

# ARTICLES

## RESOLUTION OF CIVIL DISPUTES IN CHINA

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In the late 1970s, China launched both economic and legal reforms, intending to introduce market mechanisms, open its door to foreign investors, and maintain social order based on legal norms. Accordingly, in the past twenty years, voluminous literature has been published on the Chinese legal system, discussing its basic ingredients and noting discrepancies between theory and practice.<sup>1</sup> The topic of dispute resolution, in particular, has received much attention. Numerous books and articles have been written about the resolution of commercial disputes, especially on disputes between Chinese and foreign parties.<sup>2</sup> With respect to civil conflicts between and among Chinese citizens, literature has concentrated on the use of extralegal or informal means, notably the various types of mediation.<sup>3</sup>

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1. Over the years, articles on various issues of the Chinese legal system have often noted its lack of enforcement, especially due to local protectionism. See, e.g., Luming Chen, *Some Reflections on International Arbitration in China*, J. INT'L ARB., June 1996, at 121, 154-55.

2. See, e.g., SHENG CHANG WANG, *RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA* (1996); Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329 (1997); Guiguo Wang, *The Unification of the Dispute Resolution System in China: Cultural, Economic and Legal Contributions*, J. INT'L ARB., June 1996, at 5.

3. See, e.g., Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245 (1991); Hualing Fu, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211 (1992); Eric J. Glassman, *The Function of Mediation in China: Ex-*

Despite the prominent role of mediation in Chinese dispute resolution,<sup>4</sup> the incidence of civil litigation has been rising over the years. Every year for the past two decades, except for 1983, the number of civil cases accepted by the courts of first instance steadily increased, from 300,787 cases in 1978 to 3,375,069 cases in 1998.<sup>5</sup> Accordingly, this article attempts to achieve two objectives.<sup>6</sup> First, against the backdrop of the overall dispute resolution scheme in China, this article aims at ascertaining the circumstances under which Chinese citizens have resorted to litigation to resolve civil disputes.<sup>6</sup> Second, if "legal acculturation" is defined as the extent to which law has penetrated into the populace, another objective of this article is to examine whether Chinese citizens have utilized law, namely, legal institutions, to assert rights or resolve disputes in the past twenty years. Legal institutions, in a broad sense, refer to legal norms, the legal profession, the court system, and various enforcement mechanisms. This line of inquiry is salutary because the convergence or divergence between legal theory and actual practice should not be the only yardstick for measuring the efficacy of China's legal reforms.

Toward these objectives, the first section of this article introduces the general framework of dispute resolution in pre-reform China, especially the use of mediation in resolving civil disputes and handling minor crimes. The second section examines major mechanisms of dispute resolution used after China commenced its reform programs—arbitration, mediation, and lit-

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*aming the Impact of Regulations Governing the People's Mediation Committees*, 10 PAC. BASIN L.J. 460 (1992); Philip C.C. Huang, *Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice*, 19 MOD. CHINA 251 (1993); Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation*, in 1987 Y.B. ON SOCIALIST LEGAL SYS. 219 (W.E. Butler ed.) [hereinafter Palmer, *Extra-Judicial Mediation*]; Michael Palmer, *The Revival of Mediation in the People's Republic of China: (2) Judicial Mediation*, in 1989 Y.B. ON SOCIALIST LEGAL SYS. 145 (W.E. Butler ed.) [hereinafter Palmer, *Judicial Mediation*].

4. See discussions in subsequent sections infra pp. 114-123.

5. 1999 ZHONGGUO TONGJI NIANJIAN [CHINA STAT. Y.B.] 757. Each year the State Statistics Bureau publishes statistics on various topics. Although it is not clear how the data have been reported or collected, the State Statistical Bureau has been quite consistent in its compilations over the years. With respect to legal statistics, the providers of data should be the Ministry of Justice and various juridical departments. Thus, official statistics relating to law should be reasonably reliable.

6. One caveat, however, is that this article does not assume any correlation between litigation and the efficacy of legal reforms. In other words, an upward trend in the litigation rate in China does not necessarily mean that its legal reforms have been successful. Put another way, a downward trend or no change in litigation rate in China does not mean that its legal reforms have been ineffectual. This is because people may choose not to go to court, even though the overall legal system functions effectively.

igation. The third section attempts to identify the circumstances under which Chinese citizens have litigated civil disputes, based on an analysis of more than sixty unedited cases. The last section endeavors to draw insights about legal reforms in post-Mao China, taking other pertinent factors and recent legal developments into consideration.

## I. THE GENERAL FRAMEWORK OF DISPUTE RESOLUTION IN PRE-REFORM CHINA

China commenced its legal reforms around 1979. This article refers to the thirty years before the implementation of reforms as the pre-reform period and years after the reform as the reform period. During the pre-reform period, there were three major types of social conflicts—economic disputes, administrative grievances, and civil disputes. This classification, however, is designed primarily for purposes of discussion. Some disputes were hybrid in nature and could not neatly fall into one particular category. Moreover, although the subsequent discussion introduces the primary channel for resolving each type of dispute, some disputes have been resolved through channels other than the normal one or by a combination of channels.

### ECONOMIC DISPUTES

Since China had a command or planned economy, decisions on production and distribution were administratively determined, and the outcomes of economic disputes<sup>7</sup> could produce ripple effects. When economic disputes arose, enterprises would refer the disputes to a common department-in-charge or a higher-ranking organization that had jurisdiction over both parties.<sup>8</sup> Considering all relevant factors, perhaps even the interests of those who were not the disputants in the case, the higher authority would render a decision akin to an arbitration award.<sup>9</sup> In

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7. In the past, economic disputes generally referred to conflicts between two entities (such as state or collective enterprises) over their respective economic rights and interests. For example, a dispute between two state enterprises over the performance of a sale-and-purchase contract was an economic dispute. Now, economic disputes have broadened to include bankruptcy, railway transportation, air transportation, highway transportation, etc., even if these disputes are between individuals.

8. See also Clarke, *supra* note 3, at 250 (“the dispute would eventually rise to the first administrator with authority over both plants”); G. Wang, *supra* note 2, at 5 (“the parties concerned would submit their disagreement to the superior administrative body for settlement”). In addition, since Party secretaries had significant influences in enterprises or at various levels of government, their views often determined how disputes were finally resolved.

9. See also Clarke, *supra* note 3, at 249 (“In the realm of internal resolution, . . . the standard will likely be one of what is good for the organization of which the parties and the resolver are members.”).

other words, economic disputes between domestic enterprises in China were principally resolved by administrative orders. However, disputes involving international trade were referred to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade.<sup>10</sup> From 1956 to 1976, the Foreign Trade Arbitration Commission accepted only twenty-seven cases involving foreign trade contracts.<sup>11</sup>

#### ADMINISTRATIVE GRIEVANCES

When citizens wanted to lodge complaints against the government, the so-called letters-and-visits (*xinfang*) was the normal avenue.<sup>12</sup> Under such a system, complainants wrote letters to government agencies, requesting answers to specific questions or redresses of certain grievances. People's governments at or above the county level established letter-and-visits divisions or designated cadres to exclusively handle various types of questions and complaints and to receive the masses.<sup>13</sup> As a usual practice, the department or agency would first investigate the matter, and then either redress the grievance or provide the complainant with an explanation for nonintervention.<sup>14</sup>

#### CIVIL DISPUTES

Mediation (*tiaojie*) was the principal vehicle for resolution of civil disputes.<sup>15</sup> Depending on who the mediator was and the le-

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10. The Foreign Trade Arbitration Commission was established to handle disputes arising out of foreign trade contracts. See Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Duiwai Maoyi Zhongcai Weiyuanhui de Jueding [Decision Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade], art. 1, reprinted in III ZHONGHUA RENMIN GONGHEGUO SHEWAI FAGUI HUIBIAN 1949-1990 [III LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 1949-1990] 1549 (Zhonghua Renmin Gongheguo Guowuyuan Fazhiju 1991) [hereinafter FOREIGN-RELATED LAWS].

11. See WANG, *supra* note 2, at 68.

12. Literally, *xin* means letter and *fang* means visit. The masses can send letters to or request interviews with Party branches, administrative organs, enterprises, or institutions at various levels in order to make suggestions or requests, voice opinions, raise criticisms, or even lodge complaints or appeals.

13. Zhengwuyuan Guanyu Chuli Renmin Laixin he Jiejian Renmin Gongzuo de Jueding, [Administrative Affairs Council's Decision on the Handling of Work on Letters from People and Reception of People] [hereinafter Decision on Letters and Reception], art. 1, reprinted in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU [COMPENDIUM OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] 1365 (Huaian Wang et al. ed., 1989) [hereinafter FALU QUANSHU].

14. Moreover, in cases where citizens wanted to file charges against government organs or officials, the letters-and-visits division should refer them to supervisory organs. Decision on Letters and Reception, *supra* note 13, art. 3.

15. In current literature, the term *tiaojie* has been translated as mediation. Mediation, as it is generally understood in many countries, refers to a process by which

gal effect of the mediated agreement, mediation could be classified as social-circle mediation,<sup>16</sup> police mediation,<sup>17</sup> work-unit mediation,<sup>18</sup> administrative mediation,<sup>19</sup> or people's mediation (*renmin tiaojie*).<sup>20</sup> Among these different forms of mediation, people's mediation was the predominant means of resolving civil disputes. Therefore, the following discussion encapsulates people's mediation in pre-reform China with regard to its historical background, legal provisions, and reasons for its extensive use.

### (A) *Historical Background*

In traditional Chinese society, social order was maintained by a dualistic structure of formal and informal mechanisms for dispute resolution.<sup>21</sup> The formal realm consisted of codified laws and adjudication by magistrates, while informally, disputes were resolved by mediation, which was usually conducted by gentry, village elders, or clan leaders.<sup>22</sup> Apparently, the formal mechanisms were used largely for maintaining political and social stability, whereas the informal mediation was the preferred vehicle for resolving private disputes between and among individuals.<sup>23</sup> In many instances, even if a magistrate had accepted the case, it might be eventually resolved by mediation.<sup>24</sup>

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an extra-judicial third party facilitates the resolution of a dispute between two or more parties, who later voluntarily come to an agreement or a compromise. As discussed below, disputants in China have sometimes reached compromises under pressure. Thus, *tiaojie*, in a pure sense, may not mean exactly the same as mediation.

16. Social-circle mediation here refers to mediation conducted by relatives, neighbors, or friends.

17. See Fu, *supra* note 3, at 222-23.

18. Work-unit mediation here refers to mediation conducted by the personnel of an enterprise or institution that employs one or both of the disputants, or mediation carried out by the current labor-dispute mediation committee in an enterprise, which is composed of representatives of workers, the hiring unit, and the trade union.

19. Administrative mediation means mediation conducted by a government agency or official dispatched by the government. Moreover, in economic disputes, if a common administrative superior can be found for two state-owned or collectively owned enterprises, the superior can conduct mediation. Clarke, *supra* note 3, at 283.

20. See detailed discussion *infra* pp. 114-120.

21. Huang, *supra* note 3, at 251.

22. *Id.*

23. During the Ming Dynasty, the imperial court established Dispute Handling Pavilions at county and prefecture levels for mediating civil disputes and stated that disputes regarding marital affairs, real estate, and scuffles must first be handled by the elders of the village. CHINA'S CIVIL MEDIATION SYSTEM: A PRECAUTION AGAINST CRIME 4-5 (Beijing: Editorial Board of Foreign Language Press ed. 1988) [hereinafter CIVIL MEDIATION SYSTEM].

24. Huang explains that the Qing civil justice system also operated in the intermediate third realm where the formal and informal functioned in a negotiating type of relationship. Huang, *supra* note 3, at 252. If the magistrate accepted a case, the dispute would be handled formally. If the magistrate rejected a case, the dispute would be resolved by community or kin mediation. After the filing of a complaint,

This dualistic structure was based on ideological and practical considerations. Theoretically, the underpinnings for such a system appeared to be Confucianism. According to Confucianism, a social hierarchy existed, and people should conduct their lives in accordance with their respective social statuses. If people tried to destroy social differences and did not comport with reference to *li* (proper modes of behavior), conflicts would arise. Interpersonal conflicts would lead to social instability, which would disrupt cosmic harmony. Thus, when a dispute arose, the parties should try to resolve it promptly by yielding and compromising.<sup>25</sup>

Likewise, codified laws were primarily penal in nature<sup>26</sup> and designed to prevent disruption of public order and to maintain imperialistic rule. By and large, codes were general guidelines for magistrates to perform their job, not for the illiterate populace to read. Since law had a mere deterrent effect,<sup>27</sup> mediation accompanied by instruction and persuasion was the preferred means of resolving disputes.

Apart from Confucian ideology, practical considerations were very important to the disputants. For instance, disputants and witnesses were tortured when the magistrate investigated the facts;<sup>28</sup> the time and expenses associated with traveling to the county where the magistrate was located were enormous;<sup>29</sup> adjudicated outcomes could be arbitrary and unpredictable;<sup>30</sup> corruption inevitably tainted justice;<sup>31</sup> and interdependent neighbors did not want to make enemies by resorting to law-

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but before the formal court session, most disputes were "resolved by community or kin mediation, galvanized by the lawsuit." *Id.* at 265.

25. See generally YOULANG FENG, A SHORT HISTORY OF CHINESE PHILOSOPHY (Derk Bodde, ed. 1948). See also CIVIL MEDIATION SYSTEM, *supra* note 23, at 4 (saying that Confucius regarded tolerance as a virtue and harmony as a principle).

26. The Ming Code and Qing Code contain principally penal provisions. For exemplary cases, see TUNG-TSU CHU, LAW AND SOCIETY IN TRADITIONAL CHINA (1965).

27. Law kept people from doing wrong and would not change people's internal beliefs. See, e.g., CHU, *supra* note 26, at 249.

28. In most cases, magistrates inflicted physical punishment on the parties either because they wanted to secure the true facts, or because they tried to avoid frivolous claims.

29. According to Huang, the litigants were willing to reach a mediated agreement because "[t]here were mounting costs of staying in town to await the court session. There were also the impending witness fees, once the court issued the summons. And, of course, there were the court fees to come." Huang, *supra* note 3, at 275. Clearly the time and expenses associated with traveling to the county where the magistrate was located were enormously burdensome.

30. G. WANG, *supra* note 2, at 9 (discretion enjoyed by law enforcers created enormous uncertainty in lawsuits).

31. See, e.g., CIVIL MEDIATION SYSTEM, *supra* note 23, at 5 ("the door of a *yamen* [the office of a magistrate] is open to the rich only"); G. WANG, *supra* note 2, at 9; Huang, *supra* note 3, at 283-85.

suit.<sup>32</sup> Although it is difficult to speculate which factor carried more weight, any one of these considerations could deter the disputants from going to the magistrate.

The use of mediation to resolve disputes continued to the twentieth century. As early as the 1930s, the Communist Party began organizing people's mediation to resolve non-criminal disputes in places where it had established revolutionary bases.<sup>33</sup> In the 1940s, local governments formalized and institutionalized mediation by regional regulations.<sup>34</sup> At that time, residents conducted mediation among themselves under the guidance of the government; mass organizations<sup>35</sup> were responsible for resolving disputes among residents within their respective responsibilities; and government officials directly mediated disputes.<sup>36</sup> According to government statistics, more than sixty percent of disputes were solved by mediation.<sup>37</sup>

### (B) *Legal Provisions*

In 1954, the Administrative Affairs Council of the Central People's Government<sup>38</sup> adopted the Provisional General Principles on the Organization of People's Mediation Committees.<sup>39</sup> This set of regulations accorded the status of mass organization to the people's mediation committee<sup>40</sup> and provided a general framework for conducting mediation. Under the guidance of the basic-level governments and courts,<sup>41</sup> people's mediation committees mediated general civil disputes and handled minor crimes.<sup>42</sup> In performing these two functions,

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32. G. Wang, *supra* note 2, at 10.

33. CIVIL MEDIATION SYSTEM, *supra* note 23, at 6.

34. For example, in 1941, the Shandong People's Government promulgated the Provisional Regulations on the Organization of Mediation Committees. *Id.*

35. Mass organizations were organizations established among workers, youth, women, etc. *Id.* at 7. See discussion on the "mass line" theory, *infra* pp. 108-109.

36. *Id.* at 6-7.

37. *Id.* at 7.

38. The Administrative Affairs Council was the predecessor of the State Council. The latter replaced the former in 1954.

39. Renmin Tiaojie Wei Yuanhui Zanxing Zuzhi Tongze [Provisional General Principles on the Organization of People's Mediation Committees] promulgated on Mar. 22, 1954, reprinted in FALU QUANSHU, *supra* note 13, at 1576 [hereinafter People's Mediation Provisional Principles].

40. *Id.* art. 2.

41. *Id.*

42. *Id.* art. 3. According to Clarke, people's mediation committees might mediate criminal cases that could be privately prosecuted. For example, private prosecution might be initiated for defamation in non-serious circumstances, violent interference with the freedom of marriage where death did not occur, and abuse of family members where serious injury or death did not follow. Clarke, *supra* note 3, at 279 n.139.

mediators also engaged in propagating government policies and laws.<sup>43</sup>

Members of the people's mediation committee were elected annually by representatives of urban residents or by village people's congresses.<sup>44</sup> Any person who had a clear political stance ("clear political face"), was upright, maintained links with the masses, and was enthusiastic about mediation was eligible to become a mediator.<sup>45</sup> Mediators who had neglected duties or were incompetent could be recalled and replaced.<sup>46</sup>

In conducting mediation, mediators must follow government policies and laws.<sup>47</sup> Since mediation was not a prerequisite for lawsuit, mediators could not prevent the parties from filing a lawsuit just because mediation had not yet been conducted or mediation had failed.<sup>48</sup> Further, a mediator must obtain the consent of the parties to conduct mediation<sup>49</sup> and refrain from using punishment or detention.<sup>50</sup> If mediation was conducted in violation of government policies or laws, the people's court could rectify or nullify it.<sup>51</sup> At the end of 1955, mediation committees were established in more than seventy percent of villages and neighborhoods, while staff members amounted to one million people.<sup>52</sup>

### (C) *Reasons for Its Extensive Use*

Except during the Cultural Revolution,<sup>53</sup> mediation was extensively used as a mode of dispute resolution in the pre-reform period.<sup>54</sup> Nonetheless, mediation in the pre-reform period was different from its predecessors in traditional Chinese societies. Mediation entered a new era after 1949 because it was based on

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43. People's Mediation Provisional Principles, *supra* note 39, art. 3

44. *Id.* art. 5.

45. *Id.*

46. *Id.*

47. *Id.* art. 6.

48. *Id.*

49. *Id.*

50. *Id.* art. 7.

51. *Id.* art. 9.

52. CIVIL MEDIATION SYSTEM, *supra* note 23, at 8-9. See also Chun Du, *Renmin Tiaojie: Zhongguo Shehui Wending de Diyidao Fangxian* [People's Mediation: the First Line of Defense to Safeguard China's Social Security], ZHONGGUO FALU [CHINA L.], Sept. 1995, at 12, 13.

53. During the Cultural Revolution (1966-1976), people's mediation was suspended as "an instrument of class [re]conciliation." It was resumed after the downfall of the "Gang of Four." CIVIL MEDIATION SYSTEM, *supra* note 23, at 9.

54. Clarke asserts that in the late 1950s, people's mediation committees were temporarily displaced by *tiaochu* organs. *Tiaochu* was a local government institution that apparently combined elements of mediation, arbitration, and adjudication. *Tiaochu* organs were able to impose judgments on the parties and were more concerned with criminal than civil matters. Clarke, *supra* note 3, at 273-75.

entirely different ideologies than was mediation in the past. Therefore, it is imperative to understand two basic theories of Mao Zedong—"mass line" and social contradictions.

According to Mao's "mass line" theory, the most effective way to achieve socialist revolution is to rely on the masses. That is, the leadership should formulate appropriate policies and measures based on the input of the masses. To participate meaningfully in this bottom-up or democratic process, the masses must receive education in terms of socialist principles, party and government policies, and legal norms. Accordingly, mass organizations, such as mediation committees, women's leagues, and trade unions, were established to educate the masses, to provide them with participatory opportunities, and to mobilize them for revolution.

Mao also believed that there are two basic types of social contradictions—contradictions among the people and contradictions against the people.<sup>55</sup> Contradictions against the people are antagonistic, while contradictions among the people are nonantagonistic. To resolve contradictions among the people, education and persuasion are the preferred means. In contrast, to handle contradictions against the people, an adversarial process, such as court proceedings, is more effective. Since the majority of civil disputes are contradictions among the people, mediation should be conducted because mediation serves to instruct and persuade people.<sup>56</sup>

Besides Mao's "mass line" and social contradiction theories, people's mediation was designed to strengthen education in patriotism and law observance as well as consolidate the masses for the [re]construction of the country.<sup>57</sup> In other words, people's mediation in the pre-reform period was used primarily to mobilize the masses for the revolutionary cause rather than to restore social harmony.<sup>58</sup> Against the backdrop of "politics in com-

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55. Simply stated, "contradictions among the people" are day-to-day conflicts among citizens. "Contradictions against the people," however, are conflicts between the people and the enemies. "Enemies" generally refer to counterrevolutionaries, landlords, and criminals. See Zedong Mao, *Guanyu Zhengque Chuli Renmin Neibu Maodun de Wenti* [Concerning the Problem of Correctly Handling the Contradictions Among the People], reprinted in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN 1975 NIAN 1 YUE—6 YUE [COLLECTION OF THE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1975 (JANUARY TO JUNE)] 1, 1-11.

56. Apart from this ideological underpinning, other contributing factors included: radicals criticized law as a legacy of capitalism, courts and law schools were closed for most of the time, and lawyers were targets of persecution during the Cultural Revolution. See also Palmer, *Judicial Mediation*, *supra* note 3, at 149; Clarke, *supra* note 3, at 288.

57. People's Mediation Provisional Regulations, *supra* note 39, art. 1.

58. See also Fu, *supra* note 3, at 213 ("mediation represented the practical manifestation of Party ideology").

mand," mediation emphasized class struggle.<sup>59</sup> Thus, mediators were chosen because of their political activism and ability to propagate Party policies.<sup>60</sup> Since mediation was an instrument of political mobilization, it could produce unexpected, unreasonable, or illogical outcomes because the class statuses of the disputants, rather than relevant legal norms and the facts of the case, often determined the outcome of mediation.<sup>61</sup>

## II. THE GENERAL FRAMEWORK OF DISPUTE RESOLUTION IN THE REFORM ERA

Today, the general mechanisms of dispute resolution in China are arbitration, mediation, and litigation. Depending on the nature of a dispute, the parties may resort to one, two, or even all of these avenues. Indeed, the same institution may try to resolve a dispute through more than one of these modes. For instance, in cases of commercial disputes, arbitration is the most popular mechanism, even though arbitrators often conduct mediation prior to arbitration. Similarly, to challenge certain types of administrative actions, citizens may either resort to administrative review<sup>62</sup> or file a lawsuit in court.<sup>63</sup> With respect to civil disputes, mediation and litigation are the predominant means. This section examines arbitration and mediation. The next section focuses on litigation of civil disputes.

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59. Glassman, *supra* note 3, at 467; Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 227-28.

60. Glassman, *supra* note 3, at 467.

61. *Id.* (explaining that settlements through mediation rewarded the peasantry and punished landlords, and mediators based their decisions on the class background and political correctness of the disputants).

62. See Xingzheng Fuyi Tiaoli [Regulations on Administrative Review], art. 9, reprinted in XINBIAN ZHONGHUA RENMIN GONGHEGUO CHANGYONG FALU FAGUI QUANSHU [NEWLY EDITED COMPENDIUM OF THE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] 1698 (Guowuyuan Fazhiju Yanjiushi exam. & approv., 1998) [hereinafter CHANGYONG FALU FAGUI QUANSHU] (retention, fine, revocation of license, freeze of property, restraint of physical freedom, infringement of the right to autonomously engage in business, etc.); Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa [Administrative Review Law of the People's Republic of China], art. 6, reprinted in 59 ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPR. P. CT. OF THE P.R.C.] 86 (1999) (retention, fine, revocation of license, freeze of property, restraint of physical freedom, infringement of the right to autonomously engage in business, etc.).

63. See Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Procedure Law of the People's Republic of China] [hereinafter Administrative Procedure Law], art. 11, reprinted in CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 1741 (retention, fine, revocation of license, freeze of property, restraint of physical freedom, infringement of the right to autonomously engage in business, etc.).

## ARBITRATION

Since the parties to a commercial dispute usually have signed an arbitration agreement or have incorporated an arbitration clause in their initial contract, the most popular means for resolving commercial disputes in China is arbitration.<sup>64</sup> Depending on the nationalities of the disputants and the nature of the dispute, arbitration can be classified as domestic<sup>65</sup> or international.<sup>66</sup> With respect to domestic arbitration, disputants apply to local arbitration commissions. In international arbitration, the China International Economic and Trade Arbitration Commission (CIETAC)<sup>67</sup> and the China Maritime Arbitration Commission (CMAC)<sup>68</sup> are the official organs that conduct arbitration.<sup>69</sup>

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64. Commercial disputes here refer to disputes involving economic contracts, trade, investment, technology transfer, transportation, etc. Generally, disputants choose arbitration because of its flexibility (parties can select arbitrators as well as the procedural and substantive laws to be applied), finality (arbitration awards may be challenged in court but not subject to appeal), enforceability (arbitration awards are enforced pursuant to international conventions and treaties), and confidentiality (arbitration proceedings are not open to the public). See WANG, *supra* note 2, at 5. In China, the lack of systematic protection against biases toward foreign entities in local courts has made arbitration a viable alternative for foreign investors. Brown and Rogers, *supra* note 2, at 333.

65. In domestic arbitration, both disputants are Chinese legal or natural persons, and the dispute does not involve international trade or economic transactions.

66. In international arbitration, one or both of the disputants are foreign legal or natural persons, and/or the dispute involves international trade or economic transactions.

67. As discussed above, the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade was formed to arbitrate foreign trade contract cases. See *supra* note 10. In 1980, the Foreign Trade Arbitration Commission was renamed the Foreign Economic and Trade Arbitration Commission (FETAC). See Guanyu Jiang Duiwai Maoyi Zhongcai Weiyuanhui Gaichengwei Duiwai Jingji Maoyi Zhongcai Weiyuanhui de Tongzhi [Notice Concerning the Conversion of the Foreign Trade Arbitration Commission into the Foreign Economic and Trade Arbitration Commission] *reprinted in* 1980 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [1980 GAZETTE OF THE STATE COUNCIL OF THE P.R.C.], No. 2, at 58 [hereinafter Conversion of FTAC into FETAC]. In 1988, the FETAC was renamed the China International Economic and Trade Arbitration Commission (CIETAC). See Guanyu Jiang Duiwai Jingji Maoyi Zhongcai Weiyuanhui Gaimingwei Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui he Xiuding Zhongcai Guize de Pifu [Official Reply Concerning the Conversion of the Foreign Economic and Trade Arbitration Commission into China International Economic and Trade Arbitration Commission and the Revision of Its Arbitration Rules] *reprinted in* FOREIGN-RELATED LAWS, *supra* note 10, at 1553 [hereinafter Conversion of FETAC into CIETAC].

68. In 1958, China established the Maritime Arbitration Commission (MAC) within the China Council for the Promotion of International Trade. The MAC was to arbitrate disputes involving salvage, collisions, and charter-parties. See Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Haishi Zhongcai Weiyuanhui de Jueding [Decision Regarding the Establishment of Maritime Arbitration Commission Within the China Council for the Promotion of International Trade], art. 1, *reprinted in* FOREIGN-RELATED LAWS, *supra* note 10, at 1551. In 1988, the Maritime Arbitration Commission was renamed the China Maritime Arbitration

In the early 1980s, entities authorized to settle domestic economic disputes by means other than litigation were established at various governmental levels.<sup>70</sup> In 1983, the State Council promulgated the Regulations of the People's Republic of China on Economic Contract Arbitration.<sup>71</sup> This set of regulations provided that arbitration of economic contract disputes was to be conducted by arbitration organs established at various levels within the State Administration for Industry and Commerce or its local bureaus.<sup>72</sup> Nonetheless, since there was no professional organization to supervise, the practices of local arbitration organs varied. As a result, domestic arbitration in China was not systematic.

However, international arbitration was more methodical. In 1980, the jurisdiction of the Foreign Economic and Trade Arbitration Commission (FETAC) was expanded to handle disputes arising from China's economic cooperation with foreign countries, such as disputes involving Chinese and foreign joint ventures, and credit arrangements between Chinese and foreign banks.<sup>73</sup> In 1988, the State Council approved the conversion of the FETAC into CIETAC and expanded its jurisdiction to cover "all disputes arising from international economic and trade transactions."<sup>74</sup>

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Commission (CMAC). See Guanyu Haishi Zhongcai Weiyuanhui Gaimingwei Zhongguo Haishi Zhongcai Weiyuanhui he Xiuding Zhongcai Guize de Pifu [Official Reply Concerning the Conversion of the Maritime Arbitration Commission into China Maritime Arbitration Commission and the Revision of its Arbitration Rules], *reprinted in* FOREIGN-RELATED LAWS, *supra* note 10, at 1558. By 1995, the CMAC had expanded its jurisdiction to resolve contractual or non-contractual maritime disputes arising from transportation, production, and navigation by or at sea in coastal waters and other waters connected with the sea. See Zhongguo Haishi Zhongcai Weiyuanhui Zhongcai Guize [China Maritime Arbitration Commission Arbitration Rules], art. 2, *reprinted in* WANG, *supra* note 2, at 266.

69. The disputants in a foreign-related case may choose to have their dispute arbitrated by a domestic arbitration commission. See Guanyu Guanche Shishi Zhonghua Renmin Gongheguo Zhongcai Fa Xuyao Mingque de Jige Wenti de Tongzhi [Notice Regarding Several Issues to be Clarified for the Implementation of the Arbitration Law of the People's Republic of China], *reprinted in* ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU (1996) [COMPENDIUM OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1996)] 135 (Huaian Wang et al. ed., 1997).

70. G. Wang, *supra* note 2, at 6.

71. Zhonghua Renmin Gongheguo Jingji Hetong Zhongcai Tiaoli [Regulations of the People's Republic of China on Economic Contract Arbitration], *reprinted in* 2 ZHONGHUA RENMIN GONGHEGUO XINGZHENG FAGUI XUANBIAN, XIAJUAN [A SELECTION OF THE ADMINISTRATIVE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] 2213 (1991).

72. *Id.* art. 2.

73. See Conversion of FTAC into FETAC, *supra* note 67.

74. Conversion of FETAC into CIETAC, *supra* note 67.

In 1994, China enacted its Arbitration Law to provide a more formal and uniform framework for arbitration.<sup>75</sup> The Arbitration Law mandates the establishment of the China Arbitration Association, which, as an independent social organization with the status of a legal person, is empowered to supervise arbitration commissions and to formulate rules of arbitration to be applied by arbitration commissions.<sup>76</sup> Moreover, local arbitration commissions are independent of administrative organs and maintain no subordinate relationship between one another.<sup>77</sup> The China Chamber of International Commerce (China Council for the Promotion of International Trade) is continuously empowered to formulate rules regarding foreign-related arbitration.<sup>78</sup> In 1998 and 2000, the China Chamber of International Commerce revised the CIETAC Arbitration Rules to further expand the jurisdiction of the latter.<sup>79</sup>

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75. Zhonghua Renmin Gongheguo Zhongcai Fa [Arbitration Law of the People's Republic of China] [hereinafter Arbitration Law], reprinted in CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 1780.

76. *Id.* art. 15.

77. *Id.* art. 14.

78. *Id.* arts. 66, 73. The China Chamber of International Commerce revised the CIETAC Arbitration Rules in 1994 and 1995, respectively. Among other things, the jurisdiction of the CIETAC was expanded to handle "disputes arising from international or foreign-related, contractual or noncontractual, economic and trade transactions, including those disputes between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between foreign legal persons and/or natural persons, and between Chinese legal persons and/or natural persons, in order to protect the legitimate rights and interests of the parties and promote the development of domestic and international economics and trade." Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Zhongcai Guize [China International Economic and Trade Commission Arbitration Rules], art. 2, reprinted in WANG, *supra* note 2, at 226.

79. Prior to 1998, the CIETAC did not arbitrate disputes arising between Sino-foreign equity joint ventures, between Sino-foreign equity joint ventures and domestic entities, or between Sino-foreign equity joint ventures and wholly foreign-owned enterprises, because equity joint ventures and wholly foreign-owned enterprises were Chinese legal persons and no foreign-related elements were involved. See Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa Shishi Tiaoli [Implementation Rules of the Chinese-Foreign Equity Joint Venture Law of the People's Republic of China], art. 2, reprinted in CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 540; Zhonghua Renmin Gongheguo Waizi Qiye Fa [Law of the People's Republic of China on Wholly Foreign-Owned Enterprises], art. 8, reprinted in CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 556.

Nonetheless, in 1998, the China Chamber of International Commerce expanded the jurisdiction of the CIETAC such that disputes arising between foreign investment enterprises or between foreign investment enterprises and Chinese legal persons, natural persons and/or economic organizations would also be arbitrated. In addition, the CIETAC could arbitrate disputes arising from project financing, invitation for tender, bidding, construction, and other activities conducted by Chinese legal persons, natural persons or economic organizations using capital, technology, or service originating from foreign countries, international organizations, or Hong Kong, Macao, and Taiwan. See Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Zhongcai Guize [China International Economic and Trade Arbitration Commission

## MEDIATION

In the reform period, mediation has continued to play a significant role in dispute resolution. Apart from people's mediation, mediation is often conducted prior to or during arbitration and litigation. The Arbitration Law authorizes arbitrators to conduct mediation when circumstances warrant.<sup>80</sup> In 1998, of the 736 cases concluded by arbitration tribunals, forty-five cases were resolved by mediation (6%).<sup>81</sup> Moreover, judicial mediation conducted prior to or during litigation is often practiced in civil dispute cases.

### (A) People's Mediation

In 1980, the government revived people's mediation by re-promulgating the Provisional General Principles on the Organization of People's Mediation Committees.<sup>82</sup> This move reflected the conviction that mediation based on persuasion and education was deemed effective in resolving civil disputes and preventing minor crimes, and that social harmony was necessary for economic construction. In the ensuing years, mediation, as "the first line of defense,"<sup>83</sup> was extensively used to resolve civil disputes and prevent minor crimes.<sup>84</sup>

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Arbitration Rules], art. 2, *reprinted in* 2 CHINA LAWS FOR FOREIGN BUSINESS-BUSINESS REGULATION ¶ 10-480 (CCH Australia 1999).

In 2000, the CIETAC further expanded its jurisdiction to arbitrate domestic disputes if the parties so agreed. *See Id.* A copy of the 2000 CIETAC Arbitration Rules is available at [www.arbitration.org.cn/arbitration/new\\_page\\_27.htm](http://www.arbitration.org.cn/arbitration/new_page_27.htm). Moreover, starting from October 1, 2000, the CIETAC has also been known as the Court of Arbitration of the China Chamber of International Commerce.

80. Arbitration Law, *supra* note 75, art. 51.

81. 1999 ZHONGGUO FALU NIANJIAN [LAW Y.B. OF P.R.C.] 195 (Zhongguo Falu Nianjian Bianjibu, comp. 1999). Apart from mediation conducted during arbitration proceedings, the China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Center (formerly known as the Beijing Conciliation Center) facilitates the resolution of disputes relating to international economic, trade, finance, investment, technology transfer, project contracting, transportation, insurance, and other commercial transactions. *See* Conciliation Rules of the Beijing Conciliation Center of the China Council for the Promotion of International Trade, *reprinted in* WANG, *supra* note 2, at 336, art. 2 (latest revisions not included). For a list of local conciliation centers affiliated with the China Council for the Promotion of International Trade, see WANG, *supra* note 2, at 37-42.

82. In addition, the 1982 Constitution lists people's mediation as one of the tasks of residents' committees and villagers' committees. Zhonghua Renmin Gongheguo Xianfa [Constitution of the P.R.C.], art. 111, *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 1.

83. CIVIL MEDIATION SYSTEM, *supra* note 23, at 1; Du, *supra* note 52, at 12. In addition, according to Liu Shaoqi, the activities of grassroots mediation committees represented the "first line of defense" in political-legal work. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 235.

84. *See generally* CIVIL MEDIATION SYSTEM, *supra* note 23.

In 1989, the State Council promulgated the Regulations on the Organization of People's Mediation Committees.<sup>85</sup> This set of regulations renders people's mediation more formal, systematic, and professional. The following provisions evidence this new trend.

As mass organizations established in villagers' (*cunmin*) and residents' (*jumin*) committees, people's mediation committees conduct mediation work under the guidance of the basic-level people's government and the basic-level people's court.<sup>86</sup> In addition, judicial assistants (*sifa zhuliyuan*) from the basic-level government direct the daily work of people's mediation committees.<sup>87</sup> The operating expenses of the people's mediation committees are borne by the villagers' committees or residents' committees.<sup>88</sup>

Furthermore, the masses elect members of the people's mediation committee every three years, except for those members who are simultaneously members of the residents' or villagers' committee.<sup>89</sup> People's mediators should be upright, have the ability to work with the masses, be enthusiastic about people's mediation work, and possess a certain level of knowledge in law

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85. Renmin Tiaojie Weiyuanhui Zuzhi Tiaoli [Regulations on the Organization of People's Mediation Committees] reprinted in CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 911 [hereinafter People's Mediation Regulations]. It has been argued that the 1989 Regulations reaffirmed China's commitment to the development of a formal legal structure by "legalizing" the long-established practice of mediation. Glassman, *supra* note 3, at 461. However, in view of the fact that there were regulations on people's mediation even before 1989, it can also be argued that mediation was legalized a long time ago.

86. People's Mediation Regulations, *supra* note 85, art. 2 (mediating civil disputes). Cf. People's Mediation Provisional Principles, *supra* note 39, arts. 3, 4 (mediation committees established per district or street in the cities or per village in the rural areas were to mediate general civil disputes and deal with minor crimes).

87. People's Mediation Regulations, *supra* note 85, art. 2. Judicial assistants (*sifa zhuliyuan*) assist in establishing mediation committees and training mediators. They may be asked to mediate cases that people's mediation committees for some reason cannot handle. Mediation conducted by a judicial assistant is regarded as administrative mediation. Clarke, *supra* note 3, at 276, 281; Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 274. For an account on a model judicial assistant, see Yuhua Zhang, *Zhongguo Sifa Zhuliyuan de Youxiu Daibiao—Hou Dianlu* [An Outstanding Representative of Chinese Judicial Assistants—Hou Dianlu], CHINA L., Mar. 1998, at 18.

88. People's Mediation Regulations, *supra* note 85, art. 14. It has been pointed out that in the mid-1980s, the Ministry of Justice gave State funds to mediation committees for the purchase of stationery, production of publicity materials, the payment of subsidies to mediators who had been absent from work, etc. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 268.

89. People's Mediation Regulations, *supra* note 85, art. 3. Cf. People's Mediation Provisional Principles, *supra* note 39, art. 5 (indirect elections to be held every year).

and policy.<sup>90</sup> People's mediators can receive subsidies or allowances.<sup>91</sup> People's mediators must observe such disciplinary rules as (1) not accepting invitations to dinner or gifts, (2) not disclosing the personal secrets of the parties, and (3) not insulting or punishing the parties.<sup>92</sup>

In terms of responsibilities, people's mediation committees mediate civil disputes; propagate laws, regulations, rules, and policies through mediation work; and educate citizens to observe law and discipline as well as respect social ethics.<sup>93</sup> Consequently, mediators focus on mediating civil disputes rather than dealing with both civil disputes and minor crimes. In conducting mediation, people's mediators should: (1) follow laws, regulations, rules, and policies, or in their absence, social ethics; (2) base mediation on the voluntariness of the parties; and (3) respect the parties' right to file a lawsuit and not prevent the parties from filing a lawsuit if mediation has not been conducted or if mediation has failed.<sup>94</sup>

Following the dictates of circumstances, mediators can solicit the assistance of the relevant units or individuals concerned.<sup>95</sup> Mediation is free of charge,<sup>96</sup> and mediators can initiate mediation even if the parties do not request it.<sup>97</sup> If mediation fails, or if one or both parties withdraw from the agreement, any one party can request the people's government to handle the case or file a lawsuit in the people's court.<sup>98</sup>

The objectives of the new Regulations are to strengthen the establishment of people's mediation committees, promptly mediate civil disputes, enhance unity among the people, and safe-

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90. People's Mediation Regulations, *supra* note 85, art. 4. Cf. People's Mediation Provisional Principles, *supra* note 39, art. 5 (requiring a clear political stance and no mention of having knowledge in law and policy). The judicial-administrative organs (*sifa xingzheng jiguan*) "are responsible for providing mediators with some legal education and practical training." Clarke, *supra* note 3, at 276.

91. People's Mediation Regulations, *supra* note 85, art. 14.

92. *Id.* art. 12. Cf. People Mediation Provisional Principles, *supra* note 39, art. 7 (no mention of accepting dinner invitations or gifts and of keeping personal secrets confidential).

93. People's Mediation Regulations, *supra* note 85, art. 5. Cf. People's Mediation Provisional Principles, *supra* note 39, art. 3 (mediating general civil disputes, handling minor crimes, and propagating laws and policies).

94. People's Mediation Regulations, *supra* note 85, art. 6.

95. *Id.* art. 7. Generally, a person's *danwei* (unit) refers to the group to which he or she belongs by reason of employment. In this context, "relevant units" refer to entities (administrative agencies, institutions, enterprises, etc.) that can provide assistance in resolving the dispute. "Individuals concerned" refer to people who can help to resolve the dispute, such as relatives and friends; they may or may not be the witnesses.

96. *Id.* art. 11.

97. *Id.* art. 7.

98. *Id.* art. 9.

guard social stability, thereby facilitating the construction of socialist modernization.<sup>99</sup> Accordingly, the focus of mediation has shifted from political mobilization to promotion of social cohesion. In fact, the establishment of mediation committees within residents' or villagers' committees and the supervision of mediation work by judicial assistants reflect the government's policies of formalizing people's mediation and integrating it into the overall legal system. Apparently, mediation has become a more genuine mechanism for resolving disputes.<sup>100</sup> This trend can also be supported by the fact that joint mediation can be arranged for trans-regional or trans-unit disputes.<sup>101</sup>

Over the years, mediation has been praised as an effective means of dispute resolution. Advocates assert that mediation provides flexibility in handling cases where there are gaps in the law,<sup>102</sup> allows the courts to devote their limited time and resources to the more difficult cases,<sup>103</sup> enables the parties to have the greatest possible control over their rights and interests,<sup>104</sup> prevents full-blown conflicts,<sup>105</sup> enhances unity,<sup>106</sup> and yields better compliance because the outcome is based on the agreement of the parties.<sup>107</sup>

To understand people's mediation in practice, it is useful to refer to some statistics. In 1998, there were 984,000 people mediation committees, 9,175,000 mediators, and 52,875 full-time judicial assistants.<sup>108</sup> These committees resolved about 5,267,000 civil disputes.<sup>109</sup> In addition, from 1980 to 1994, people's mediation committees prevented more than one million disputes from intensifying, as well as preventing 1.33 million unnatural deaths (including homicide and suicide).<sup>110</sup> In 1994, the success rate of

99. *Id.* art. 1.

100. See also Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 227-28.

101. People's Mediation Regulations, *supra* note 85, art. 7; Kuadiqu Quidanwei Minjian Jiufen Tiaojie Banfa [Measures on Mediation of Trans-Area and Trans-Unit Civil Disputes], reprinted in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU (1994) (ZENGBIANBEN) [COMPENDIUM OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1994) (SUPPLEMENTAL VOLUME)] [hereinafter FALU QUANSHU (1994)] 967 (Huaian Wang et al. ed., 1995).

102. Clarke, *supra* note 3, at 271 (citing Zheng Qixiang, et al., "Zhuozhong Tiaojie" de Tifa Ying Yu Xiugai [The Expression "Stress Mediation" Should be Amended], 1990 FAXUE (Shanghai), No. 2, at 26, 26-28).

103. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 238.

104. Clarke, *supra* note 3, at 271 (citing Zheng, *supra* note 102).

105. CIVIL MEDIATION SYSTEM, *supra* note 23, at Editor's Note; Du, *supra* note 52, at 14.

106. Clarke, *supra* note 3, at 271 (citing Zheng, *supra* note 102).

107. *Id.*

108. 1999 CHINA STAT. Y.B., *supra* note 5, at 745.

109. *Id.*

110. Du, *supra* note 52, at 14. On average, mediation committees under the guidance of judicial assistants prevent more than 80,000 disputes from intensifying into

mediation was as high as 94.5%.<sup>111</sup> Nonetheless, people's mediation has also been criticized.

First, the majority of mediators are retired personnel with a general knowledge of the law,<sup>112</sup> and housewives,<sup>113</sup> who mediate on a part-time basis<sup>114</sup> and receive only small allowances.<sup>115</sup> While some mediators are no longer as idealistic as they were, many mediators have realized that they can no longer advance their political or social status through mediation work.<sup>116</sup> In other words, there are no incentives for mediators to perform well. To raise the performance of mediators, some local governments have rewarded mediators with stipends,<sup>117</sup> while others have signed service contracts with mediators.<sup>118</sup>

Similarly, many judicial assistants have limited legal training so that they cannot effectively perform their guiding role.<sup>119</sup> Indeed, judicial assistants, who are limited in number, do not have sufficient time to handle the cases before them.<sup>120</sup> As a result, the competency and dedication of many mediators or judicial assistants is questionable. Furthermore, mediation committees still use coercive tactics, even though not as prevalent as in the past.<sup>121</sup>

In particular, the couple in a divorce case often felt pressured to reconcile their differences.<sup>122</sup> Besides, some mediators have achieved settlements not based on a clear understanding of

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crimes, more than 50,000 suicide cases arising out of civil disputes, and more than 60,000 unnatural deaths each year. Zhang, *supra* note 87, at 19.

111. Du, *supra* note 52, at 14.

112. CIVIL MEDIATION SYSTEM, *supra* note 23, at 1.

113. Glassman, *supra* note 3, at 469.

114. Apparently, some mediators were permitted to serve full-time or take a temporary leave of absence from work. See Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 268.

115. See Du, *supra* note 52, at 13 (mediators do not have fixed compensation and receive subsidies if they have missed work); Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 249 (because mediators are often poorly paid, elections in many cases actually are requests for mediators to stay). Cf. CIVIL MEDIATION SYSTEM, *supra* note 23, at 12 (in urban neighborhoods, remuneration is in the form of a monthly salary; in rural areas, remuneration is determined by the amount of work contracted).

116. Fu, *supra* note 3, at 228. Nonetheless, close links are maintained between Party cadres and mediation committees. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 249.

117. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 267-68.

118. Fu, *supra* note 3, at 237-42; Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 276-77.

119. Clarke, *supra* note 3, at 281.

120. *Id.* (Each judicial assistant supervises about twenty people's mediation committees.).

121. *Id.*

122. See Fu, *supra* note 3, at 221; Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 250-52.

the facts and the law.<sup>123</sup> This type of “unprincipled” or unlawful mediation has been widely criticized. In consequence, mediators are urged to conduct mediation based on the principle of voluntariness and to distinguish rights from wrongs.

Compounded by the problem that some government departments tend to push their responsibilities onto mediators,<sup>124</sup> people’s mediators and judicial assistants lack substantive authority to enforce mediated agreements.<sup>125</sup> Therefore, parties can easily refuse to comply with the mediated agreement.<sup>126</sup> On the other hand, legal reform advocates or the so-called modernists believe that an overemphasis of mediation will result in a heavy reliance on informal justice and, thus, insufficient attention to the development of formal legal institutions.<sup>127</sup>

Nonetheless, people’s mediation will continue to be a major means of resolution in civil dispute cases for several reasons. First and foremost, it is the State’s policy to use mediation to educate the masses while resolving civil disputes. In other words, mediation can simultaneously serve two important functions. One is to promote social stability,<sup>128</sup> and consequently, economic construction, by expedient resolution of civil disputes. The other is to propagate laws, policies, and social ethics in real-life situations. Second, the amount of time, energy, and expenses associated with a lawsuit can be costly, whereas mediation service at least is provided free of charge.

Third, if the disputants have unequal access to information, mediation, rather than trial, may produce a more acceptable outcome to the disadvantaged party. This is because with relatively limited access to information, the disadvantaged party will be less prepared for trial, and thus, stands to lose more. However, medi-

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123. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 240-42; Clarke, *supra* note 3, at 272.

124. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 242.

125. Fu, *supra* note 3, at 229, 234. *See also* Du, *supra* note 52, at 14 (Mediators do not have power to enforce mediated agreements.).

126. If the parties affirm their consent to the mediated agreement by having it stamped by a “responsible government department” within one year from the date on which the party’s rights were infringed, the agreement will have legal effect. Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 270. Furthermore, in 1990, the Ministry of Justice issued the Measures for Handling Civil Disputes, which gave mediation committees and judicial assistants some power in enforcing a mediated agreement. For example, if one party wants to repudiate a mediated agreement, it should apply to the court within fifteen days after the agreement is signed. Upon expiration of the fifteen days, the government can “take necessary measures” to enforce the agreement. Fu, *supra* note 3, at 235, n.102.

127. *See* Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 236.

128. *See* Glassman, *supra* note 3, at 484 (“the creation of an institution that promotes social stability”); Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 244 (“mediation is generally expected to improve social stability and unity”).

ation makes the disadvantaged party feel as if it is on an equal footing with the advantaged party. Fourth, since the majority of people still live in villages, which are closely knit societies, and disputants have to deal with each other again in the future, mediation ending with a compromise is a better option than litigation ending with bitter feelings. Finally, in urban areas where legal professionals are in short supply and judicial resources are still limited, mediation can serve as a realistic alternative.

### (B) *Judicial Mediation*

Judicial mediation has been used in civil trials in China since the late 1930s.<sup>129</sup> In 1982, China promulgated a Civil Procedure Law on a trial basis, which provided that judges should stress mediation while adjudicating cases.<sup>130</sup> However, when mediation was ineffective or when one party retracted its promise, judges should promptly adjudicate.<sup>131</sup> Coercion and unlawfulness were the most noteworthy problems associated with judicial mediation.<sup>132</sup> To rectify these problems, while containing similar provisions on mediation, the Civil Procedure Law of 1991 emphasizes voluntariness and compliance with the law in mediating cases.<sup>133</sup>

Under the new law, relying upon the willingness of the parties, the court should mediate based on clear facts and distinguish right from wrong.<sup>134</sup> One judge or a collegiate bench can mediate a dispute, and mediation should be conducted on the spot whenever possible.<sup>135</sup> The court can invite relevant units or individuals concerned to assist in mediation.<sup>136</sup> Most importantly, a mediated agreement must be produced based on the voluntari-

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129. In the liberated areas, the Party gave priority to mediation in civil trials. Palmer, *Judicial Mediation*, *supra* note 3, 150.

130. Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [The Civil Procedure Law of the People's Republic of China (Trial Implementation)], art. 6, *reprinted in* FALU QUANSHU, *supra* note 13, at 389.

131. *Id.* arts. 6, 102.

132. See Palmer, *Judicial Mediation*, *supra* note 3, at 157 (reports indicating that the judge's search for a consensual settlement in contested divorce cases may cause the disputants to believe that they had no choice but to accept a mediated outcome), 153-54 (feeling unable to secure enforcement of adjudicated outcomes, judges were prepared to use mediation to circumvent relevant legal provisions, and in so doing, to infringe upon the litigants' rights).

133. Zhonghua Renmin Gongheguo Minshi Susong Fa [The Civil Procedure Law of the People's Republic of China] art. 9, *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 1707 [hereinafter Civil Procedure Law]. However, if only one spouse wants a divorce, the court is obligated to conduct mediation first. See Zhonghua Renmin Gongheguo Hunyin Fa [The Marriage Law of the People's Republic of China] art. 25, *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 335 [hereinafter Marriage Law].

134. Civil Procedure Law, *supra* note 132, art. 85.

135. *Id.* art. 86.

136. *Id.* art. 87.

ness of both parties and cannot violate the law.<sup>137</sup> A mediated agreement becomes legally binding once it has been delivered to and signed by the parties.<sup>138</sup> However, if mediation does not result in an agreement or one party retracts before the delivery of the written mediated agreement, the court should adjudicate promptly.<sup>139</sup>

Judicial mediation can be conducted before trial or at any stage prior to judgment.<sup>140</sup> In fact, the court of second instance can carry out mediation, and the judgment of the court of first instance will be rescinded once the mediated agreement is delivered.<sup>141</sup> If one party can prove that a legally effective mediated agreement was entered into in violation of the principle of voluntariness or its contents have violated the law, the same case can be retried.<sup>142</sup>

Compared with people's mediation, judicial mediation receives less coverage in the literature and has attracted primarily negative comments. First, critics maintain that since enforcement of the law is difficult because of local protectionism and selfish departmentalism (failure of concerned departments to assist in the execution of judgment), judges tend to reach a mediated rather than an adjudicated outcome.<sup>143</sup> Second, lower-court judges sometimes do not want to apply the law because of insufficient legal knowledge; thus, they prefer to rely on interpersonal skills, rather than legal analysis, to resolve disputes.<sup>144</sup> Third, some courts use mediation as stalling tactics.<sup>145</sup>

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137. *Id.* art. 88.

138. *Id.* art. 89. Under the following circumstances, the court may not produce a written mediated agreement: (1) reconciliation in divorce cases; (2) continuation of adoption relationships; (3) agreements that can be performed immediately; and (4) any other cases not requiring a written mediated agreement. When a written mediated agreement is not necessary, the court should record the mediated outcome and have the parties, judges, and court secretary to sign. *Id.* art. 90.

139. *Id.* art. 91.

140. *Id.* art. 128.

141. *Id.* art. 155.

142. *Id.* art. 180.

143. Palmer, *Judicial Mediation*, *supra* note 3, at 151-52. Even mediated agreements can be ineffective in securing the desired outcome. *Id.* at 152-53. Similarly, owing to the lack of strong enforcement power by courts, judges may correctly believe that a mediated agreement giving both parties something has a greater chance of being implemented than a judgment. Clarke, *supra* note 3, at 294.

144. Palmer, *Judicial Mediation*, *supra* note 3, at 170-71. See also Fu, *supra* note 3, at 221-22 (mediation impedes the development of legal professionalism because it requires no legal training) (quoting Zhang Xingzhong, *Zhuozheng Tiaojie Yuanze Shi Wojian [My Opinion about the Principle of Emphasizing Mediation]*, FAZHI RIBAO [LEGAL DAILY], May 22, 1989).

145. Fu, *supra* note 3, at 221. Prolonged judicial mediation has also been an effective method to block contested divorce applications. Palmer, *Judicial Mediation*, *supra* note 3, at 169.

To understand judicial mediation in practice, it is useful to refer to some statistics. In 1998, the court of first instance concluded 3,360,028 civil disputes, of which 1,540,368 were resolved by mediation (about 46%); and 1,456,247 economic disputes, of which 626,741 were resolved by mediation (about 43%).<sup>146</sup> The court of second instance decided 204,958 civil disputes, of which 17,620 were resolved by mediation (about 9%); and 89,261 economic disputes, of which 7328 were resolved by mediation (about 8%).<sup>147</sup>

### (C) Summary

In the pre-reform period, people's mediation was an instrument of mobilization. With the passage of the Regulations on the Organization of People's Mediation Committees, people's mediation has become more formal, systematic, and professional. Mediation has become a more genuine mechanism for resolving civil disputes.

As a component of the overall Chinese legal system, people's mediation is a legal institution promoted by the State, rather than being an informal, community-originated mode of dispute resolution. Commentators suggest that mediation serve as a control mechanism to promote social stability, which is a prerequisite for successful economic reforms.<sup>148</sup> Similarly, one scholar asserts that as mediation becomes institutionalized, it becomes an arm of the State.<sup>149</sup> Considering mediation both in the pre-reform and reform periods, it is perhaps more accurate to say that mediation has been a part of the overall social control network since 1949.

Judicial mediation was emphasized at the beginning of 1980s. However, the Civil Procedure Law of 1991 mandates that mediation must be based on voluntariness and lawfulness, and that adjudication must be conducted upon mediation failure.

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146. 1999 LAW Y.B. OF CHINA, *supra* note 81, at 1022. The corresponding figures for 1997 were 51% and 50%, respectively. Figures derived from 1998 ZHONGGUO FALU NIANJIAN 1998 LAW Y.B. OF CHINA 1239 (Zhongguo Falu Nianjian Bianjibu, comp. 1999). Thus, in comparison, there were an increase in litigation and a decrease in judicial mediation for both civil and economic disputes in 1998.

147. 1999 LAW Y.B. OF CHINA, *supra* note 81, at 1023. The corresponding figures for 1997 were 10% and 9%, respectively. Figures derived from 1998 LAW Y.B. OF CHINA, *supra* note 145, at 1240. Accordingly, in the courts of second instance, the proportion of civil and economic disputes resolved by judgment was greater than that by mediation in 1998.

148. See, e.g., Glassman, *supra* note 3, at 462, 478-79. See also Palmer, *Extra-Judicial Mediation*, *supra* note 3, at 235-36, 245 (close links between mediation committees and governmental departments or local institutions to create a comprehensive system of local control); Fu, *supra* note 3, at 216 (disputes regarded as fundamentally disruptive to modernization).

149. Clarke, *supra* note 3, at 295.

Mediation can be conducted at any stage prior to judgment, and the court of second instance can mediate a case on appeal. This seems to suggest that mediation is considered a more effective vehicle to resolve civil disputes—it is not a zero-sum game.

As a mode of alternative dispute resolution, mediation is practiced in many jurisdictions.<sup>150</sup> Thus, it is not unique for China to use mediation as a vehicle for resolving disputes. Nevertheless, Chinese mediation is unique in the sense that people's mediation has been used as an instrument of mobilization and a part of the social control network. In addition, various types of mediation have been institutionalized to form integral parts of the overall legal system. Apparently, elements of coercion have existed, and still exist, though to a lesser degree. Nonetheless, pressure on the parties is inevitable, even in the case of informal mediation in traditional societies or during judicial mediation in other countries.<sup>151</sup> In addition, mediation has its inherent merits. It can quickly resolve interpersonal disputes, prevent minor conflicts from becoming full-blown ones, reduce court backlogs, and allow courts some flexibility to direct their limited resources.

### III. LITIGATION OF CIVIL DISPUTES IN THE REFORM ERA

Notwithstanding the fact that mediation is extensively used in China, the use of civil litigation and litigation in general has increased over the years.<sup>152</sup> Several developments may account for this upward trend. First of all, although Chinese citizens still use the system of letters-and-visits to redress their grievances against government agencies, the General Principles of the Civil Code enable them to sue government officials for civil liability if their rights are infringed in the line of duty.<sup>153</sup> With the passage

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150. For example, Japan enacted the Civil Mediation Act in 1951 to integrate statutes relating to mediation of civil or commercial disputes so that civil or commercial disputes could be settled amicably. See *Minjichoteiho* [Civil Mediation Act], Law No. 222 of 1951 (as amended by Law No. 91 of 1991), reprinted in 1999 *KONSAISU HANREI ROPPO* [1999 CONCISE SIX CODES AND DECISIONS] 1162 (Sanseido 1998).

151. According to the Civil Mediation Act, a mediation committee is to be organized by the court. The mediation committee may consist of a judge or judges. Upon the request of the parties, the mediation committee may be composed of a judge and at least two commissioners appointed from outside the court. See *id.* arts. 5-6. In practice, the same judge may adjudicate the case if judicial mediation fails.

152. See *supra* note 5 and accompanying text for the increase in civil litigation. Moreover, the total number of civil, economic, and administrative cases accepted in the courts of first instance in 1983 was 800,516, but the figure rose to 4,923,468 in 1998. See 1999 *CHINA STAT. Y.B.*, *supra* note 5, at 757.

153. *Zhonghua Renmin Gongheguo Minfa Tongze* [the General Principles of the Civil Code of the People's Republic of China], art. 121, reprinted in *CHANGYONG FALU FAGUI QUANSHU*, *supra* note 62, at 317.

of the Administrative Procedure Law, litigation against the government has increased.<sup>154</sup> Moreover, when complaints are lodged against government agencies, judicial mediation cannot be a viable option, unless the lawsuit concerns compensatory damages.<sup>155</sup> Furthermore, the State Compensation Law, adopted in 1994, enables citizens to seek compensation from administrative agencies, the procuratorate, and the judiciary for injury to person or property.<sup>156</sup>

Apart from the availability of lawsuits against government agencies, commentators have offered other explanations for the surge in civil litigation. For instance, one party may be motivated by a desire to impress upon the opponent the seriousness of his or her complaint.<sup>157</sup> In addition, an individual with a weak case may use litigation as a strategy to minimize losses.<sup>158</sup> Another popular, but unsubstantiated, assertion is that intellectuals use the court system to protect their rights. It has also been suggested that increased litigation serves the government's goal of enhancing the importance of the courts.<sup>159</sup>

The preceding explanations are useful to understanding the increase in litigation in China. Nonetheless, it may be more instructive to examine some specific cases in order to obtain further insights as to why some parties choose to file lawsuits, or alternatively, why some cases finally make it to the court. Based on the facts of sixty-two unedited cases decided by an appellate bench in two years,<sup>160</sup> the following discussion attempts to iden-

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154. The Administrative Procedure Law was effective on October 1, 1990. In 1990, the number of administrative disputes accepted by the courts of first instance totaled 13,006, but it reached 25,667 in 1991. In 1998, the courts of first instance accepted 98,350 administrative cases. 1999 CHINA STAT. Y.B., *supra* note 5, at 757.

155. Administrative Procedure Law, *supra* note 63, arts. 50, 67. To seek compensatory damages alone, the complainant should first go to the administrative agency. If the complainant does not accept the solution made by the administrative agency, it can file a lawsuit. *Id.* art. 67.

156. Zhonghua Renmin Gongheguo Guojia Peichang Fa [State Compensation Law of the Peoples' Republic of China], *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 202.

157. Palmer, *Judicial Mediation*, *supra* note 3, at 148 (going to the court is not only to initiate a successful lawsuit, but to gain access to a sympathetic forum).

158. People with weak cases tend to insist on adjudication in the court of first instance because they can either win the case or have an opportunity to renegotiate a better deal by opting for mediation in the court of second instance. Palmer, *Judicial Mediation*, *supra* note 3, at 165; Glassman, *supra* note 3, at 476 ("A decision to litigate likely reflects a party's strategic preference for judicial rather than committee mediation.").

159. *Class Actions Litigation in China*, 111 HARV. L. REV. 1523, 1531 (1998). In addition, since State control over individuals continues to decrease, class actions show that increasing the role of courts in dispute resolution may grant the government a certain amount of control over disputes. *Id.* at 1532.

160. These sixty-two cases were decided by the Guangzhou Intermediate People's Court in 1989 and 1990. Although a collegiate bench decided these cases on

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appeal, they represented the workload of an appellate judge in a two-year period. As of now, Chinese court decisions are not published systematically as cases are in the U.S. The Supreme People's Court have selected and published cases of people's courts in a series primarily for illustration and education purposes. Treatises or monographs on particular subjects, such as intellectual property and economic contracts, also publish some court decisions. Since the sixty-two cases have not been published, they are numbered from 1 to 62 here for the purposes of confidentiality and discussion. See Case 1, (Guangzhou Intermediate People's Court, Jan. 30, 1989)(on file with author); Case 2, (Guangzhou Intermediate People's Court, Jan. 1989)(on file with author); Case 3, (Guangzhou Intermediate People's Court, Feb. 27, 1989)(on file with author); Case 4, (Guangzhou Intermediate People's Court, Mar. 22, 1989)(on file with author); Case 5, (Guangzhou Intermediate People's Court, Mar. 22, 1989)(on file with author); Case 6, (Guangzhou Intermediate People's Court, Mar. 22, 1989)(on file with author); Case 7, (Guangzhou Intermediate People's Court, Mar. 1989)(on file with author); Case 8, (Guangzhou Intermediate People's Court, Mar. 29, 1989)(on file with author); Case 9, (Guangzhou Intermediate People's Court, Mar. 31, 1989)(on file with author); Case 10, (Guangzhou Intermediate People's Court, Apr. 13, 1989)(on file with author); Case 11, (Guangzhou Intermediate People's Court, Apr. 28, 1989)(on file with author); Case 12, (Guangzhou Intermediate People's Court, May 9, 1989)(on file with author); Case 13, (Guangzhou Intermediate People's Court, May 9, 1989)(on file with author); Case 14, (Guangzhou Intermediate People's Court, May 1989)(on file with author); Case 15, (Guangzhou Intermediate People's Court, May 23, 1989)(on file with author); Case 16, (Guangzhou Intermediate People's Court, May 23, 1989)(on file with author); Case 17, (Guangzhou Intermediate People's Court, May 29, 1989)(on file with author); Case 18, (Guangzhou Intermediate People's Court, May 31, 1989)(on file with author); Case 19, (Guangzhou Intermediate People's Court, July 11, 1989)(on file with author); Case 20, (Guangzhou Intermediate People's Court, July 11, 1989)(on file with author); Case 21, (Guangzhou Intermediate People's Court, July 18, 1989)(on file with author); Case 22, (Guangzhou Intermediate People's Court, July 28, 1989)(on file with author); Case 23, (Guangzhou Intermediate People's Court, July 28, 1989)(on file with author); Case 24, (Guangzhou Intermediate People's Court, Aug. 4, 1989)(on file with author); Case 25, (Guangzhou Intermediate People's Court, Aug. 18, 1989)(on file with author); Case 26, (Guangzhou Intermediate People's Court, Aug. 26, 1989)(on file with author); Case 27, (Guangzhou Intermediate People's Court, Aug. 31, 1989)(on file with author); Case 28, (Guangzhou Intermediate People's Court, Sept. 1989)(on file with author); Case 29, (Guangzhou Intermediate People's Court, Sept. 1989)(on file with author); Case 30, (Guangzhou Intermediate People's Court, Sept. 26, 1989)(on file with author); Case 31, (Guangzhou Intermediate People's Court, Oct. 19, 1989)(on file with author); Case 32, (Guangzhou Intermediate People's Court, Nov. 14, 1989)(on file with author); Case 33, (Guangzhou Intermediate People's Court, Nov. 30, 1989)(on file with author); Case 34, (Guangzhou Intermediate People's Court, Dec. 15, 1989)(on file with author); Case 35, (Guangzhou Intermediate People's Court, Dec. 21, 1989)(on file with author); Case 36, (Guangzhou Intermediate People's Court, Dec. 26, 1989)(on file with author); Case 37, (Guangzhou Intermediate People's Court, Dec. 26, 1989)(on file with author); Case 38, (Guangzhou Intermediate People's Court, Dec. 26, 1989)(on file with author); Case 39, (Guangzhou Intermediate People's Court, Dec. 26, 1989)(on file with author); Case 40, (Guangzhou Intermediate People's Court, Jan. 16, 1990)(on file with author); Case 41, (Guangzhou Intermediate People's Court, Feb. 12, 1990)(on file with author); Case 42, (Guangzhou Intermediate People's Court, Feb. 12, 1990)(on file with author); Case 43, (Guangzhou Intermediate People's Court, Feb. 29, 1990)(on file with author); Case 44, (Guangzhou Intermediate People's Court, Mar. 23, 1990)(on file with author); Case 45, (Guangzhou Intermediate People's Court, Apr. 17, 1990)(on file with author); Case 46, (Guangzhou Intermediate People's Court, May 3, 1990)(on file with author); Case 47, (Guangzhou Intermediate People's Court, May 29, 1990)(on file with au-

tify common elements conducive to lawsuits. Although the sample comes from a few years ago, it is still relevant because the inquiry aims at ascertaining what sorts of cases were involved. In addition, two implicit points are noteworthy. First, explanations are the most useful if viewed in their respective contexts. Second, generalization inevitably involves a certain amount of speculation and oversimplification.

Of the sixty-two cases, there are twenty-three succession disputes (37.1%);<sup>161</sup> twenty-three domestic relations disputes (37.1%);<sup>162</sup> six cases involving compensation for physical injury and/or property damage (9.7%);<sup>163</sup> eight cases concerning repayment of debt (12.9%);<sup>164</sup> one case regarding failure to pay for delivery of goods;<sup>165</sup> and one case involving a property dispute.<sup>166</sup> Except for one case of retrial,<sup>167</sup> all of these cases are appeals from judgments of the courts of first instance located in

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thor); Case 48, (Guangzhou Intermediate People's Court, June 14, 1990)(on file with author); Case 49, (Guangzhou Intermediate People's Court, July 5, 1990)(on file with author); Case 50, (Guangzhou Intermediate People's Court, July 5, 1990)(on file with author); Case 51, (Guangzhou Intermediate People's Court, July 5, 1990)(on file with author); Case 52, (Guangzhou Intermediate People's Court, July 5, 1990)(on file with author); Case 53, (Guangzhou Intermediate People's Court, July 30, 1990)(on file with author); Case 54, (Guangzhou Intermediate People's Court, Aug. 7, 1990)(on file with author); Case 55, (Guangzhou Intermediate People's Court, Aug. 22, 1990)(on file with author); Case 56, (Guangzhou Intermediate People's Court, Sept. 6, 1990)(on file with author); Case 57, (Guangzhou Intermediate People's Court, Sept. 25, 1990)(on file with author); Case 58, (Guangzhou Intermediate People's Court, Oct. 23, 1990)(on file with author); Case 59, (Guangzhou Intermediate People's Court, Oct. 31, 1990)(on file with author); Case 60, (Guangzhou Intermediate People's Court, Nov. 20, 1990)(on file with author); Case 61, (Guangzhou Intermediate People's Court, Nov. 20, 1990)(on file with author); Case 62, (Guangzhou Intermediate People's Court, Dec. 25, 1990)(on file with author).

161. These cases are numbered 1, 2, 3, 9, 10, 15, 20, 23, 24, 27, 28, 30, 31, 33, 37, 40, 43, 50, 51, 54, 58, 60, and 62.

162. These cases involve divorce, distribution of marital property, liability for debt after dissolution of marriage, child support and custody, "marriage dispute," and/or determination of paternity. They consists of cases numbered 5, 6, 8, 11, 12, 13, 17, 18, 19, 21, 26, 32, 34, 35, 36, 41, 42, 45, 48, 49, 55, 57, and 59.

163. See Case 4; Case 7; Case 16; Case 25; Case 38; Case 46.

164. See Case 14; Case 29; Case 39; Case 44; Case 47; Case 52; Case 56 ; Case 61.

165. See Case 53.

166. See Case 22.

167. In Case 62, a prior judgment of the intermediate people's court (the court of second instance) was appealed to (*shensu*) the high people's court. *Shensu* is different than *shangsu*. *Shangsu* is an appeal against a judgment within the prescribed period for filing an appeal, whereas *shensu* is an appeal against a legally effective judgment. In this case, the high court directed the intermediate court to retry the case on the basis of incorrect application of the law and failure to determine the details of the facts.

various districts around Guangzhou, the capital of the Guangdong Province.<sup>168</sup>

The parties<sup>169</sup> in these cases came from all walks of life, and included school teachers, workers, retired workers, individual households (*getihu*), farmers, cadres, retired cadres, temporary workers, people waiting for employment (*daiye*) [the unemployed] or having no fixed employment, a village cooperative, a villagers' committee, drivers, a prisoner, a restaurant manager, factories, and a shopping center. In about twenty of these cases, there is more than one plaintiff or defendant in the courts of first instance.<sup>170</sup> At the time of litigation, most parties were living in the Guangzhou Municipality, Zengcheng County, and Longmen County,<sup>171</sup> while several parties were living outside China, such as in Hong Kong or the United States.<sup>172</sup> Moreover, at least one party in thirty-one cases was represented by lawyers or legal

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168. The Chinese court system is four-tiered: the Supreme People's Court (the highest judicial organ in the country); high people's courts in provinces or municipalities directly under the central government that hear appellate cases and very important cases of first instance; intermediate people's courts in major cities that hear appellate cases and important cases of first instance; and basic-level people's courts which hear cases of first instance.

169. The parties here refer to plaintiffs and defendants, excluding third parties who had joined the appeal as either appellants or respondents. Third parties are people whose interests will be affected by the adjudicated outcome. They can request to participate in the lawsuit, or the court may ask them to participate. If the court imposes civil liability on them, they will have the rights and duties of a litigant. Civil Procedure Law, *supra* note 85, art. 56. Third parties are excluded from this computation because this article aims at determining why some disputants have chosen to litigate their disputes.

170. The disputes in these cases concern succession (12 cases), compensation for physical injury and/or property damage (4 cases), debt (2 cases), and relocation and contract dispute (1 case). Case 62 also appears to be a multi-party succession case; however, since it is a retrial of a case decided by the intermediate people's court, it is not clear who the original plaintiffs and defendants were. Taking Case 62 into account, the total number of multi-party cases is twenty. In some cases, there are also a number of third parties. See *e.g.*, Case 20; Case 31; Case 43.

171. Examples of parties living in other areas include a factory located outside the Guangdong Province sued for payment after delivery of goods. Case 53; the plaintiff in a divorce case was living in another province. Case 26.

172. See, *e.g.*, Case 1 (one plaintiff was living in Hong Kong); Case 15 (one plaintiff was living in the United States); Case 27 (two defendants were living in Hong Kong); Case 30 (five plaintiffs were living in Hong Kong); Case 54 (plaintiff was living in the United States and defendant was living in Hong Kong). In addition, some third parties were living outside China. See, *e.g.*, Case 20 (a third party in the court of first instance was living in the United States); Case 33 (an appellant who was a third party in the court of first instance was living in Hong Kong).

workers (*falu gongzouzhe*),<sup>173</sup> while the parties in some cases authorized relatives or friends to represent them.<sup>174</sup>

Most of the time, the appellant(s) or respondent(s) were plaintiffs or defendants in the original lawsuit, even though third parties sometimes joined on appeal.<sup>175</sup> There were also cases in which both the plaintiff and defendant appealed from the judgment of the court of the first instance.<sup>176</sup> Four appellants decided to rescind their appeals and were granted approval.<sup>177</sup> Generally, the court affirmed the decision of the lower court either in whole or in part. However, in two cases, the court vacated the judgment of the lower court and remanded the case for retrial on the basis of procedural errors.<sup>178</sup> In another instance, the court reversed the lower court's decision and granted divorce.<sup>179</sup> Eleven cases were resolved by judicial mediation,<sup>180</sup> which constituted about 18% of the total number of cases.<sup>181</sup> One case was transferred from another province to the court of first instance after thirteen years because the defendant had moved to Guangzhou.<sup>182</sup>

Although the factual details of each case were different, common patterns did exist in the two major types of cases—domestic relations and succession. In domestic relations cases, one spouse sought dissolution of marriage either after a period of separate living resulting from suspected infidelity and/or bitter

173. See Cases 1, 3, 5, 10, 11, 15, 16, 17, 20, 21, 22, 24, 25, 30, 31, 33, 34, 36, 37, 39, 40, 42, 43, 44, 47, 52, 53, 54, 58, 61 (lawyers) and Case 27 (one of the defendants represented by a legal worker). In addition, the defendant in Case 53 was represented by a legal worker, and the plaintiff in Case 11 was represented by intern-lawyers.

174. See, e.g., Case 15 (son); Case 21 (a retired cadre of intermediate people's court); Case 50 (daughter and son-in-law). It is not necessary for someone to have prior legal training in order to represent another in a civil case. Civil Procedure Law, *supra* note 133, art. 58. Of these cases, elderly people, see Case 15; Case 50, or parties who were not residing in China, see Case 54, tended to have representatives in court. In Case 54, both the plaintiff and the defendant were living outside China, so they retained counsel and had other individuals represent them.

175. See, e.g., Case 24; Case 33.

176. See, e.g., Case 21; Case 40.

177. See Case 12 (divorce); Case 23 (succession); Case 35 (divorce); Case 45 (marriage dispute).

178. See Case 37 (certain legal heirs were not listed as parties); Case 44 (company involved in a debt lawsuit was not listed as a party).

179. See Case 6.

180. See Case 4 (compensation); Case 8 (divorce); Case 30 (succession); Case 34 (divorce); Case 38 (compensation); Case 41 (divorce); Case 46 (compensation); Case 47 (debt); Case 52 (debt); Case 55 (divorce); Case 59 (divorce).

181. Considering that four appeals were rescinded, an alternative figure would be 19% (eleven out of fifty-eight cases).

182. See Case 26

quarrels,<sup>183</sup> or to a lesser extent, due to personality differences.<sup>184</sup> There were several cases in which one spouse repeatedly filed for divorce because the previous court(s) had denied his or her request.<sup>185</sup> In some instances, the parties either agreed to divorce

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183. See Case 5; Case 6; Case 21; Case 32; Case 42. For the purpose of illustration, the factual details of Case 5 and Case 32 are as follows:

In Case 5, the couple had married for about four years when the husband began a close relationship with a younger woman. The wife suspected the affair and discord crept into their marriage. Several years later, the wife went to the home of the young woman and made a scene. In addition, she threw some of her husband's belongings into a pond and divided the house into two sections by filling an adjoining doorway. As a result, the wife lived in the northern part of the house, while the husband lived in the southern part. Thereafter, another man went to visit the wife at her place. Since the husband believed the wife's behavior was improper, their conflict further intensified. Finally, the husband filed for divorce; and the wife contested. The trial court granted divorce, but the wife appealed on the ground that they still had feelings toward each other. The appellate court affirmed and granted divorce.

In Case 32, the wife resumed correspondence with a former male classmate. This aroused the husband's suspicion, and their relationship began to change. The next year, the husband became close to a female colleague. This upset the wife, and the marriage further deteriorated. They frequently quarreled, and the husband hit the wife. The two decided to live separately for awhile, and eventually the couple reached an agreement to divorce each other. However, the wife retracted her promise when asked to sign the agreement. Subsequently, the husband sought a divorce in court. The court, however, did not grant the divorce. The wife then tried to reconcile with the husband. Even so, the husband was determined to obtain a divorce. He filed a lawsuit again. This time the trial court granted his request. The husband accepted the judgment but requested to have custody of one son (the couple had two sons). The wife appealed on the ground that the marriage had not completely broken down. The appellate court granted divorce but changed the amount of child support.

184. See Case 19; Case 48; Case 57. For purpose of illustration, the facts of Case 19 are summarized as follows: The couple had conflicts over family trivialities and due to personality differences. In a span of about four years, the husband (plaintiff) thrice sued to obtain a divorce on the basis of personality conflicts. Each time the court conducted mediation, and the couple reconciled. However, the couple continued to bicker over trivialities, and the wife scolded the husband, using crude remarks. As a result, the husband filed for divorce for the fourth time. The wife contested. The trial court denied the husband's request, so he appealed. In affirming the lower court's decision, the appellate court explained that the couple lived normally during the proceedings, that the wife had understood her problem and repented, and that the husband should forgive her in view of the interests of family and children.

185. See Case 6; Case 13; Case 19; Case 32; Case 42; Case 49; Case 57. For the purpose of illustration, the facts of Case 6 are summarized as follows: The couple had married for about nine years and were raising three children when the wife found out that the husband had an illicit relationship with another woman. Thereafter, their marriage deteriorated, and they ended up living separately. In 1983 and 1984, the husband filed lawsuits to seek a divorce; however, both times the court denied the husband's request. The husband appealed, but the appellate courts affirmed. After two more years, the husband again filed a lawsuit seeking for divorce, and the wife again contested. The trial court denied the husband's request and the husband appealed. This time the appellate court granted divorce, giving the wife custody of the eldest son, and the husband custody of the two younger sons.

each other at the trial court or accepted the lower court's decision to grant divorce; however, one or both of them appealed the division of property and/or the arrangements for child support and custody.<sup>186</sup>

According to the Marriage Law, when only one spouse seeks a divorce, or the couple agrees to divorce but disagrees over the division of property or the arrangements for child support or custody, the parties may either request mediation by a relevant government body or file a lawsuit.<sup>187</sup> Since a government body can only persuade the couple to reconcile or the contesting party to agree to divorce but has no authority to grant a divorce, filing a lawsuit remains the most viable option for someone who is determined to obtain a divorce. Moreover, if the court refuses to grant a divorce, the spouse who seeks a divorce has no choice but to try again. This procedural requirement explains why in several cases one spouse kept going to the court despite repeated failures.

Similarly, in those cases in which the couple could not, on their own or through mediation, reach any agreement with respect to the division of marital property or the arrangements for child support or custody, they had no choice but to let the court adjudicate. Indeed, with regard to the division of marital property and the arrangements for child support and custody, a people's mediator or a mediation committee does not possess any

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186. See, e.g., Case 21; Case 41; Case 48; Case 57; Case 59. For the purpose of illustration, the facts of Case 59 are summarized as follows: In granting divorce, the trial court gave custody of the daughter to the husband and ordered the wife to pay monthly child support in the amount of fifty dollars. The court divided the marital property in the following way: (1) the husband a fan, a bed, a male closet, two bed sheets, one comforter, two-thirds of cash deposit, etc., while the wife was given a fan, a blanket, two chairs, two sets of tea cups, one-third of cash deposits, etc.; (2) the wife was to give the husband within six months of the judgment more than 2000 yuan—which included the cash value of some jewelry, the two-thirds of cash deposits, and reimbursement for child support during their separation; (3) the husband was to give the wife within six months of the judgment some grain coupons; and (4) the wife was ordered to move out of the apartment after the divorce. The wife appealed on the ground that the trial court's division of marital property was improper. The appellate court conducted mediation, and the couple reached an agreement. The mediated agreement required the wife to pay only 1300 yuan, let the wife keep the cash from the sale of the jewelry and the cash deposit, and allowed the husband to keep the grain coupons.

187. See Marriage Law, *supra* note 133, arts. 24, 25. Article 24 of the Marriage Law provides that if a married couple voluntarily agree to divorce each other, they should go to the department of marriage registration to apply for a divorce. If the department determines that the requested divorce is based on the voluntariness of both parties and the arrangements for children and property division have been properly handled, it should promptly issue a divorce certificate. Article 25 of the Marriage Law states that when only one spouse seeks a divorce, a relevant government organ may conduct mediation or the party who wants a divorce may file a lawsuit.

real authority. Besides, mediators in many instances do not have the expertise or the resources to resolve disputes over the ownership of marital property, much less to determine what is in the best interests of the children.

Except for one case in which divorce was rejected, the appellate court either upheld the lower courts' decisions to grant divorce, or granted divorce on appeal.<sup>188</sup> This phenomenon casts doubt on the general claim that the couple in a divorce trial are often under pressure to reconcile. In fact, courts have granted divorce more often than rejected it.<sup>189</sup> However, it is not clear how many divorce cases have successfully made it to the courts, and one could argue that the divorce cases that did so definitely comprised adamant parties and truly irreconcilable differences.

In an overwhelming majority of the succession cases, the parties went to court because they had disputes over the distribution of real property,<sup>190</sup> especially the portions of a residential building.<sup>191</sup> Compared with other types of cases, succession cases

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188. See Case 19 (divorce rejected); Case 6 (divorce granted on appeal). For the facts of these cases, see *supra* note 184 for Case 19 and note 185 for Case 6.

189. For example, in 1998, the courts of first instance granted divorce in 224,039 cases and rejected divorce in 101,893 cases. The courts of first instance also conducted mediation. In 501,511 cases, the couple agreed to divorce, while in 140,912 cases, the couple decided not to divorce. 1999 CHINA LAW Y.B., *supra* note 81, at 1022.

190. See, e.g., Case 1; Case 2; Case 3; Case 10; Case 15; Case 20; Case 24; Case 27; Case 28; Case 30; Case 31; Case 33; Case 40; Case 43; Case 50; Case 51; Case 54; Case 58; Case 60; Case 62. It may be argued that almost all succession cases involved distribution of real property because the remaining succession cases are as follows: Case 9 concerned dispute over money, while Case 23 (withdrawal of the appeal) and Case 37 (procedural error due to the fact that one heir was not included as a party) did not indicate the subject matter of the dispute.

191. See Case 24; Case 31; Case 50. For the purpose of illustration, the facts of Case 31 are summarized as follows: A, the decedent, owned a three-story house. A married B at the beginning of the 20th century, and the couple had two daughters (C and D). In the late 1920s, A married E, and the couple raised F (son), G (daughter), H (daughter), and K (son). In 1940s, C and D married and moved out. F worked and supported the parents and his younger brother and sisters. In the late 1960s, when all the children had become independent, A died. At that time, the siblings decided that F would support E and K would support B. In the mid-1980s, B died. Meanwhile the first story of the house had been rented out since the mid-1970s. E had been collecting the rent. E and the son of F lived in the front part of the second floor, but the back part was vacant. K and his family occupied the third floor. One year after B died, C filed a lawsuit, seeking distribution of inheritance and requesting to move back to the second floor of the three-story house. K replied that C could not just move back to the house without consultation, and that although he had no objection to distribution of inheritance, he wanted to inherit more because he had completed more obligations to B. The trial court granted E the whole first floor; divided the second floor among F (1/2, front portion), C (3/8, middle portion), and H (1/8, back portion); and gave one-third of the third floor to D (front), K (middle), and G (back) (including common use of the top patio). K appealed, requesting to have the ownership right of the front portion of the third floor and the right to use the third floor for a long (unlimited) period of time. Believing that the

involved more litigants or third parties living outside China.<sup>192</sup> Most of the decedents died intestate,<sup>193</sup> while a couple of decedents had left questionable wills.<sup>194</sup> In addition, the disputes embodied various patterns. For instance, the decedent had married twice or more, leaving children and/or grandchildren;<sup>195</sup> the decedent had agreed to bequeath real property to a relative in exchange for support in old age;<sup>196</sup> and one heir who had entered an agreement with other heirs to handle the property later changed her mind.<sup>197</sup>

Since the majority of succession cases were multi-party, it was difficult for people's mediators to conduct mediation among them. Not only did the parties have conflicting interests, but also some of them were living outside China. In cases where the parties contested a will or the decedent died intestate, the court, being perceived as the authority to make the final decision, was also adept at handling legal issues. Moreover, the housing shortage was so acute in China that it was beyond the ability of an ordinary mediator to persuade the parties to make concessions.

Apart from the common patterns found in these two major types of cases, it is also possible to distill insights from a general reading of all cases. First, in cases where expert testimonies were necessary, the courts appeared to be in a better position to procure them. For instance, in one case, the court requested that an administrative agency inspect building structures to determine which of the adjacent buildings had slanted beyond safety limits.<sup>198</sup> Likewise, in a paternity case, the court requested that a hospital conduct a blood test to determine a child's paternity.<sup>199</sup>

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distribution of the middle section of the second floor to her was not reasonable, C also appealed. The appellate court decided that (1) A, B, and E each owned one-third of the house, (2) since A and B died intestate, their estate should be inherited by their legal heirs, (3) because C and D moved out in the 1940s, F and G should inherit more because they had given A and B more support, (4) the trial court's distribution of the house was proper, but it did not take into consideration the facts that K had used the third floor for a long time, and that K had given B more support, and (5) K should receive the front portion of the third floor where the living conditions were better, and D should receive the middle portion because she was living somewhere else.

192. See Case 1; Case 15; Case 20; Case 24; Case 27; Case 28; Case 33; Case 40; Case 43; Case 50; Case 54; Case 58. In the late 1980s and early 1990s, Hong Kong had not yet been reverted to Chinese sovereignty. Thus, "outside China" here includes Hong Kong.

193. See Case 10; Case 15; Case 20; Case 33.

194. See Case 28; Case 43.

195. See Case 2; Case 15; Case 24; Case 27; Case 33; Case 43; Case 60.

196. See Case 9.

197. See Case 20; Case 58.

198. See Case 16.

199. See Case 26. Since the plaintiff in this case was living in another province, mediation would not be feasible in this context.

Second, in cases where prior governmental intervention or arbitration had failed, the parties had no choice but resort to the court.<sup>200</sup> Third, in cases where the parties have unequal bargaining positions, the court appeared to be a better or more neutral forum than mediation. For example, the defendants in two cases were a village cooperative and a villagers' committee, respectively.<sup>201</sup> Fourth, in cases involving debt, the amounts in dispute were not negligible.<sup>202</sup> The stake at issue might be too large for people mediators to handle effectively.

It is also helpful to examine briefly the larger environment within which the litigants lived. Guangzhou, as the capital of the Guangdong Province and one of the most developed cities in China, has been the vanguard of economic reforms.<sup>203</sup> In 1989, Guangzhou had a population of 5,854,265.<sup>204</sup> The average annual wage of workers was 3272 yuan,<sup>205</sup> and the average annual income of farmers was 1524.80 yuan.<sup>206</sup> Compared with the corresponding national figures of 1387.81 yuan<sup>207</sup> and 601.51 yuan,<sup>208</sup> Guangzhou appeared to be doing very well.

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200. See Case 22; Case 25. For the purpose of illustration, the key facts of Case 25 are as follows: The plaintiffs had signed a five-year production contract with the villagers' committee. Before the contract expired, however, the local government wanted to renovate a nearby highway. Since parts of the workshop would be removed, the plaintiffs had to move their production. While the villager's committee and the plaintiffs were negotiating, a highway construction vehicle accidentally broke an electric wire. The villagers' committee was informed, but it did not connect the wire immediately. In addition, as the negotiations between the plaintiffs and the villagers' committee prolonged, the government forcefully removed parts of the workshop. The plaintiffs contacted xingfang the county government to conduct arbitration with respect to the disputes arising from the renovation of the highway and the disruption of production due to lack of electricity supply. Meanwhile, the villagers' committee asked the town's rural economic contract administration committee to arbitrate the original production contract dispute. The plaintiffs, however, did not accept the arbitration award rendered by the town's rural economic contract administration committee. Thus, they requested a review by the county's rural economic contract administration committee. The county's rural economic contract administration committee also rendered an arbitration award. Nonetheless, the plaintiffs did not agree with any of the aforementioned awards and filed a lawsuit.

201. See Case 22 (village cooperative); Case 25 (villagers' committee).

202. See, e.g., Case 39 (17,000 yuan); Case 47 (76,000 yuan).

203. Guangzhou, one administrative unit in the Guangdong Province, consists of the Municipality, districts, and nearby counties. At the early stage of economic reforms, three Special Economic Zones were established in Guangdong—Shenzhen, Shantou, and Zhuhai—to attract foreign capital and technology. Thus, Guangzhou has been leading other Chinese areas in the implementation of economic reforms.

204. 1990 GUANGZHOU NIANJIAN [GUANGZHOU Y.B.] 443.

205. *Id.* at 593.

206. *Id.* at 604.

207. This figure represents the average annual total income of urban residents. 1990 ZHONGGUO TONGJI NIANJIAN [STAT. Y.B. OF P.R.C.] 296.

208. *Id.* at 314.

By the end of 1989, there were twenty-four law firms, thirteen notary offices, and 167 grassroots-level legal service offices in Guangzhou.<sup>209</sup> There were 561 licensed lawyers, 167 notaries, and more than 600 legal workers.<sup>210</sup> Among the lawyers, 277 were full-time.<sup>211</sup> As a result, one lawyer served 10,435 people.<sup>212</sup> However, taking the legal workers into consideration, one legal professional would serve 5042 persons.<sup>213</sup> Still, there were not enough legal professionals to serve the community.

Legal fees ranged from 10 to 30 yuan for drafting a complaint, a reply, or an appellate brief, from 70 to 150 yuan for taking up a civil case not involving property; and from 100 to 200 yuan plus a certain percentage of the amount in dispute for handling a civil case involving property.<sup>214</sup> The filing fees of the appellate court in the sixty-two cases ranged from 20 yuan to 2790 yuan, depending on the nature of a case and/or the amount in dispute. Based on the average income figures of Guangzhou residents, one may conclude that it was not terribly expensive to obtain legal services.

Although there is not necessarily any correlation between the level of economic development and litigation rate,<sup>215</sup> these statistics reflect that residents in Guangzhou had some, if not reasonable or substantial, access to courts and legal assistance. Furthermore, the local government appeared to have done a considerable amount of propagating work,<sup>216</sup> even though it was not clear how much more legal knowledge citizens had acquired and how legally conscious citizens had become. Since the litigants in these cases came from all walks of life, it is reasonable to conclude that the legal campaigns achieved a certain amount of

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209. GUANGZHOU FALU FUWU ZHINAN [THE GUIDEBOOK TO LEGAL SERVICES IN GUANGZHOU] 2-4 (Guangzhoushi Sifaju Yanjiushi, ed. 1991). At that time, law firms were composed of lawyers who were basically state employees. Grassroots-level legal service offices in streets or village townships run largely by judicial assistants provided legal services as supplements to law firms and notaries, engaged in propagation of law, and directed or conducted mediation.

210. *Id.* The figure for notaries was computed until the end of 1990. *Id.* at 3. Legal workers (*falu gongzuozhe*) consisted of judicial assistants, retired personnel of political and law departments, etc. *Id.* at 4.

211. *Id.* at 2.

212. Dividing 5,854,265 by 561 results in the figure 10,435.

213. 5,854,265 divided by 1,161 is 5,042.

214. GUANGZHOU FALU FUWU ZHINAN, *supra* note 208, at 24-25. The percentages were listed as follows: below 5,000 (free); 5,001 to 10,000 (3%); 10,001 to 100,000 (1.5%); 100,001 to 1,000,000 (1%); and above 1,000,000 (0.5%). *Id.*

215. There may be some correlation between economic reforms and increase in litigation because complex commercial transactions are probably beyond the ability of people mediators.

216. From January to September 1990, grassroots legal service offices provided 16,900 persons with answers to legal questions. GUANGZHOU FALU FUWU ZHINAN, *supra* note 208, at 55.

success because of the ostensible participation of various social sectors.

Certainly, the question remains whether these sixty-two cases were representative of civil disputes in China at that time or are representative today. In 1989, the courts of first instance in Guangzhou accepted 8805 cases, the subject matter of which included domestic relations (40.7%), housing (29.1%), debt (19.6%), succession (2.9%), and compensation (4.1%).<sup>217</sup> At the national level, the courts of first instance accepted 1,815,385 cases, the subject matter of which included domestic relations (47.9%), housing (3.8%), succession (1.3%), debt (31.8%), and compensation (9.5%).<sup>218</sup> Recently, in 1998, the courts of first instance accepted 3,375,069 civil cases nationwide, the subject matter of which included marriage and family affairs (42.3%), inheritance (0.4%), housing (4.2%), compensation (9.9%), and debt (38.5%).<sup>219</sup>

In comparison, the sixty-two cases were composed of domestic relations (37.1%), succession (37.1%), compensation for physical injury and/or property damage (9.7%), repayment of debt (12.9%), failure to pay for delivery of goods (1.6%), and property dispute (1.6%). A further breakdown by year reveals that in 1989, domestic relations and succession cases respectively constituted 38.5% of the total number of cases, while in 1990 each of them accounted for 34.8%.<sup>220</sup> In other words, domestic relations and succession cases were the most common types of civil disputes in the sample.

Since the breakdowns of the 1989 and 1998 national surveys are similar, the overall pattern of civil disputes in China remains consistent over the years. However, the breakdown of the 1989 Guangzhou survey is different in some respects from the 1989 and 1998 national surveys, while the breakdown of sixty-two cases is different in some respects from the other three surveys. Although many possible answers may explain the differences be-

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217. 1990 GUANGZHOU Y.B., *supra* note 203, at 103.

218. 1990 ZHONGGUO FALU NIANJIAN [LAW Y.B. OF CHINA] 993. Of these 1,815,385 cases, 869,872 cases dealt with domestic relations (745,267 divorce cases and 124,605 other marriage and family matters) (47.9%); 68,229 housing (3.8%); 23,707 succession (1.3%); 577,121 debt (31.8%); and 172,287 compensation (9.5%). *Id.*

219. 1999 CHINA STAT. Y.B., *supra* note 5, at 758. Of these 3,375,069 cases, 1,427,482 cases dealt with marriage and family affairs (42.3%); 14,743 inheritance (0.4%); 140,993 housing (4.2%); 332,708 compensation (9.9%); and 1,300,972 debt (38.5%). *Id.*

220. In 1989, the bench decided 39 cases. Of these cases, there were 15 domestic relations (38.5%) and 15 succession (38.5%) cases. In 1990, the bench decided 23 cases. Among these cases, there were 8 domestic relations (34.8%) and 8 succession (34.8%) cases.

tween these four sets of statistics, two are most probable. First, the bench of the sixty-two cases might happen to have more succession cases than other benches in the area, or alternatively, the bench did not adjudicate any housing disputes at all. Second, there were more housing disputes in Guangzhou in 1989 than in other parts of China. Thus, the discrepancy may be attributed primarily to regional differences.

The most remarkable similarity between these four sets of statistical data is the large number of domestic disputes. Apparently, domestic relations constantly occupy a huge, if not the largest, proportion of civil disputes in China. This phenomenon can also be supported by the finding that the most common type of work for judicial assistants is to mediate marriage disputes.<sup>221</sup> Accordingly, domestic disputes are a striking feature of the sample, which also matches a much broader pattern of civil litigation in China.

Considering the fact that the overall pattern of civil disputes in China has remained consistent over the years, the growth in the number of civil cases in the past two decades demonstrates that Chinese citizens have increasingly resorted to litigation to address their grievances. Together with the surge in litigation involving administrative malfeasance in recent years, the rising incidence of civil litigation largely reflects that Chinese citizens are no longer afraid to go to the court. Chinese citizens appear to have more confidence in the court, except perhaps for cases in which their opponent is influential due to Party or government affiliations. Given the general assumption that Chinese are averse to litigation, the phenomenon of increasing litigation reflects a kind of revolution by itself.

#### IV. REFORMATION OF THE LEGAL SYSTEM

For many years, legal scholars and practitioners have frequently noted the weaknesses of the Chinese legal system. The most notable shortcomings include: susceptibility of the courts to the local Party and government,<sup>222</sup> insufficient funding of local courts,<sup>223</sup> absence of judicial independence,<sup>224</sup> regional or local

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221. See Zhang, *supra* note 87, at 18-19.

222. Chen, *supra* note 1, at 155 (explaining that the local government has control over the financial and personnel matters of the judiciary); Clarke, *supra* note 3, at 261-63 (the local Party and government have the power to instruct the courts on how to decide cases and judges can lose their jobs if they do not comply).

223. Chen, *supra* note 1, at 155 (explaining that the enforcement division of the court is insufficiently funded).

224. Clarke, *supra* note 3, at 260 (individual judges are subject to the dictates of the adjudication committee, which is the highest decision-making body within a court).

protectionism,<sup>225</sup> shortage of qualified judges and lawyers,<sup>226</sup> lack of enforcement power,<sup>227</sup> and failure of the units or departments concerned to assist in the execution of court judgments.<sup>228</sup> Apart from these structural deficiencies, corruption has further hindered the development of an effective legal system.<sup>229</sup> While China has generated an impressive array of legal norms, it does not have the necessary infrastructure to implement them. Consequently, reforms of the judiciary, the bar, and enforcement mechanisms are inevitable.

Recent reforms include the enactment of the Judges Law in 1995, which provides that judges cannot be dismissed without cause, and that judges are compensated under a separate wage system.<sup>230</sup> Moreover, judges must meet certain professional qualifications.<sup>231</sup> In 1996, the Lawyers Law was passed.<sup>232</sup> The Lawyers Law enumerates general standards for obtaining a license to practice law.<sup>233</sup> Subsequently, detailed implementing regulations have been promulgated, including regulations regarding legal service fees, disciplinary measures, and bar examination.<sup>234</sup> Aside from legislative enactment, the Party has urged local authorities and governmental departments to end protectionism.<sup>235</sup>

In 1997, the State College for Judges was established in Beijing.<sup>236</sup> Thus, there will be more qualified judges to fill the judici-

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225. See Chen, *supra* note 1, at 154-55; Palmer, *Judicial Mediation*, *supra* note 3, at 151; Clarke, *supra* note 3, at 266-68.

226. See Chen, *supra* note 1, at 128; Clarke, *supra* note 3, at 257-58; Palmer, *Judicial Mediation*, *supra* note 3, at 155.

227. Clarke, *supra* note 3, at 263-65 (courts lack autonomous enforcement powers because of the absence of contempt power, few penalties for refusing to obey a court order, and lack of bureaucratic clout to enforce judgment against administrative units).

228. See Palmer, *Judicial Mediation*, *supra* note 3, at 151-52.

229. See Clarke, *supra* note 3, at 259-60.

230. Zhonghua Renmin Gongheguo Faguan Fa [Judges Law of the People's Republic of China], arts. 8, 34-36, *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 54.

231. *Id.* arts. 9-10.

232. Zhonghua Renmin Gongheguo Lushi Fa [Lawyers Law of the People's Republic of China], *reprinted in* CHANGYONG FALU FAGUI QUANSHU, *supra* note 62, at 901.

233. *Id.* arts. 6-9.

234. See, e.g., Lushi Weifa Xingwei Chufa Banfa [Measures for Punishing Lawyers for Illegal Behavior], *reprinted in* 1998 CHINA LAW Y.B., *supra* note 146, at 791; Lushi Fuwu Shoufei Guanli Zanxing Banfa [Provisional Measures for the Management of Lawyers' Service Fees], *reprinted in* 1998 CHINA LAW Y.B., *supra* note 146, at 797.

235. See Zhonggong Zhongyang Zhengfa Weiyuanhui Yanjiushi' Yansu Zhifa Jianjue Qingchu Difang he Bumen Baohu Zhuyi [Strictly Enforce the Law and Resolutely Eliminate Local and Departmental Protectionism], FAZHI RIBAO, May 2, 1997.

236. 1998 CHINA LAW Y.B., *supra* note 145, at 144.

ary. Moreover, there were 8441 law offices nationwide.<sup>237</sup> Of the 98,902 lawyers, 47,574 were full-time, 18,695 were part-time, and 12,892 were specially retained.<sup>238</sup> In 1998, there were 8946 law offices and 101,220 lawyers in China.<sup>239</sup> Thus, both law offices and lawyers in China have been increasing.<sup>240</sup> Furthermore, in 1998, there were 35,873 legal service offices in villages, townships, or streets and 118,359 legal service workers.<sup>241</sup> These legal service offices handled 594,500 civil cases involving litigation and 1,132,700 civil cases not involving litigation.<sup>242</sup> Since the mid-1990s, a legal aid system has been established in such cities as Guangzhou, Shanghai, and Wuhan.<sup>243</sup> Last, a legal service hot line (148) was initiated in 1998 to answer citizens' questions regarding laws and regulations.<sup>244</sup>

Given the recent measures to improve the legal infrastructure and to increase the legal consciousness of the Chinese citizenry, it is likely that litigation will gain legitimacy as a method for resolving civil disputes. Furthermore, the Civil Procedure Law provides for a simplified procedure by which simple or straightforward disputes can be speedily resolved.<sup>245</sup> This simplified procedure allows the plaintiff to file an oral complaint, empowers the court to dispense with some procedural formalities, and requires the case to be adjudicated within three months from the date of acceptance.<sup>246</sup> Thus, resolving disputes by litigation can be less costly or time-consuming than is normally expected.

237. *Id.* at 1256.

238. *Id.*

239. 1999 CHINA STAT. Y.B., *supra* note 5, at 745.

240. The corresponding figures for 1995, 1996, and 1997 are 7,263 and 90,602; 8,265 and 100,198; and 8,441 and 98,902, respectively. *Id.* The number of lawyers in 1997, however, was smaller than that of 1996. *Id.*

241. 1999 CHINA LAW Y.B., *supra* note 81, at 1041.

242. *Id.*

243. See Xiaobing Gong, *Tansuozhong de Zhongguo Falu Yuanzhu Zhidu* [China's Legal Aid System under Exploration], *ZHONGGUO FALU* [CHINA L.], Sept., 1996, at 16.

244. See Yang Xiao, *Botong 148 Falu Fuwu Songdaojia—Shandongsheng Dongmingxian Jianwen* [Dial 148 Legal Service Delivered to Your Home—Shandong Province Dongming County News], *ZHONGGUO FALU* [CHINA L.], Mar. 1999, at 24. In Mandarin, 148 sounds close to *yaosifa* (in order to seek legal service, it is necessary to go to the judicial organ). A county in the Shandong Province first started this program, and the plan was to have it implemented nationwide within two years. *Id.* at 24-25.

245. Civil Procedure Law, *supra* note 132, art. 142. Simplified procedure is largely used by judges who are dispatched to the countryside, urban residential areas, or neighborhood offices of some courts to settle civil disputes on the spot.

246. *Id.* arts. 143-46.

## V. CONCLUSION

To a certain extent, mediation in China is an historical continuity. As a means of dispute resolution, mediation has recognizable merits, especially in densely populated societies where interpersonal conflicts are inevitable, legal professionals are not readily available, and the court itself is not well staffed.<sup>247</sup> However, Chinese citizens have increasingly resorted to litigation to resolve civil disputes. This trend indicates that Chinese citizens are willing to use litigation in certain circumstances. Still, mediation is widely practiced in China.

Given the widespread use of mediation in China, the inquiry is whether the court can play its dispute-resolution role to the fullest extent possible. Mediation has its own merits. Moreover, from a utilitarian perspective, as long as mediation can effectively resolve disputes, it is not necessary to resort to litigation. On the other hand, advocates of legal reform believe that people's mediation may be an impediment to the development of formal legal institutions. Whether this concern is valid or not depends on how one defines the legal system—narrowly or broadly. If law and court are the ends to pursue, extra-judicial mediation will dilute the legal process.

Whether or not disputes should be resolved by litigation or mediation depends on one's values and perception. Looking at the dichotomy of state versus society, one may argue that the more individuals litigate their disputes, the more autonomy they will lose in their lives, because litigation will result in increased state involvement. This assertion is based on the assumption that mediation is devoid of state intervention. However, since mediation has been institutionalized, systematized, and legalized in China, it is indisputable that the state has already been heavily involved in resolving disputes.

At the present time, the overall picture of civil dispute resolution in China can be summarized as follows. Under normal circumstances, disputes are first resolved by mediation. If mediation proves ineffectual or the subject matter of dispute is beyond the scope of authority or the ability of mediators, litigation is a natural choice. Thus, day-to-day minor conflicts are within the domain of mediation committees, while the courts handle legal questions and complicated factual issues. Accordingly, in the area of civil dispute, mediation and litigation complement each other.<sup>248</sup> Nonetheless, if the current Chinese legal

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247. Mediation has its inherent merits even in countries with deeply ingrained legal traditions, such as the United States.

248. Although some civil disputes are resolved through administrative channels, administrative mediation is generally used to resolve those disputes. In addition,

system is schizophrenic,<sup>249</sup> because there is a split between using formal legal mechanisms and informal means, the corollary is that it must choose one way or another or be able to integrate them successfully.

Legal reforms in China have steadily progressed in the past two decades. As a matter of fact, incremental implementation and learning from experience have been China's practices. Many statutes, regulations, and decrees have been promulgated. Sometimes conflicting provisions have surfaced due to lack of coordination.<sup>250</sup> In truth, the whole legal system is not devoid of legal norms. However, the current Chinese legal system has plenty of room for improvement. In particular, further efforts need to be invested in building the necessary infrastructure, namely, the reform of the judiciary, strengthening of enforcement mechanisms, and training of legal professionals.

Certainly, legal consciousness is not confined to litigation. To an extent, legal acculturation can be ascertained by evaluating whether law has become a part of ordinary citizens' consciousness, whether citizens believe in the legitimacy of law or equality before the law, and how legal institutions are being utilized in general. These factors, in turn, depend on the accessibility of legal resources, such as the number of lawyers and legal aid services, as well as confidence in the enforcement system. In examining these variables in the context of civil disputes, this article attempts to provide some insights about legal reforms in China, thereby enhancing the study of Chinese jurisprudence.

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mediation here refers to various types of mediation, including lawyer mediation, social-circle mediation, etc.

249. Professor Wang Gungwu used this expression as he made comments in my seminar on mediation in China (May 14, 1999, National University of Singapore).

250. For example, according to the Labor Law, hiring units can dismiss workers under certain circumstances by giving thirty-days' notice. *Zhonghua Renmin Gongheguo Laodong Fa* [Labor Law of the People's Republic of China], art. 26, reprinted in *CHANGYONG FALU FAGUI QUANSHU*, *supra* note 62, at 924. However, the Regulations on Labor Management in Foreign Investment Enterprises require the company to solicit the opinions of the trade union for dismissal under the same circumstances. *Waishang Touzi Qiye Laodong Guanli Guiding* [Regulations on Labor Management in Foreign Investment Enterprises], art. 12, reprinted in *FALU QUANSHU* (1994), *supra* note 101, at 741.