 1989 Rules, arts. 2, 7, *supra* note 13, at 18-19; 1954 Rules, arts. 2, 6, *supra* note 14, at 124-25.

143. See 1989 Rules, arts. 9-10, 13-14, 16, *supra* note 13, at 19; 1954 Rules, arts. 9-10, *supra* note 14, at 125.

144. See 1989 Rules, arts. 11-12, *supra* note 13, at 19; 1954 Rules, arts. 7, 9, *supra* note 14, at 124-25.

sion. While the 1989 regulations still seek to foster dispute resolution, unity among the people, and production modernization, the new regulations additionally aim to "maintain social stability."¹⁴⁵ This emphasis on control has replaced the 1954 mandate of "strengthening the people's education in patriotic observance of the law."¹⁴⁶ This change signals the government's intention that mediation assist more in maintaining social control than in broadcasting Party propaganda. Similarly, although article 5 (in specifying the intended tasks of mediation) expounds the need to "publiciz[e] laws, decrees, regulations, rules and policies," the article follows with a demand that mediators "teach citizens to abide by the laws and discipline and to observe social ethics."¹⁴⁷ Political activism, then, is encouraged only to the extent that it enhances social order.

The 1989 regulations further reflect this theme of control over activism in specifying the qualities a mediator must possess. Although the mediator's objectivity, interest in mediation, and link with the masses remain important, he no longer must possess a "political appearance [which] is clear."¹⁴⁸ This standard was replaced with the requirement that a mediator have "some legal knowledge, and understand the policies quite well."¹⁴⁹ While it would be naive to expect that an individual with an questionable political background could become a mediator under the new rules, within an acceptable range the government appears less concerned with a mediator's ideology than with his ability to understand and apply legal standards.

A similar change can be seen in the election of the committee members. Under the 1954 rules, mediators were elected indirectly by the local government.¹⁵⁰ Now mediators are to be directly elected, with the exception of some elected members of the village and neighborhood committees who are appointed to serve concurrently as mediators.¹⁵¹ Because mediators are often poorly paid, "elections" in many cases are often requests by the village and neighborhood committees for an effective mediator to stay on.¹⁵² Yet by symbolically removing the selection process from the Party-dominated local government, the 1989 regulations free mediators still further from activist obligations.

Other changes in the 1989 rules are slight, yet also signal the government's intention that mediation become more professional.

145. 1989 Rules, art. 1, *supra* note 13, at 18.

146. 1954 Rules, art. 1, *supra* note 14, at 124.

147. 1989 Rules, art. 5, *supra* note 13, at 19.

148. 1954 Rules, art. 5, *supra* note 14, at 124.

149. 1989 Rules, art. 4, *supra* note 13, at 19.

150. See 1954 Rules, art. 5, *supra* note 14, at 124.

151. See 1989 Rules, art. 3, *supra* note 13, at 18.

152. Palmer, *supra* note 9, at 249.

For instance, the mediator's term of office has lengthened from one to three years.¹⁵³ Further, while under the old rules only the body choosing a mediator could remove him for dereliction of duty,¹⁵⁴ the mediation committee itself now has this power.¹⁵⁵ The village or neighborhood committee which established a mediation committee must provide necessary operational funding,¹⁵⁶ possibly including mediators' wages.¹⁵⁷ Additionally, no constraints remain governing the time when mediators may work. Under the old rules, mediation could take place only "during periods of production leisure."¹⁵⁸

The 1989 regulations also enhance the mediators' professionalism by removing a power. The 1954 rules expressly empowered mediation committees to settle disputes involving minor criminal acts.¹⁵⁹ Conversely, the 1989 rules withdraw this authority from the committees. This modification appears wise, as mediation seems an improper instrument to assign criminal liability and dole out punishments.

Furthermore, in perhaps the most significant procedural change, the 1989 regulations create a link between mediation committees and local government bodies. During the 1980s the central government attempted to provide all localities with at least one legally-trained official. These judicial assistants, numbering 50,000 by 1988, are assigned the dual roles of providing day-to-day guidance to the People's Mediation Committees¹⁶⁰ while also mediating disputes brought to the local government, either initially or after previous mediation has failed.¹⁶¹ The judicial assistants especially have aided the mediation committees by providing legal training. While Palmer notes that the training programs are "in many respects superficial,"¹⁶² nonetheless the programs reinforce the notion that settlements must be based in law. Demonstrating the growing influence of the judicial assistants, Liu reports that 71.8 percent of the nation's 6.37 million mediators have received at least some legal training.¹⁶³

153. 1989 Rules, art. 3, *supra* note 13, at 18.

154. *See* 1954 Rules, art. 5, *supra* note 14, at 124.

155. 1989 Rules, art. 3, *supra* note 13, at 18.

156. *See id.* art. 14 at 19.

157. *See id.*

158. 1954 Rules, art. 8, *supra* note 14, at 125.

159. *See id.* art. 3 at 124.

160. *See* 1989 Rules, art. 2, *supra* note 13, at 18.

161. Yang, *supra* note 64, at 28.

162. Palmer, *supra* note 9, at 269.

163. Liu, *supra* note 56, at 68. No information is provided, however, concerning the quality of that training. Given the current strain on China's capacity to train lawyers, judges and judicial assistants, it seems likely that the training given to most mediators is cursory.

The 1989 rules provide that mediators must predicate their work on "the basis of laws, decrees, regulations, rules and policies."¹⁶⁴ This requirement resembles the 1954 regulations, but article 6 of the 1989 rules goes on to provide that if no "explicit provisions are stipulated," the mediators are to apply "social ethics."¹⁶⁵ Although this phrase is not defined, Vice Minister Lu's comments that accompanied the publication of the 1989 rules imply that "social ethics" is intended to mean something very different than Maoist revolutionary ideology. Lu declared that mediation has been instrumental "in improving public morality and civilized ideas."¹⁶⁶ Furthermore, he cited statistics showing how many villages, neighborhoods and factories had been "civilized" with the help of mediation.¹⁶⁷

In addition, the 1989 regulations incorporate the mediation restrictions established by the 1954 rules. For example, mediation committees are barred from showing favoritism or accepting gifts from disputants.¹⁶⁸ More importantly, committees must avoid coercion; mediators are to apply only "reason and patient persuasion" in encouraging settlement.¹⁶⁹ Additionally, parties may litigate at any point, even if they agree to a settlement but later regret its terms.¹⁷⁰ Mediators are prohibited from pressuring disputants to settle and from employing threats, insults or punishments.¹⁷¹ Moreover, mediators may not disclose private information about the parties.¹⁷²

Yet the distinction between persuasion and coercion is obscured by allowing committees to attempt mediation even absent a demand by a party for intervention.¹⁷³ The 1989 regulations also allow "relevant units and individuals" to participate in mediation.¹⁷⁴ To the extent that disputants' work units, family members, and friends are thus able to involve themselves in the process, this provision may encourage settlements that are less than voluntary.

Furthermore, the 1989 rules give more clout to mediated settlements. Although mediated agreements are non-binding on a dis-

164. 1989 Rules, art. 6, *supra* note 13, at 19.

165. *Id.*

166. Liu, *supra* note 56, at 70.

167. However, it is possible to argue that Lu's use of the term "civilization" refers to the Maoist theory of "socialist spiritual civilization," implying a more activist connotation.

168. 1989 Rules, art. 12, *supra* note 13, at 19.

169. *Id.* art. 8.

170. *See* art. 9.

171. *See id.* art. 12.

172. *Id.* However, the efficacy of this provision is made uncertain by article 5, which requires mediators to keep neighborhood and village committees informed about all disputes. *See id.* art. 5.

173. *See id.* art. 7.

174. *Id.*

satisfied party, local governmental bodies must fully support mediated settlements grounded in law.¹⁷⁵ The new rules also go much further in encouraging written settlement records.¹⁷⁶ For instance, parties may request that an agreement be drawn up and signed.¹⁷⁷

Moreover, the 1989 regulations appear to recognize better that parties will accept mediated settlements as fair only when convinced of the mediators' neutrality. Thus the new rules dictate that when disputants are from different localities, mediation must be performed jointly by committee members from each locality.¹⁷⁸ Similarly, continuing a post-Cultural Revolution stress on protecting ethnic minorities, the regulations demand that committees in areas of high ethnic minority concentration have minority members.¹⁷⁹

Finally, the new rules promote mediation committees in the workplace. The 1954 rules provided only for residential mediation committees, and Lubman found that the émigrés he interviewed in the mid-1960s had little knowledge of mediation committees centered in factories.¹⁸⁰ Yet expanding the scope of mediation to include the workplace seems to have been a goal from the beginning of mediation's post-Cultural Revolution rebirth. By 1981, 70,000 mediation committees existed in the nation's factories, mines and businesses,¹⁸¹ a number which had almost doubled by the end of 1989.¹⁸² The 1989 regulations are expressly applicable to these workplace mediation committees.¹⁸³

IV. THE FUNCTION OF MEDIATION IN CHINA TODAY

Before further analyzing the 1989 rules, two points should be noted. First, the regulations are best understood as a compilation of those policies that were practiced informally throughout the 1980s. Similarly, the 1989 rules prohibit activities that the government has previously discouraged. Thus the importance of the new regulations lies not in the establishment of new policies mandating abrupt change in the practice of mediation, but rather in the government's affirmation that the significant changes that have transformed mediation since the Cultural Revolution should be continued and nurtured.

175. *See id.* art. 10.

176. *See id.* art. 8.

177. *Id.*

178. *Id.* art. 7.

179. *See id.* art. 3 at 18.

180. Lubman, *supra* note 26, at 1330.

181. *See* Zhou Zheng, *China's System of Community Mediation*, *BEIJING REVIEW*, Nov. 23, 1981, at 23, 24.

182. Liu, *supra* note 56, at 69.

183. 1989 Rules, art. 15, *supra* note 13, at 19.

Second, it seems prudent to urge caution in evaluating the role of codified law in the P.R.C. Given the scarcity of exposure to the inner workings of the Chinese legal system, especially in areas that do not directly affect international business, foreign writers tend to place undue emphasis on China's written law. This focus is particularly misguided given that China's paramount leader, Deng Xiaoping, has no constitutional basis for his position of power. Rather than closely referring to written laws as sources of legitimacy, often the government codifies law in order to lend new direction to a program or to reaffirm existing policies. As the tragic events of 1989 prove, codified law remains firmly subordinate to the perceived needs of the Party. Therefore, the enforcement and interpretation of written law depends largely upon the will of the Party.

Because the new regulations reaffirm practices that have been widely reported in the Chinese press and to a lesser extent studied by outside observers, it is possible to draw tentative conclusions regarding both the effect and meaning of the 1989 rules. A more definitive interpretation, however, awaits further field study to determine the true impact of the rules upon the actual work of the committees.

We have seen that mediation has served different functions in various stages of Chinese history. In Imperial China, mediation's role was primarily to stabilize society. For Mao, especially when the disputants were of the same social class, mediation was a valued tool to achieve political mobilization. As seen against this tradition, the newly promulgated rules confirm that today's Party leadership values mediation most prominently as a method of maintaining social order. Thus, ensuring social stability has once again become mediation's primary function.

Nevertheless, in making this assessment it is possible to understate the role that the government has assigned mediation in effecting change. Those who regard a capitalist society based on written law as the normative model are quick to find a propagandist flavor in Chinese mediation decisions, which are often couched in revolutionary vocabulary. For example, when a mediator expressly grounds his decision in the "bad class origin" of an individual "clinging to a feudal ideology," one may perceive that the Party has assigned a political role to mediation.

Yet in drawing such conclusions one misses the propagandist impact of the Party's decision that mediation is to be based on codified law and "social ethics." Mediation settlements grounded in "contractual obligations" and "fairness" play as large a role in communicating current Party values to the masses as did the 1950s' decisions emphasizing class struggle.¹⁸⁴ The critical changes that

184. See, e.g., Zweig et al., *supra* note 109, at 346 (recounting incident in which

have occurred in the last dozen years, as the Party replaced the anarchy of the Cultural Revolution with a limited market-based economy, were possible only through an enormous degree of mobilization. As before, mediation continues to serve as an important means by which the Party educates the public about policy initiatives.

Ironically, through such changes the Party has sought essentially to mobilize the masses toward stability. Without going so far as to sacrifice its own paramount position, the Party has attempted to convince the population that social order is to be based on written laws. When these laws are broken, redress is available. Although the familiar equation of stability with written law may merely reflect cultural bias, clearly the Party leadership has made this same assumption. Thus until the government once again follows a more "revolutionary" course, it is something of a semantic squabble to ask whether mediation is used to mobilize or stabilize. The desired result remains the same: the creation of an institution that promotes social stability as the country moves toward gradual economic reform.

Mediation is ideally suited to this task of maintaining order.¹⁸⁵ Whether conflicts are actually resolved or, as critics argue, merely suppressed, mediation serves as a low cost, low risk safety valve. While disputants might not always agree that justice was reached through mutual compromise, mediation does afford parties an opportunity to air their grievances. Consequently, citizens are likely to perceive government authority as more responsive and participatory.

Additionally, as compared to the costs of litigation or even arbitration, mediation is an inexpensive means of social control.¹⁸⁶ Due to scarce resources, a country struggling to modernize cannot easily spend funds to educate lawyers and build courtrooms when money is desperately needed to train scientists, engineers, and businesspeople, and to rebuild the economic infrastructure. Dozens, if not hundreds, of mediators can be trained at the cost of training one judge; furthermore, these mediators can be expected to dispense jus-

mediator tutored countryside residents in the Party's rural policies and in economic contract law). Thus the study of contract law can provide propaganda opportunities. Although concluding that the Party's interests overshadow the independent force of law in influencing contract litigation, Zweig et al. observe that, to the extent that law and contractual rights receive continued favor, these forces may gain a legitimacy independent of the Party. *Id.* at 362.

185. In saying that mediation is used to maintain "order" and "control," I do not intend a pejorative meaning for these terms. Although one can well imagine how mediation might be used for sinister means in China, a nation under increasing scrutiny for its human rights violations, I refer instead to the order that every government must instill to preserve economic stability and ensure its own existence.

186. See LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 52, at 86.

tice more quickly, if less precisely. Further, because mediation is a second job to many and a hobby to others, mediators can often perform their duties without excessive conflict with occupational responsibilities.¹⁸⁷

Mediation is also attractive to the Party because it is non-threatening. Although the Party has purposely granted some autonomy to the committees,¹⁸⁸ it would be naive to expect that the Party does not continue to exert significant control. As the events of 1989 proved, the current Chinese leadership faces its most significant challenge from well-educated members of society. Limiting their number is an option that the Party has almost certainly considered. In this light, reliance upon semi-trained mediators both limits the size of the intelligentsia and restricts its impact upon the masses.

Mediation is also perceived as non-threatening to the public; authority wears the face not of a police officer or a judge, but rather of a next door neighbor. Laws and policies can be explained by someone the disputant knows and to some degree presumably trusts. Because the mediators stress the well-being of the local community, disputants may decide to compromise for the common good without ever considering that the government may have been intrusive or coercive.

Mediation also serves as a convenient method of social control because it discourages rights consciousness. The Imperial and Maoist regimes successfully minimized consciousness of individual rights, stressing instead one's duty to subordinate individual concerns to the needs of the community.¹⁸⁹ Mediation fits nicely with this notion; litigation does not. Should individuals find that they can go to court and demand justice as a personal right, the Party would surely question the implications of such a discovery.¹⁹⁰

Additionally, mediation serves as an effective means of keeping order because it is compatible both with Communist ideology and Chinese tradition. Individual leaders can support mediation without fear of political attack, given mediation's fit within the Maoist "mass line" participatory model of government. Similarly, the Party realizes the extent to which the Confucian ethic of compromise, so consistent with the nature of mediation, still holds sway over the Chinese psyche. There are few institutions that have such strong historical ties to both Imperial and Maoist China.

Yet to say that mediation in today's China serves exclusively as

187. See Liu, *supra* note 56, at 70.

188. The same pattern has been observed in the courts. The Party ordinarily intervenes minimally in cases that do not implicate important government policies.

189. Lubman, *supra* note 26, at 1351.

190. See Zweig et al., *supra* note 109, at 326.

a means to secure social order is to see its function in a vacuum, because the Chinese appear to have finally established mediation's proper relationship to litigation. In Imperial China, mediation and litigation existed in two separate and unequal spheres: proper people mediated, vulgar people litigated. In post-liberation China, mediation often supplanted litigation. Although courts were theoretically available, political and practical considerations restricted their widespread use. This trend reached its zenith during the Cultural Revolution, when all courts were closed and only mediation committees were left to compete with the rule of the mob.

Since the early 1980s, however, litigation has become much more important in China. For the practical and philosophic reasons discussed above, the government still would prefer that disputes be mediated, but it has begun to recognize the necessity of litigation. This recognition was brought about by the government's realization that economic reform has greatly increased the complexity of many disputes. The government saw that foreigners and Chinese nationals would invest in China only if institutions existed to fairly interpret and enforce the written law. Also central to the concerns of investors, law and litigation serve as buffers against a possible return of the anarchy of the Cultural Revolution.¹⁹¹ Because many members of the current leadership were among the Red Guard's numerous victims, today's Party understands the importance of establishing institutions that will guard against a revival of traumatic upheaval.

Thus, an interconnected system of dispute resolution has developed in contemporary China. To an unprecedented degree, mediation and litigation serve in complementary roles.¹⁹² Mediation is the primary and preferred method of resolving disputes, while litigation acts as the ultimate and equally legitimate recourse. It is remarkable and novel that as litigation's star has brightened, mediation's has not dimmed. The government has ensured that both are viewed as valid and important.

Developing this desirable relationship posed appreciable challenges for the Party. For example, although differing greatly in procedure, both systems needed to operate in a coordinated manner. If the courts were to recognize the efforts of the mediation committees, the committees' decisions had to be grounded in law. Also, to prevent an excessive growth of expensive lawsuits, it was necessary that parties submitting to mediation believe that the committees would adhere to a standard of justice equivalent to that observed by the courts. The answer devised was to "legalize" mediation, both

191. Palmer, *supra* note 9, at 219.

192. *Id.* at 238.

by freeing it somewhat from Party control and by constraining it through procedural requirements.

In embodying these developments, the 1989 regulations send two signals. To the legal community, the new rules indicate the government's intention that mediation play a significant role in the developing legal system: mediation and mediators are to be treated with respect. To the mediation committees, the 1989 regulations announce that the committees must resolve disputes according to law. Today's more professional mediators serve a central role in the integrated Chinese legal process.

The promulgation of the new regulations signals the P.R.C.'s long-term dedication to mediation. This commitment is largely a recognition of reality. Even if the government became convinced that China should adopt litigation as the exclusive mode of dispute resolution, the nation would lack the legal resources necessary to carry out such a design at least until the next century. Yet irrespective of resource limitations, it is unlikely that the government would abandon mediation. For all of the reasons discussed above, mediation will remain an important facet of the Chinese legal system.¹⁹³

Nonetheless, it appears likely that the government will curtail mediation's role in the area of economic law. Mediation generally works best among small groups which know one another¹⁹⁴ and have a mutual interest in sustaining an ongoing relationship.¹⁹⁵ The mediator must have authority over both parties, derived from either her own status¹⁹⁶ or that of the institution with control over the parties. At a very minimum, the parties must feel that the mediator understands the basic points of contention in the dispute.

But as disputes become more complex, particularly with regard to contract disputes involving parties from different geographic areas who have never worked together before and have no common government entity above them, the necessary assumptions of effective mediation appear less applicable.¹⁹⁷ Although adept at solving family disputes, poorly educated mediators are ill-equipped to resolve disputes between large enterprises suing and countersuing over contractual breach. The huge rise in lawsuits reported in 1989 indicates that mediation in China has encountered the difficulties

193. Indeed, it seems probable that mediation will function as a cornerstone of China's legal system long after Communism's demise. Given the economic problems that will face any Chinese government in the foreseeable future and the country's long tradition of mediation, it seems likely that any new leadership will avoid relying solely on litigation.

194. See Abel, *supra* note 65, at 179.

195. John Haynes, *Mediators and the Legal Profession: An Overview*, in LEGAL ISSUES AFFECTING THE PRACTICE OF MEDIATION, *supra* note 17, at 5, 11.

196. Abel, *supra* note 65, at 179.

197. Ross, *supra* note 15, at 63-64.

outlined above. Thus civil suits increased twenty-four percent, and economic disputes rose an astounding forty-two percent over 1988.¹⁹⁸ Although some of the increase is attributable to the growth of both business and legal resources, the rise in lawsuits clearly reflects the increasing desire of enterprises to resolve their complex disputes in the courtroom.¹⁹⁹

V. CONCLUSION

For the vast majority of disputes, the Chinese government will continue to push parties toward mediation. Mediation currently offers the sole realistic choice for a government strapped for resources, and serves important political and social functions. Chief among these is the ability to foster stability. The government sees in mediation an institution which is participatory, unifying, and easily manipulated. It provides a sense of empowerment, while at the same time deflects discord from the Party. Within the parameters and goals set out in the 1989 rules, mediation becomes an ideal tool for the Party as it attempts the difficult task of pulling China into the twenty-first century, while avoiding the fate of the Communist regimes in Eastern Europe and the Soviet Union.

198. Chang Hong, *Contract Disputes on the Rise*, CHINA DAILY, Jan. 5, 1990, at 1, col. 1.

199. China's experiences should be well noted. In most areas, an examination of China's mediation model is helpful only by the roughest analogy to those attempting to de-emphasize litigation in the West. Certainly those who pin their support for mediation's use in the U.S. on its widespread use in China are naive. Cultural, political, and economic conditions in the P.R.C. have created a unique climate in which mediation prospers. Yet when even these factors cannot make the mediation of complex economic conflicts tenable in China, it should give pause to the supporters of alternate dispute resolution in the West.