

Dispute Resolution In China

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I. INTRODUCTION

Chinese dispute resolution procedures, especially mediation, have long been perhaps the single feature of the Chinese legal system most extensively studied in the West. In part, this is because the Chinese government has permitted the flow abroad of a great deal of information about dispute resolution institutions other than courts.¹ In the United States in particular, interest in Chinese methods has grown along with the interest in alternative dispute resolution (ADR) in general.² Even the former Chief Justice of the United States Supreme Court, Warren Burger, has expressed his admiration of Chinese mediation institutions.³

Just as most of the Western studies on Chinese dispute resolution institutions have concentrated on mediation, so have they also tended to accept that the Chinese procedure translated as "mediation" (*tiaojie*) is roughly comparable to what we understand by the English term: that is, a procedure whereby a third party attempts to bring disputing parties to a voluntary settlement of their dispute. Both Chinese and Western commentators are usually aware of evidence that mediators often pressure or even coerce parties to accept a suggested settlement,

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1. It is still extremely difficult to obtain reliable information about the functioning of courts.

2. See, e.g., M. Holt Meyer & Charles J. Wysocki, *Chinese Mediation*, N.Y. ST. BAR J., April 1985, at 37; William O'Hara, *Dispute Resolution in the Union of Soviet Socialist Republics and the People's Republic of China*, R.I. BAR J., Feb. 1985, at 4 (1985); Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1729. Kenneth Karst mentions Chinese society as one that puts "emphasis on mediation to preserve ongoing relationships," but takes care to note that "[s]uch a society may not be all sweetness and light." Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 490 n.166.

3. See *US Chief Justice in Shanghai*, Xinhua She [New China News Agency], Sept. 8, 1981, in BRITISH BROADCASTING CORPORATION, SUMMARY OF WORLD BROADCASTS, PART 3: THE FAR EAST [SWB/FE], Sept. 10, 1981, at A1/1.

but this phenomenon is seen as aberrational and generally deplorable.

The purpose of this article is to suggest that this understanding of Chinese mediation is incomplete. The picture usually painted of mediation is far from wrong — the idea of mediation as the English term is commonly understood is an important strain in Chinese theory and practice, and the principle of voluntariness is constantly stressed both in academic commentary and in legislation. But that strain is only one strain, and it coexists with other strains that pull mediation as practiced in other, more coercive directions. Thus, the standard picture of mediation needs to be enriched by a recognition that some of its elements previously thought aberrational, such as coercion, may in fact be a vital part of a different, competing logic operating within Chinese mediation institutions. Thus, where this article uses “mediation” and cognate terms in reference to Chinese institutions and practices, they should be understood simply as rough-and-ready translations of *tiaojie*. Whether and to what extent *tiaojie* is “really” mediation is one of the questions the article aims to explore.

II. THEORETICAL FRAMEWORK

A. *Standard Classification of Dispute Resolution Procedures*

Methods of dispute resolution are traditionally placed along a spectrum that ranges from informal negotiations between the parties at one end to formal adjudication by some court-like body at the other. Once third parties are involved — and it is with third-party dispute resolution procedures that this article is concerned — commentators commonly put the procedure in one of three categories: mediation, arbitration, and adjudication.⁴ Mediation involves a third party who attempts to bring the parties to a voluntary agreement. Neither party is required to accept any proposal of the mediator. Arbitration involves a third party, chosen by the disputants either before or after the dispute arises, whose decision is binding on the parties by prior agreement. In other words, whereas mediation involves voluntariness as to outcome, arbitration involves voluntariness only as to process. In adjudication, neither the process nor the outcome can be rejected at the will of the parties. An authoritative organ — let us call it a “court” — decides on its own whether it has jurisdiction to decide the dispute and what the

4. See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 7–10 (1985); MARTIN M. SHAPIRO, *COURTS, A COMPARATIVE AND POLITICAL ANALYSIS* 3–17 (1981) (discussing continuum of “go-between, mediator, arbitrator, judge”).

outcome will be.⁵

These models do not, of course, exist in such splendid isolation in real life.⁶ When a party “voluntarily” decides to accept a settlement reached through mediation, that acceptance is based on a calculation that the consequences of not accepting would be worse than the consequences of accepting. Whether we call the acceptance “voluntary” depends on whether we think it is legitimate to impose the consequences of not accepting upon the party. If the consequences of a party not accepting such a settlement are that the mediator shoots that party, we would not call acceptance “voluntary.” If the consequences of not accepting are for the parties to proceed to expensive and time-consuming adjudication likely to result in a large judgment against the party, we usually call acceptance of a mediated settlement “voluntary.”

The outcome of arbitration is also affected by the presence of adjudicative institutions. In each of the three models it is only adjudicative institutions that have the power to enforce their judgments coercively. Thus, where the losing party to arbitration breaks its promise to abide by the outcome, the winner must go to adjudicative institutions to obtain enforcement and must satisfy whatever requirements those institutions have.

Finally, the process of adjudication in real life can contain substantial elements of mediation. The party expecting to win must take into account the possibility of difficulty in enforcing the judgment. Judges may for reasons of their own wish to encourage the parties to reach an agreed settlement before judgment and thus may implicitly or explicitly threaten the party deemed recalcitrant.

Like many societies, China has institutions conventionally labeled mediation, arbitration, and adjudication. As might be expected, the real institutions do not fit the models outlined above exactly, nor do they correspond exactly to institutions going by the same name in other countries. The shape of each is influenced not only by the special features of Chinese society, but also by the features of alternative avenues of dispute resolution. It is not by chance that a dispute ends up in one forum and not another. Certain fora are conducive to certain substantive rules and substantive results. Some processes are hospitable to particular visions of social order and inimical to others. Conversely, some concrete social orders are hospitable to certain procedures for dispute resolution and inimical to others. This article will explore the

5. See the table in GOLDBERG ET AL., *supra* note 4, at 8.

6. For a concise discussion of the interrelatedness of various fora, see Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2064–67 (1987).

reciprocal influence between Chinese society and its institutions for dispute resolution.

B. Two Paradigms of Dispute Resolution

Although dispute resolution is commonly thought of in terms of the three ideal-typical modes of mediation, arbitration, and adjudication, a complete model of dispute resolution in China requires the introduction of another axis containing the categories of internal resolution and external resolution.

By “external resolution” as an ideal type, I mean the resolution of the dispute by a third party (whether labelled mediator, arbitrator, or adjudicator) who has no distinct relationship with the parties other than a specialized function as dispute resolver. The dispute resolver has no particular interest in the individual or collective well-being of the parties. External resolution is the dominant paradigm in writings about dispute resolution in Western societies.⁷ The disputing parties are assumed to be legally independent of each other and of the dispute resolver.

By “internal resolution” as an ideal type, I mean the procedure whereby a parent corporation, for example, resolves disputes between managers of two wholly-owned subsidiaries, or the President resolves turf battles between competing executive agencies. The dispute resolver has authority not because of its specialized function as dispute resolver but because of some other distinct relationship with the parties. Moreover, the well-being of the parties bears directly on the well-being of the dispute resolver. As a result, the dispute resolver may be more interested in maximizing values such as the collective well-being of the whole dispute triangle — the two parties and the resolver — than in deciding who should “win” by applying rules relating to matters such

7. See, for example, the tables in GOLDBERG ET AL., *supra* note 4, at 8–9. None of the nine models of “primary” and “hybrid” dispute resolution processes presented by the authors adequately describes the resolution of disputes within a family or within a corporation by a common superior with a strong interest in the welfare of the disputants. Other writers stress the *public* nature of the disputes with which they are concerned, deliberately defining as outside the realm of their analysis intra-family and intra-corporate disputes or bureaucratic turf battles within the executive branch. See, e.g., P. H. Gulliver, *Introduction to Case Studies of Law in Non-Western Societies*, in *LAW IN CULTURE AND SOCIETY* 11 (Laura Nader ed., 1969) (defining dispute as a public assertion, usually through some standard procedures, of an initially dyadic disagreement); Merry, *supra* note 6, at 2061 (defining dispute as a “confrontation that has escalated into a public arena”). This article is concerned with disputes that get taken to a third party, but that third party need not be very “public,” and indeed may be organizationally very close to the parties.

as fault. Both parties can be viewed as pockets of their common superior, and the decision how much to take from one pocket and put in the other is decided by considerations such as convenience and efficiency, not justice and fault.

Internal and external resolutions can differ markedly in their procedures and outcomes. Procedurally, internal resolution blurs the lines between mediation, arbitration, and adjudication. Because of its special relationship with the parties, the dispute resolver is in a position to impose an outcome no matter what mode is ostensibly used. Unlike an external mediator, a parent company can, for example, fire the manager of Subsidiary A who refuses to accept the proposed "voluntarily mediated" solution of the dispute with Subsidiary B. On the other hand, disputants can bring special pressures of their own to bear on the dispute resolver that are not available to litigants in court. If it would not be easy for the head office to replace the managers of Subsidiary A, they can effectively, if only implicitly, threaten non-cooperation if they feel especially aggrieved by a decision of the head office. Thus, parties are not completely free to reject "mediated" solutions, and the dispute resolver is not completely free to impose an "adjudicated" solution.

Internal resolution is also likely to produce a different outcome from external resolution. This is because different norms can be applied. In the realm of external resolution, even a mediated settlement is formed in the shadow of the norms that the parties believe would apply if the dispute went to adjudication. Thus, whoever makes the norms to be applied in external adjudication can shape the outcome of disputes even between parties who keep the dispute entirely private, provided that such external assistance remains a real possibility.⁸

In the realm of internal resolution, on the other hand, the norms established for external resolution may never come into play. Instead, the standard will likely be one of what is good for the organization of which the parties and the resolver are members. To take a concrete example, suppose Factory A promises to supply a certain grade of steel to Factory B. It later finds that it can save \$10,000 by delivering an inferior grade. If Factory B accepts the inferior grade steel, it can

8. As Owen Fiss points out, however, there are many reasons to suppose that the terms of a negotiated or mediated settlement may not simply reflect the parties' views about the norms that would apply in adjudication. Among other things, "the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant." Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

produce different products for a loss of only \$1,000. External resolution may require finding who is at fault if A fails to deliver the promised grade of steel. If the contract is upheld, A will lose and be out \$10,000. If both factories are owned by the same parent company, however, B will be instructed to accept the inferior steel because in that way the total losses of A and B are reduced from \$10,000 to \$1,000. Fault may be irrelevant. Of course, if transaction costs were zero, substantially the same end result might be reached under a regime of external resolution: it would be rational for A to offer, and for B to accept, any amount more than \$1,000 and less than \$10,000 in exchange for B's accepting the inferior steel. In the real world, however, transaction costs are never zero and are often substantial enough to block any such solution.⁹

In looking at dispute resolution in China, it is crucial to remember that while the standard paradigm of external resolution may often be appropriate when considering the resolution of disputes between individuals, the structure of the planned economy often makes the paradigm of internal resolution more appropriate in the analysis of disputes between enterprises in the state-owned and collective sectors.

The traditional model of the planned economy views the state as essentially one giant vertically-integrated productive firm, "China, Inc."¹⁰ Various ministries are divisions within the firm, and enterprises are factories. When Steel Plant believes that a delivery from Iron Plant is not up to standard, it can complain to government administrators, and the dispute would eventually rise to the first administrator with authority over both plants.¹¹ That official's primary concern is to take the action that will best fulfill the goals of the plan. If the iron is indeed of poor quality, which party is in the best position to refine it? Can Steel Plant's targets still be met with inferior iron? Fault

9. On the effect of transaction costs on bargaining over legal entitlements, see Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 15-19 (1960). For an update on debate over the Coase Theorem, see Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982) and sources cited therein.

10. A brief description of the Chinese planning system can be found in Donald Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 U.C.L.A. PAC. BASIN L.J. 1, 5-6; (1991); for a fuller account, see Barry Naughton, *China's Experience with Guidance Planning*, 14 J. COMP. ECON. 743 (1990); Barry Naughton, *Industrial Planning and Prospects in China*, in U.S.-CHINA TRADE: PROBLEMS AND PROSPECTS 179 (Eugene K. Lawson ed., 1988).

11. This example is taken from, and more fully detailed in, John A. Spanogle, Jr. & Tibor M. Baranski, Jr., *Chinese Commercial Dispute Resolution Methods: The State Commercial and Industrial Arbitration Bureau*, 35 AM. J. COMP. L. 761, 764-65 (1987), who label it "administered resolution."

comes into the picture only, if at all, when it is time to assess the performance of plant managers for the purpose of bonuses or promotions. (Indeed, because we are assuming that both plants are in the same industrial "system" (*xitong*), a promotion may take a manager from one plant to the other.)

Both internal and external resolution of disputes have their characteristic flaws. External resolution is unconcerned with minimizing net social loss, and may involve high transaction costs. Lawyers may be hired, for example; allegations must be proved. As in *Bleak House's* case of *Jarndyce and Jarndyce*, the entire amount in controversy could end up being consumed by legal fees.¹² To this social cost must be added any costs attributable to dispute resolution not borne by the parties (for example, the cost to the public of running a court system).

Internal resolution — such as occurs in planned economies, for example — also leads to inefficient allocation of resources. In the above example of the contract for steel between *A* and *B*, *B* has little incentive to expend resources trying to find a way to minimize its loss — for example, by looking for the most profitable line of alternative products. Instead, its time is better spent making representations to the parent that the unexpected loss cannot be fairly blamed on its management.¹³

Economic reform in China has brought about a reduction in the scope of the centrally planned economy. In some cases, this has meant a reduction in the scope of internal dispute resolution. The internal resolution paradigm can by no means, however, be discarded. Whether or not enterprises are formally within the plan (and often they will be partly in and partly out), various government organs remain keenly interested in them and affected by their well-being. In particular, the

12. For a modern example, see Stephen Labaton, *The Ronan Case: A Giant Legal Battle Over a Tiny Company*, N.Y. TIMES, Sept. 1, 1989, at B8. For an interesting economic analysis of litigation expenditures, see Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127 (1988). For a review of the relevant literature, see Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989).

13. This is a specific manifestation of a more general problem:

The lack of universally applicable rules diverts the energies of enterprises to bargaining from improving efficiency and product quality. Enterprises seek rents rather than profits. They look for ways to manipulate the rules to their financial advantage rather than taking the rules as given.

Gene Tidrick, *Planning and Supply, in CHINA'S INDUSTRIAL REFORM* 175, 193-99 (Gene Tidrick & Jiyuan Chen eds., 1987) (footnote omitted). See generally Anne O. Krueger, *The Political Economy of Rent-Seeking Society*, 64 AMER. ECON. REV. 291 (1974).

decline of central planning has in many cases simply meant the rise of local government control over enterprises. If two disputing enterprises are run by the same municipal government, it is still necessary to keep the internal resolution paradigm in mind. It is possible that in any particular case internal resolution will not be the appropriate paradigm, but such can only be a conclusion of analysis, not a premise of it.

C. *Structure of Analysis*

One way of looking at dispute resolution in China is to analyze separately the conventional modes of mediation, arbitration, and adjudication: the mode of dispute resolution is held constant, while one or more institutions that can resolve disputes in that mode are studied.¹⁴ The problem with this approach is that it commits one *a priori* to the position that one is studying essentially the *same thing* (e.g., “mediation”) as conducted by different institutions. To the extent that one can overcome this methodological predisposition and discover important differences, as some writers have done,¹⁵ the whole point of the study — the analysis of a particular mode of dispute resolution — is lost.

Moreover, the mode-centered approach tends to neglect the actual experience of disputants. The contention of this article is that the institution that deals with a dispute is more important than the mode of dispute resolution the institution might use. Disputants find themselves in a particular concrete forum for dispute resolution, not in an abstract mode. Concentrating on particular third-party fora for dispute resolution allows us to see more clearly the ways in which one apparent mode of dispute resolution may shade into another. It allows us to dispense with concern over how to classify a particular style of

14. See, e.g., Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966); David Hunter, *Chinese Labour Dispute Arbitration Procedures: An Early Review in Zhejiang Province*, 11 COMP. LABOR L.J. 340 (1990); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967); Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 1987, at 219 (W.E. Butler ed., 1987) [hereinafter Palmer, *Extra-Judicial Mediation*]; Michael Palmer, *The Revival of Mediation in the People's Republic of China: (2) Judicial Mediation*, in YEARBOOK ON SOCIALIST LEGAL SYSTEMS 1988, at 143 (W.E. Butler ed., 1989) [hereinafter Palmer, *Judicial Mediation*]; Spanogle & Baranski, *supra* note 11 (arbitration).

15. See, e.g., Lubman, *supra* note 14, at 1329 (“[A]lthough mediation is discussed in Communist Chinese sources as if it were a single, well-defined method of resolving disputes, it may vary significantly with the type of mediator.”).

dispute resolution; instead, we can simply examine each style on its own terms. This article, therefore, will take an institution-centered approach to dispute resolution in China.

III. INSTITUTIONS FOR DISPUTE RESOLUTION

A. Courts¹⁶

1. In General

China has a system of courts of general jurisdiction and various specialized courts.¹⁷ There is generally one appeal from the trial in first instance. The trial in second instance is *de novo*, but the judgment is final. There is no third appeal, even on issues of law alone.¹⁸

There are four levels of courts of general jurisdiction. All can serve as courts of original jurisdiction, depending on the perceived importance of the case and the status of the parties.¹⁹

At the top of the structure is the Supreme People's Court (*zuigao renmin fayuan*) (SPC). Below it, at the provincial level, are the thirty Higher-Level People's Courts (*gaoji renmin fayuan*) (HLPC). There is one HLPC for each province, autonomous region (*e.g.*, Tibet or Xinjiang), and centrally-administered city (*e.g.*, Beijing or Shanghai).

Below the HLPCs are the 381 Intermediate-Level People's Courts

16. This section on courts is based on my fuller discussion in Clarke, *supra* note 10, at 57-69, but has been condensed, modified, and updated.

17. The structure of the court system is set out in Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa [Law of the People's Republic of China on the Organization of People's Courts], as amended, 1983 ZHONGHUA RENMIN GONGHEGUO FAGUI HUBIAN [COLLECTED LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] [FGHB] 4 [hereinafter Court Organization Law].

18. Parties can still contest judgments that have become legally effective through a procedure known as *shensu* (petition). A petition is essentially a request to the court that made the judgment or its superior court to have another look at the case. The procuracy can also be petitioned to re-open the case. There are as yet no clear standards governing the grounds on which petitions may be brought or the number of times they may be brought. On petitions generally and their relationship to appeals, see Margaret Y. K. Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L. 118, 133-141 (1989).

19. For example, Intermediate-Level People's Courts are the courts of original jurisdiction in all criminal cases where a foreigner is the accused or the victim. Zhonghua Renmin Gongheguo Xingshi Susong Fa [Criminal Procedure Law of the People's Republic of China], 1979 FGH 87, Art. 15 [hereinafter Criminal Procedure Law].

(*zhongji renmin fayuan*) (ILPC).²⁰ These are established just below the provincial level in prefectures (*diqu*), provincially-administered cities, and within centrally-administered cities.

At the bottom are the 3,000-odd²¹ Basic-Level People's Courts (*jiceng renmin fayuan*) (BLPC), which exist at the county level. Each court has a president, a vice-president, and several judges. Because it may be difficult for parties from outlying areas to attend court, a BLPC may establish branch courts known as People's Tribunals (*renmin fating*) (PT) outside the town in which it is headquartered. The decision of a PT is the decision of the BLPC and is properly appealed to the court above the BLPC, not the BLPC itself.²² There were about 18,500 PTs across the country by the end of 1990.²³

The jurisdiction of specialized courts is by subject matter and is not limited by administrative boundaries.²⁴ Their personnel are appointed from the center, not by a People's Congress at a particular level. The specialized courts include military courts, maritime courts, forestry courts, and railway courts.

China's approximately 3,500 courts have a staff of 215,000, of which 125,000 are judges.²⁵ Court presidents are usually chosen by the People's Congress at the same administrative level (*e.g.*, city or county or province), but vice-presidents and other judges are chosen

20. The figure is derived from Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report], 1989 ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [GAZETTE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] [NPCSC GAZETTE] No. 2, at 109, 115, translated in FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT: CHINA [FBIS-CHINA], May 2, 1989, at 83.

21. See Ren, *supra* note 20, at 122.

22. Court Organization Law, *supra* note 17, Art. 20.

23. See Ren Jianxin, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report], FAZHI RIBAO [LEGAL SYSTEM DAILY], Apr. 12, 1991, at 2, translated in SWB/FE, Apr. 25, 1991, at C1/1.

24. There are about 132 specialized courts. See Chang Hong, *Top Judge Feels Law Has Made Big Gains*, CHINA DAILY, Oct. 3, 1989, at 4, col. 1.

25. See *id.* I have estimated the number of courts at 3,500, instead of using the figure of 3,358 given in this 1989 source, by adding up the figures given for people's courts in the text and making allowances for specialized courts and for growth. In his 1988 report to the National People's Congress, then-Supreme People's Court president Zheng Tianxiang gave a figure of 3,435 courts as of the end of 1987. See Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Supreme People's Court Work Report], 1988 NPCSC GAZETTE No. 4, at 24, 34. Neither the 1990 nor the 1991 Supreme People's Court work reports contain information on the number of courts.

by the corresponding People's Congress Standing Committee.²⁶ The effect of this system is that court personnel are controlled by the government at the corresponding level.²⁷ Chinese judges have no security of tenure and below the SPC are not appointed by the central government. Hence, BLPC judges are beholden to the county-level government, HLPC judges are beholden to the provincial-level government, and SPC judges are beholden to the central government.²⁸

China's courts hear and decide cases in three basic organizational forms. First, a single judge can try minor civil and criminal cases in the first instance.

Second, other cases are tried by a collegiate bench composed solely of judges or of judges and "people's assessors" (*renmin peishenyuan*) selected from the populace. Members of the collegiate bench, whether lay or professional, are supposed to enjoy equal rights to participate in the bench's decision, which is made by majority vote. In fact, it appears that the role of people's assessors is largely a formality and that they are not expected to disagree with the views of the presiding judge.²⁹

Third, each court has an Adjudication Committee, which is the highest decision-making body within the court. It is composed of the court president, the vice-president, the head and deputy head of the various specialized chambers, and ordinary judges. The Adjudication Committee has the power to decide individual cases if it wishes and

26. The exception to this rule is the ILPC, where the provincial-level People's Congress Standing Committees usually choose all judges, including the court president. In minority areas and in cities, there may be a level of People's Congress between the province and the county. If so, that People's Congress and its Standing Committee choose ILPC personnel according to the regular procedure above.

27. Officially, the court president is appointed by the People's Congress of the same level as the court; the vice-president and other judges are appointed by the Standing Committee of the same People's Congress. People's Congresses are rarely if ever anything more than rubber stamps for the local Chinese Communist Party (CCP) organization, particularly in matters of legal administration, which are handled by the same Party committee that handles public security matters. See *infra* notes 61-64 and accompanying text.

28. Many ILPCs have no People's Congress at the same level. Prefectures, for example, are units of administration immediately below the provincial government established for the convenience of that government and have no People's Congress of their own. In that case, ILPC judges are officially appointed by the provincial People's Congress. See *supra* note 26.

29. See, for example, Liu Shouhai, *Peishenyuan Liangdi Shu [Letters from [People's] Assessors in Two Places]*, FAZHI RIBAO, Aug. 25, 1988, at 1, where the writer recalls his service as a people's assessor. After the trial but before any discussion, he was informed that the court president had already decided how the case was to be disposed of and was presented with a copy of the judgment to sign. His career as a people's assessor ended when, in another case, he ventured to question the conclusions of the presiding judge.

to direct the judge or bench that heard the case to enter a particular verdict.³⁰

In addition to deciding cases by adjudication, courts can and indeed are encouraged to lead the parties to a mediated agreement. Courts have authority to conduct mediation in two types of cases: civil cases and minor criminal cases heard only upon complaint.³¹ Until its 1991 revision, the Civil Procedure Law instructed courts to “stress mediation”; when attempts at mediation failed, they were to proceed to adjudication.³² The category of “civil cases” is generally deemed to include disputes over property and status arising under civil law or the Marriage Law, as well as disputes arising under economic law and labor law.³³ The Criminal Procedure Law provides that in cases heard only upon complaint, such as defamation or abuse of family members,

30. The Adjudication Committee is discussed in greater detail below: see *infra* text accompanying notes 51-55.

31. See RENMIN TIAOJIE SHIYONG DAQUAN [PRACTICAL COMPENDIUM OF PEOPLE'S MEDIATION] 15 (Liu Zhitao ed., 1990) [hereinafter MEDIATION COMPENDIUM]. It is likely that the latter category should be expanded to include all cases amenable to private prosecution. The category of “civil cases” should be understood to include matters such as contract disputes between enterprises, which in China would probably be considered “economic” cases. It is unclear to what extent “administrative” cases — disputes between citizens and government organs over which courts have authority — can be mediated. Article 50 of the Administrative Litigation Law (ALL) states flatly: “When the people’s courts try administrative cases, mediation shall not be used.” Later on, however, Article 67 provides that mediation may be used after all when the case involves a demand for compensation for injuries. Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the People’s Republic of China], 1989 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GAZETTE OF THE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA] [STATE COUNCIL GAZETTE] 297 [hereinafter Administrative Litigation Law], translated in Stephen G. Wood & Chong Liu, *China’s Administrative Procedure Law: An English Translation with Comments*, 43 ADMIN. L. REV. 89 (1991); PRC, *Administrative Litigation Law*, CHINA L. & PRACTICE, No. 5, 1989, at 37.

32. See Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [Civil Procedure Law of the People’s Republic of China (for Trial Implementation)], 1982 FGHB 133, Art. 6. Article 6 is now Article 9 in the revised Civil Procedure Law. Where it formerly said that people’s courts should “stress mediation,” it now says they should “conduct mediation in accordance with the principles of voluntariness and lawfulness.” Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the People’s Republic of China] [hereinafter Civil Procedure Law], reprinted in RENMIN RIBAO (HAIWAI BAN) [PEOPLE’S DAILY (OVERSEAS EDITION)] [hereinafter Renmin Ribao-HB], Apr. 15, 1991, at 2, Art. 8 [hereinafter Civil Procedure Law], translated in SWB/FE, May 8, 1991, at C1/1; CHINA L. & PRACTICE, No. 5, 1991, at 15. The translation here is my own.

In the view of the Economic Chamber of the Beijing Intermediate-Level People’s Court, to “stress” mediation meant that the court should attempt mediation in every case before it. See Liang Qinhan, *Chuli Jingji Jiufen Anjian Ying Zhuozhong Tiaojie [In Handling Cases of Economic Disputes One Should Stress Mediation]*, 1981 FAXUE YANJIU [LEGAL STUDIES] No. 4, at 13, 13. Although this article predates even the old Civil Procedure Law, to “stress mediation” appears to have been a well-settled policy directive for courts.

33. See MEDIATION COMPENDIUM, *supra* note 30, at 15.

the court "may" conduct mediation.³⁴ Mediation may also be conducted by a court hearing an appeal.

An important feature of court mediation is that the mediation agreement has the same effect as a court judgment once it is delivered to the parties.³⁵ In fact, it arguably has a stronger effect. Since it is, in theory, voluntary, it may not be appealed.³⁶ In addition, in divorce cases, court mediation is the only type of mediation attempt that can be required before a court will give judgment.³⁷

2. Shortcomings of Dispute Resolution Institutions

China's courts suffer from severe limitations as dispute resolution institutions because they are often unable or unwilling to enforce legal standards. First, judges may simply lack the education necessary to do the job competently. China now has some seven "political-legal institutes" and thirty-three university law departments which annually produce about 4,000 LL.B. graduates.³⁸ Because very little legal education took place between the mid-1960s and the late 1970s,³⁹ there is a great shortage of persons qualified to serve as judges.⁴⁰ Recent graduates, in their early twenties, are simply too young.⁴¹ A large number of judges are demobilized army officers,⁴² and some

34. See Criminal Procedure Law, *supra* note 19, Arts. 13, 127. In cases heard only upon complaint (*zisu anjian*), victims (or in some cases others acting on their behalf) must act as prosecutors.

35. See MEDIATION COMPENDIUM, *supra* note 31, at 17.

36. See *id.*, *supra* note 31, at 17; Palmer, *Judicial Mediation*, *supra* note 14, at 161.

37. See Zhonghua Renmin Gongheguo Hunyin Fa [Marriage Law of the People's Republic of China], 1980 FGHB 3, Art. 25 [hereinafter Marriage Law].

38. See James Kraus, *Legal Education in the People's Republic of China*, 13 SUFFOLK TRANSNAT'L L.J. 75, 85 (1989). The LL.B. is a four-year undergraduate degree in China.

39. See Jerome A. Cohen, *Notes on Legal Education in China*, 4 LAWASIA 205 (1973) ("[T]he first thing to understand about legal education in China today is that there isn't any."); see generally Timothy Gelatt & Frederick Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 41-50 (1980).

40. In 1980 Deng Xiaoping himself lamented the severe shortage of competent judicial officials. See DENG XIAOPING, *Muqian de Xingshi he Renwu [The Present Situation and Tasks]*, in DENG XIAOPING WENXUAN 1975-82 [SELECTED WORKS OF DENG XIAOPING 1975-82] 203, 227 (1983).

41. See Huang Mingli, *Views on Judicial Reform*, 1985 ZHENGFA LUNTAN [POLITICS AND LAW FORUM] No. 1, at 71, translated in JOINT PUBLICATIONS RESEARCH SERVICE, CHINA REPORT: POLITICAL, SOCIOLOGICAL AND MILITARY AFFAIRS [JPRS-CPS], Oct. 10, 1985, at 42, 46.

42. These officers are simply assigned to a court whether they are wanted there or not. In 1988, the then-president of the Supreme People's Court asked the National People's Congress to give the courts more power to refuse assignments of unqualified personnel and begged local Party committees, People's Congresses, and governments not to send such people. See Zheng,

courts even draft their clerks into service as “substitute judges” (*daili shenpanyuan*) when manpower is short.⁴³ There is as yet no career judicial bureaucracy with clear, or even vague, standards of competency. There are *no* objective qualifications that all judges must have.⁴⁴ In August, 1990, the President of the Supreme People’s Court estimated that by 1991, 40% of China’s judges would still lack a college education — and the percentage would be even *higher* among court presidents and vice presidents.⁴⁵

Judicial ignorance of the law is particularly devastating in a system such as China’s because it is so difficult to remedy. Chinese judicial procedure is basically inquisitorial, leaving a great deal of initiative to the judge instead of to the parties and their lawyers. Just finding the applicable law can be an impossible task. Laws and regulations are promulgated by a bewildering variety of governmental and quasi-governmental bodies, and no comprehensive and up-to-date indexes are available.⁴⁶ There is no regular system of case reporting

supra note 24, at 36.

43. See Li Yuming, *Shujiyuan Bu Neng Yi “Daili Shenpanyuan” Shenfen Ban’an* [Clerks Cannot Handle Cases as “Substitute Judges”], 1990 FAXUE [JURISPRUDENCE] (Shanghai) No. 11, at 39. Clerks are often recent law graduates whose career track leads next to an assistant judgeship and who may know more law than the judges.

44. In 1988, Supreme People’s Court president Zheng Tianxiang announced that a Law on Judges (*Faguan Fa*) was being drafted. See Zheng, *supra* note 25, at 36. According to his successor, Ren Jianxin, this law would establish a unified national standard of qualifications for judges. See Su Hongyu & Yu Xinnian, *Fayuan Gaige he Jianshe Shi Wancheng Shenpan Renwu de Zhongyao Baozheng* [The Building and Reform of Courts Are Important Guarantees of the Fulfillment of Adjudication Tasks], FAZHI RIBAO, July 19, 1988, at 1 (quoting Ren Jianxin). Ren repeated the announcement that a Law on Judges was being drafted in 1989, see Ren, *supra* note 20, at 118, and in 1991, see Ren, *supra* note 23, at 2 (this time labelling it “Regulations on Judges” (*Shenpanyuan Tiaoli*)). No draft of this law is publicly available and it has yet to be enacted.

45. See Ren Jianxin *Stresses Need to Educate and Train Court Personnel*, in SWB/FE, Aug. 28, 1990, at B2/1. The apparent inverse relationship between rank and educational level is explained by the primacy accorded to political reliability in the selection of cadres. Many court presidents and vice presidents are demobilized army officers with little schooling.

Other sources corroborate the general picture. In 1989, one writer asserted that only 10% of all judges and procurators had been educated at or above the college level. See Li Maoguan, *Why “Laws Go Unenforced”*, BEIJING REV., Sept. 11–17, 1989, at 13, 15. In his 1989 report to the National People’s Congress, the President of the Supreme People’s Court stated that 30% of “court cadres” (*fayuan ganbu*) had graduated from institutions of higher education. See Ren, *supra* note 20, at 119. The term “court cadres” covers more than merely judges (*shenpan ren yuan*).

46. An egregious example of the problem of keeping track is reported in Ao Yi, *Bei Lengluo de Xin de “Zhian Guanli Chufa Tiaoli”* [A Cold Shoulder to the New “Security Administration Punishment Regulations”], FAZHI RIBAO, Jan. 17, 1989, at 2. One of China’s most important statutes is the Security Administration Punishment Regulations (SAPR), which designate a variety of public order offenses and grant to the police the authority to try and

that would allow judges to see how other courts had handled similar problems.⁴⁷ Quite often there will simply be no statutory rule directly on point, or there may exist contradictory rules. In these cases, there is simply no way of guessing how an untrained and ill-educated judge will choose to decide the issue and no sense of what sorts of arguments should or should not count.

Second, even if judges have enough education to do the job, they may be corrupt or partial and unwilling to render a correct judgment. Official corruption is a serious problem in China⁴⁸ — indeed, it was one of the grievances that sent the people of Beijing and other cities into the streets in the spring of 1989⁴⁹ — and it extends to the judiciary.⁵⁰ It is difficult, however, to quantify it in a rigorous way

punish offenders. The SAPR were first promulgated in 1957 (1957 [July–Dec.] FGHB 245) but were reissued with substantial revisions in 1986 (1986 FGHB 151). The reissue was accompanied by a substantial, even unavoidable publicity campaign. Nevertheless, several authoritative law books published in 1987 and 1988 continued to refer to the 1957 SAPR as the current statute, and one even recommended that it be revised to fit current conditions.

47. The Supreme People's Court does publish the Supreme People's Court Gazette, a periodical containing directives, interpretations, and cases (generally lower court decisions thought to be particularly instructive). In addition, judges no doubt have access to case reports that are not publicly available. I know of no publication, however, that indexes cases by subject matter, and thus case reports are not as useful as they might otherwise be.

A useful introduction to the role of the Supreme People's Court Gazette is Liu Nanping, "Judicial Review" in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 246–250 (1988).

48. For a sampling of Chinese and foreign assessments, see John P. Burns, *China's Governance: Political Reform in a Turbulent Environment*, 1989 CHINA Q. 481, 490 n.33 and sources cited therein; Nicholas Kristof, *Leaders in Beijing Bar Their Kin from Using Family Ties for Profit*, N.Y. TIMES, July 29, 1989, § 1, at 1, col. 1; Julia Leung, *Greased Palms Lubricate Wheels in China*, WALL ST. J., July 20, 1989, § 1, at 10, col. 1; *Chief Procurator[:] Anti-Corruption Struggle Will Be "Long" and "Arduous"*, Xinhua News Agency, in SWB/FE, Nov. 28, 1989, at B2/1. "What can you do — it's the kids," Chinese officials reportedly said (more or less) to remonstrating officials of the Reagan administration when explaining that they were powerless to stop freelancing children of high officials from selling missiles to Iran and Saudi Arabia. See Fox Butterfield, *Under Deng, Running China Has Become a Family Affair*, N.Y. TIMES, July 2, 1989, § 1, at 1, col. 4.

49. See Sheryl WuDunn, *150,000 Lift Their Voices for Change*, N.Y. TIMES, May 16, 1989, at A12. In a survey of 2,348 residents of 33 cities conducted in 1987 by a branch of the Chinese Academy of Social Sciences, respondents expressed a very high degree of dissatisfaction with official corruption. See Burns, *supra* note 48, at 489.

50. See, e.g., Ren, *supra* note 20, at 120; Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao [Supreme People's Court Work Report]*, ZHONGGUO FAZHI BAO [CHINESE LEGAL SYSTEM NEWS], Apr. 23, 1986, at 2, 3 (report delivered to 4th Session of 6th National People's Congress, April 8, 1986); *Heilongjiang People's Court Work Report*, HEILONGJIANG RIBAO [HEILONGJIANG DAILY], Mar. 19, 1990, at 7, translated in FBIS-CHINA, May 10, 1990, at 80, 81; KYODO NEWS AGENCY, *Bribery Attempts on Court Officials Increase*, translated in FBIS-CHINA, July 28, 1989, at 27; *Law Officials Trample on Law*, CHINA DAILY, July 21, 1989, at 3.

that would provide meaningful comparative perspective. The number of news stories is a function of the government's wish to publicize the problem, not necessarily of its magnitude. In the absence of reliable data, it is possible only to note the existence of this obstacle to law implementation, but not to specify its degree.

Third, even if judges are able and willing to render a correct judgment, their decision may be overridden by higher authorities within the court. Courts at all levels have as part of their structure an Adjudication Committee headed by the president of the court.⁵¹ It is the highest decision-making body within the court as an institution.⁵² It is official policy that "judicial independence" means not that the particular judge or judges hearing the case should be independent from outside pressures (*i.e.*, senior judges in the same court), but at most that the court *as an institution* should be free from outside pressures.⁵³ The Adjudication Committee has the power, among other things, to override the decision of the judges who actually heard the case and conducted the trial and to order them to enter a different decision.⁵⁴ Reports in the legal press indicate that in many courts it is routine for the Adjudication Committee to decide cases, with the result that "those who try the case do not decide it, and those who decide the case do not try it" (*shenzhe bu pan, panzhe bu shen*).⁵⁵

51. See Court Organization Law, *supra* note 17, Art. 11.

52. Although Article 8 of the Court Organization Law does not actually say this in so many words, it is quite clear from other Chinese sources that this is so. See *infra* notes 54 and 55 and sources cited therein.

53. "The view that the collegiate bench [*heyi ting*] and the trial judge [*shenpan yuan*] can independently adjudicate and that the chamber president and the court president can have no say in the matter [*bu neng guowen*] is in opposition to the principle of independent adjudication by courts mandated by the laws of our country." *Zuigao Renmin Fayuan Yuanzhang Jiang Hua Tan Renmin Fayuan Duli Shenpan Wenti* [Supreme People's Court President Jiang Hua Discusses the Issue of Independent Adjudication by the People's Courts], *ZHONGGUO FAZHI BAO*, May 29, 1981, at 1. For a study of the theory and practice of judicial independence in the first decade of the People's Republic, see Jerome A. Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 *HARV. L. REV.* 967 (1969).

54. The relationship between the local Party authorities, the Adjudication Committee, and the individual judge(s) hearing a case can be expressed as follows. The Party committee has the right, and even the duty, to concern itself with the work of the court and to make suggestions. It has the actual power, but not the right, to order the court to make a particular decision. (If it did not have the actual power to do so, China would be a very different place.) The Adjudication Committee has both the right and the actual power to order individual judges hearing a case to make a particular decision.

55. Sun Jiebing, *Dangqian Fayuan Shishi Duli Shenpan de Zuli ji Duice* [Obstacles and Solutions to the Implementation of Independent Adjudication by Courts Today], 1989 *XIANDAI FAXUE* [MODERN JURISPRUDENCE] No. 1, at 44, 45. For other criticisms of the current role of the Adjudication Committee, see Li Shaoping, *Gai "Xian Ding Hou Shen" Wei "Xian Shen Hou Ding"* [Change "Decision Before Trial" to "Trial Before Decision"], 1990 *FAXUE YANJIU* No.

Fourth, the court as a whole is subject to numerous outside pressures and is particularly vulnerable to local government direction. Judges can be threatened with various unpleasant consequences if they do not decide as the threatener wishes. I shall look here at only one kind of vulnerability with a specific institutional basis, that is, the power of the local Party and government to dictate to courts how to decide cases.

The local Party handles judicial matters through its Political-Legal Committee (*zheng-fa weiyuanhui*),⁵⁶ which has traditionally been in charge of the police, the procuracy, the courts, other aspects of judicial administration, and civil affairs. The Political-Legal Committee is often headed by the leader of the local police or of the local Party and government.⁵⁷

It has long been the practice in China for local Party secretaries or Party committees to review and approve the disposition of cases by courts.⁵⁸ This was the concrete manifestation of the principle of Party

2, at 39 and Wang Xinru, *Shenpan Weiyuanhui Dingan Ying yu Gaibian* [The System of the Adjudication Committee Deciding Cases Should Be Changed], 1989 ZHENGZHI YU FALU [POLITICS AND LAW] No. 1, at 24.

56. According to the Notice of the Central Committee of the Chinese Communist Party on the Establishment of Political-Legal Committees [Zhonggong Zhongyang Guanyu Chengli Zheng-Fa Weiyuanhui de Tongzhi] (Central Committee Doc. No. 5, 1980), the Political-Legal Committee, *inter alia*, "guides [*zhidao*] the work of the various political-legal departments" (this would include courts) and "properly disposes of important and difficult cases." This document, not to my knowledge publicly available, is cited in Zhonggong Zhongyang Guanyu Jiaqiang Zheng-Fa Gongzuo de Tongzhi [Chinese Communist Party Central Committee Notice on Strengthening Political-Legal Work] (Jan. 13, 1982) [hereinafter 1982 Political-Legal Notice], reprinted in ZHONGGONG NIANBAO 1983-84 [YEARBOOK OF CHINESE COMMUNISM 1983-84] 8-3, 8-6 (Taipei 1984).

The central CCP Political-Legal Committee was renamed the Political-Legal Leading Group in 1988 as part of a move to reduce its influence. Following the crisis of May and June, 1989, it has been revived. See Willy Lam, *Legal, Security Apparatus to Be Strengthened*, SOUTH CHINA MORNING POST, Apr. 4, 1990, at 10, reprinted in FBIS-CHINA, Apr. 4, 1990, at 22. Similar changes in status occurred at the local level. See *Change in Status of Legal Organs in Sichuan*, in SWB/FE, Feb. 13, 1990, at B2/2 (announcing retransformation of county- and provincial-level Political-Legal Leading Groups back into Committees and associated rise in status).

57. See Zhao Zhenjiang et al., *Lun Falu Shixiao* [On the Effectiveness of Laws], 1989 ZHONG-WAI FAXUE [CHINESE AND FOREIGN LEGAL STUDIES] No. 2, at 1, 5. One knowledgeable public security cadre from a large city informed me that the head of the Political-Legal Committee in that city was also the head of the procuracy, but added that it made little difference from which branch of the judicial apparatus the head came.

58. In 1959, a model judge wrote:

When cases I have handled required arresting and sentencing, had a relatively strong policy nature, or involved village or cooperative cadres, I asked instructions from the Party committee both before and during the process of handling the cases, and afterward I reported to the Party committee. . . . Whenever the Party committee gave me

leadership. The official theory now is that Party leadership is to be exercised at the level of legislation or general policy-making, not in the adjudication of specific cases.⁵⁹ But it has proved difficult to break old habits.

Judges may find themselves out of a job if they do not do as they are told by the Political-Legal Committee or by some other local power-holder.⁶⁰ The formal power of appointment and dismissal of court personnel is lodged in the local People's Congresses. In practice,

instructions, I conscientiously studied and thoroughly implemented them.

Liu Zejun, *Realizations from my Adjudication Work*, 1959 ZHENGFA YANJIU [POLITICAL-LEGAL STUDIES] No. 1, at 48, 48, quoted in JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA: 1949-1963*, at 501 (1968). The practice described above, far from being irregular, has in fact been given a name: "shuji pi'an" (approval of cases by the [local Party] secretary). See generally Hungdah Chiu, *Structural Changes in the Organization and Operation of China's Criminal Justice System*, 7 REV. SOCIALIST L. 53, 59-61 (1981) (discussing the persistence of the "shuji pi'an" system). The system was officially approved by the Supreme People's Court in a 1979 set of instructions issued to lower courts: "Important cases and cases involving foreigners should be reorted to the Party committee at the same level for examination and approval (*shenpi*)." Renmin Fayuan Shenpan Minshi Anjian Chengxu Zhidu de Guiding (Shi Xing) [Rules on the System of Procedure for the Adjudication of Civil Cases by People's Courts (for Trial Implementation)] (Supreme People's Court, Feb. 2, 1979), Part 6, § 2, in ZHIXING GONGZUO SHOUCHE [HANDBOOK ON IMPLEMENTATION WORK] 73, 81 (SunChangli ed. 1988) [hereinafter 1979 Rules on Civil Procedure].

59. See Zhang Zhidong, *Quxiao Dangwei Shenpi Anjian [The Abolition of the Examination and Approval of Cases by the Party Committee]*, in ZHONGGUO BAIKE NIANJIAN [CHINA ENCYCLOPEDIA YEARBOOK] 189 (1981). One Chinese writer stated the theory as follows:

As everyone knows, our country's constitution was drafted and discussed by the drafting committee formed by responsible comrades of the Party center and personages from all walks of life. In addition, it was passed by the organ of supreme state power, the National People's Congress, embodies the will of the entire Party and people, and represents the common interests of all the people. If state laws are subject to the decisions of any level of the Party, then in truth the collective interests of the entire Party and all the people are subject to the interests of a locality or a small group. This is an absurd theory and a dangerous practice.

Dong Likun, *Shei Ye Bu Neng Jü yu Falü zhi Shang [Nobody Can Be Above the Law]*, 1980 SHEHUI KEXUE [SOCIAL SCIENCE] No. 1, at 7, 10. In 1980, President of the Supreme People's Court Jiang Hua was quoted as saying: "When the Party committee strengthens its leadership over political-legal departments, it is mainly in the area of line, principles, and policy. It is not necessary to examine and approve specific cases." *Baozheng Fayuan Yi Fa Duli Shenpan, Feichu Dangwei Shenpi Anjian Zuofa [Guarantee the Independent Adjudication of Cases by the Courts in Accordance with the Law; Abolish the Practice of the Party Committee Examining and Approving [Decisions in] Cases]*, RENMIN RIBAO [PEOPLE'S DAILY], Aug. 25, 1980, at 1. But see 1979 Rules on Civil Procedure, *supra* note 58 at 81. Mr. Jiang also referred to a 1979 CCP Central Committee document instructing Party committees not to override the rules of the Criminal Law and the Criminal Procedure Law. *Id.*

60. Just how much of a threat this is will, of course, depend on the desirability and availability of other jobs. Because Chinese writers appear to believe that the power to appoint and dismiss carries with it the power to influence decisions, I am assuming that the threat is real and that the job to which an uncooperative judge is reassigned would be in effect a demotion.

however, they act as rubber stamps for the local Party organizational department.⁶¹ The real power is in the hands of the local Party leadership.⁶² "This personnel power exercised by a small group of leaders hangs like the sword of Damocles over those who would do things according to law."⁶³ "If the court insists on handling things according to law and disposes of certain cases in ways not satisfactory to these leaders, some of them will use their power to arbitrarily reassign the court's leadership."⁶⁴

Fifth, any judgment needs to be enforced, yet the courts are short on autonomous enforcement powers.⁶⁵ It is frequently difficult to get court judgments enforced against any determined defendant, to say nothing of a well-connected and politically powerful defendant. Indeed, in 1988 a former President of the Supreme People's Court described the failure to enforce court decisions as "the most outstanding problem in the administration of justice in the economic sphere."⁶⁶

61. See Zhao et al., *supra* note 57, at 3, 5.

62. See Gaishan Zhifa de Keguan Tiaojian [Improve the Objective Conditions for the Implementation of Law], FAZHI RIBAO, Apr. 13, 1989, at 1. One county Party secretary is reported to have expressed this view at a meeting of political-legal cadres:

All of you sitting here, I ask you — you, the court president: if I hadn't put your name up, could you serve? You, the chief procurator: if I hadn't put your name up, could you serve? You, the public security chief: if I hadn't put your name up, could you serve? If you ask me, none of you could serve!

Fang Chengzhi, *Renmin Fayuan Zai Guojia Jigou Zhong de Diwei* [The Position of the People's Courts in the Structure of the State], 1985 FAXUE ZAZHI [JURISPRUDENCE MAGAZINE] No. 4, at 15, 16.

63. Zhao et al., *supra* note 57, at 5.

64. Shi Youyong, *Shenpan Zhong Difang Baohu Zhuyi de Chengyin ji Duice* [Local Protectionism in Adjudication: Causes and Countermeasures], 1989 FAXUE (Shanghai) No. 6, at 15, 15.

65. This problem is, of course, hardly unique to China. For a classic American case, see *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). In that case, Chief Justice Roger Taney was confronted by the simple refusal of military authorities, acting under orders from President Lincoln, to obey a writ of habeas corpus: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." *Id.* at 153.

66. See Zheng, *supra* note 25, at 29. Complaints about problems in implementing judgments are a regular feature of the annual Supreme People's Court work reports. For the latest, see Ren, *supra* note 23, at 2.

Other articles addressing the problem of implementation include: Ding Conghan, *Dui 42-Jian wei Zhixing de Jingji Anjian Diaocha Pouxi* [Investigation and Analysis of Forty-Two Cases of Economic Disputes Where the Judgment Was Not Implemented], 1989 FAXUE ZAZHI [JURISPRUDENCE MAGAZINE] No. 3, at 42; Shi, *supra* note 64; Wang Qinglin, *Baokang Fayuan Anjian Zhixing Bu Tuo Bu Ya* [Baokang Court Implements Judgments Without Delay and Without Backlogs], FAZHI RIBAO, Aug. 3, 1988, at 2; *Failure to Enforce Laws "Grave Problem"*, Xinhua News Agency, in FBIS-CHINA, Mar. 28, 1989, at 15; Xu Fang & Liu Jian, *Songjiang Xian Fayuan "Shen Zhi Jian Gu"* [The Songjiang County Court Pays Attention to Both Adjudication and Execution], FAZHI RIBAO, Mar. 4, 1989, at 1; Zhang Jianxin, *Ju Bu*

Why is it so difficult to execute judgments? First, there are few penalties for refusing to obey a court order.⁶⁷ Chinese courts have no contempt power, and it is not a crime to refuse to obey a court order. Article 157 of the Criminal Law⁶⁸ makes it a crime to refuse to carry out a judgment if the refusal is by means of threats or violence. This covers the person who interferes with the actions of others carrying out a judgment, but does not cover the person who is ordered to do something and simply does not do it.⁶⁹ There is one report of a man sentenced under the Criminal Law to one year's imprisonment for refusing to carry out a judgment, but no details are provided as to whether he used threats or violence.⁷⁰

Article 77 of the 1982 Civil Procedure Law⁷¹ empowered the court to fine or detain those who "have a duty to assist in execution" of civil judgments and refuse to do so, but this probably did not refer to the actual subject of the judgment, who is usually called "the executee" (*bei zhixing ren*). Evidently this lacuna was noted, for the 1991 revision⁷² provides in Article 102 that parties themselves (as well as others) may be fined or detained if they refuse to carry out a

Zhixing Fayuan Panjue Yao Fu Falü Zeren; Anyang Xian Fayuan Panchu Li Tiansheng Tuxing Yi Nian [Those Who Refuse to Implement Court Judgments Must Bear Legal Responsibility: Anyang County Court Sentences Li Tiansheng to One Year's Penal Servitude], FAZHI RIBAO, Aug. 3, 1988, at 1.

67. See Ding Haihu & Chen Xiuyan, *Shilun Qiangzhi Zhixing Lifa* [A Tentative Discussion on Legislation Regarding Compulsory Execution], 1989 FAXUE ZAZHI No. 5, at 38, 39.

68. *Zhonghua Renmin Gongheguo Xing Fa* [Criminal Law of the People's Republic of China], 1979 FGHB 48 [hereinafter Criminal Law].

69. One writer has proposed that the crime of contempt of court (*mieshi fating zui*) be added to the Criminal Law. Even this proposal, however, does not appear to cover all deliberate refusals to carry out court judgments and orders. It suggests punishing refusal to carry out court judgments "in a way that shows contempt for the court (*yi mieshi fating de fangshi*)." Zhao Yongchen, *Zai Xing Fa Zhong Ying Zengshe Mieshi Fating Zui de Tiaokuan* [A Provision Should Be Added to the Criminal Law Criminalizing Contempt of Court], 1989 XIANDAI FAXUE [MODERN JURISPRUDENCE] No. 1, at 56, 56. Why Chinese law shows such a reluctance to punish for the mere fact of deliberately refusing to obey a court order is an intriguing question, but one beyond the scope of this paper.

70. See Zhang, *supra* note 66, at 1. Another case involved the continued commission by the defendant of a forbidden act — the taking of property adjudged not his — which was then defined as theft. The defendant also made threats to court officials. See Li Zhouxin, *Anhua Xian Liangming Minshi Susong Dangshiren Ju Bu Zhixing Fayuan Caiding Daitou Hongqiang Jiti Chachang* [Two Parties to a Civil Suit in Anhua County Refuse to Carry out Court Ruling, Take the Lead in Seizing Collective Tea Field], FAZHI RIBAO, Aug. 26, 1988, at 1. I have found no case where the defendant was punished for refusing to perform a required act.

71. *Supra* note 32.

72. Civil Procedure Law, *supra* note 32.

legally effective court judgment or ruling.⁷³ It remains to be seen, however, how well this provision will be enforced.

Second, courts often lack sufficient bureaucratic clout to enforce their judgments against administrative units. Any clout they have comes from the bureaucratic rank of individual judges. Although courts and governments at any given level are supposed to be equal, court presidents generally have a lower bureaucratic rank than the chief executive of the government at the same level.⁷⁴ This means, for example, that the latter has access to some documents from the center that the former cannot see. It is simply alien to the way China functions that a lower-level official from one bureaucracy should be able to give orders to a higher-level official from another.⁷⁵ A low-status judge does not have the prerogative to disobey, much less to command, a higher-status official. As one county Party secretary is reported to have said, "Tell me what matters more: official rank or the law? I can definitely tell you, rank matters more. Law is made by man; without man, how could there be law? Without man, how could law matter at all? That's why I say that rank matters more."⁷⁶

Third, the cooperation of local authorities is needed. Judicial independence is not of much use if it results in nothing more than the issuance of a piece of paper. The enforcement of local court judgments may be supported by local authorities, if only because a judgment they opposed would probably not be issued in the first place. Nevertheless, courts are reluctant to move with force and authority against the truly recalcitrant defendant. In one case, an old man and his wife transferred their house to a third party, and then wanted it back so they could give it to their son. To accomplish their purpose, they simply reoccupied the original house. The new owner took them to court and won at both the first trial and on appeal. The defendants, however, refused to move out on the grounds that they were old. Fearing they would commit suicide, the court eventually ruled that they could stay in the house until they died, at which time the court's judgment would

73. Refusal to carry out judgments is one of a list of acts in Article 102 that are said to subject the actor to criminal liability if they violate the Criminal Law. Aside from the fact that it is hardly necessary to put this truism in the Civil Procedure Law, we have already seen that the mere refusal to carry out a court order does not appear to violate the Criminal Law. Several Chinese judges with whom I have spoken confirm this view.

74. See Fang, *supra* note 62, at 15; Tao-tai Hsia, *The Concept of Judicial Independence* 9 & n.23 (1986) (unpublished paper).

75. See generally KENNETH LIEBERTHAL & MICHAEL OKSEBERG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES* ch. 4 (1988) (discussing characteristics of the structure of state power).

76. See Fang, *supra* note 62, at 16.

take effect. The writer reporting this case criticizes the court, but demonstrates the identical attitude when he says that where execution would “genuinely cause difficulty,” one should consider an “appropriate postponement.”⁷⁷

The greater enforcement problem occurs with the execution of judgments from courts outside the jurisdiction of the local government. The enforcement of such judgments is essentially a voluntary matter for the local authorities.

Local courts in China are considered in fact, although not in law, to be simply arms of local government. Courts are dependent on local government for their financing, and their personnel serve *de jure* at the pleasure of the local People’s Congress and *de facto* at the pleasure of the local Party organization.⁷⁸ This sets the stage for the conflict of two principles. A court, wherever located, is by law empowered to issue a judgment binding on anyone, provided it has proper jurisdiction. In the Chinese political system, however, County A in Province X cannot tell County B in Province Y what to do any more than the citizens of Del Mar, California can declare Groton, Connecticut a nuclear-free zone.⁷⁹ Because of the identification of courts with local governments, their judgments are subject to the latter principle, not the former.

Local authorities often oppose the enforcement of outside judgments.⁸⁰ Under economic reform, localities are more dependent than before on their own resources. Local enterprises form the revenue base for local governments.⁸¹ Thus, it is important to protect their

77. Su Nan, *Fayuan de Panjue Zai Mouxie Difang Nanyi Zhixing* [Court Judgments Are Difficult to Implement in Certain Places], FAZHI RIBAO, Jan. 3, 1989, at 4. The issue of principle versus pragmatism was faced by the United States Supreme Court perhaps most poignantly in *Brown v. Board of Education*, 349 U.S. 294 (1955), where it ordered the desegregation of public schools “with all deliberate speed[.]” *Id.* at 301. The author of the formula himself conceded that as a matter of constitutional law, the idea that the Court could recognize a violation of personal rights yet not provide an immediate remedy was “entirely unprincipled,” “simply indefensible,” and “just plain wrong.” See Philip Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 827, 828 (1987). For criticism of the Court’s formulation, see, *inter alia*, Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968) and Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963).

78. See *supra* note 26.

79. See John Glionna, *No Issue Is Too Big or Too Small for Del Mar*, L.A. TIMES, June 24, 1990, at B1 (reporting decision of Del Mar City Council in 1989 to declare town a nuclear-free zone).

80. See Mu Xiaoqian & Liu Jian, *Shei Zai Wei Beigao Chongdang Houtai?* [Who Is Backing Up the Defendant?], FAZHI RIBAO, Apr. 5, 1988, at 3.

81. See Ding & Chen, *supra* note 67, at 38; Shi, *supra* note 64, at 16.

financial health. The President of the Supreme People's Court complained about this phenomenon:

Some localities — mainly Party and government leaders at the basic level — demand that when the court passes judgment, it be favorable to the party from the locality. If it is not, they accuse the court of “embracing outsiders” (*gebozhou wang wai guai*). If a court from outside the locality rules against a local party in a suit, requiring that party to bear economic liability, to pay a debt, or to compensate for economic loss, certain leaders of the locality will obstruct the implementation of the court's judgment.⁸²

The financial contract system, under which localities are obliged to turn over a fixed amount of revenues to the center each year and may keep the remaining revenues,⁸³ has made it even less likely that local authorities will permit resources to flow out of the jurisdiction. Since local governments are usually the primary claimants on the enterprise's income, they bear the loss when their enterprise pays out to an outside party.⁸⁴

If it is common for local courts to rule against outsiders, it is easy to see why even the most upright local authorities would have good reason to be suspicious of the impartiality of an outside judgment against a local enterprise. They would naturally be reluctant to help enforce it. Sometimes outside court personnel will actually make a trip (at the winner's expense) to the loser's district to execute the judgment. But without the cooperation of local authorities, outside court personnel are simply strangers in a strange land. They have no connections, no authoritative letters of introduction, no influence, and no power.⁸⁵

It can be very difficult to obtain local court cooperation if the local authorities are dead set against it. Contracts across jurisdictions

82. Shi, *supra* note 64, at 15 (citing a speech made by Supreme People's Court president Ren Jianxin in October, 1988). Ren's predecessor made the same complaint in almost identical terms (and using the same colloquial expression) in April of 1986. See Zheng, *supra* note 50, at 3.

83. See LIEBERTHAL & OKSENBERG, *supra* note 75, at 139.

84. See Ding & Chen, *supra* note 67, at 38.

85. See Henan Sheng Xinxiang Shi Zhongji Renmin Fayuan [Henan Province Xinxiang City Intermediate Level People's Court], *Shuli Quanguo Fayuan Yipanqi Sixiang, Jiji Xiezhu Waidi Fayuan Gaohao Zhixing Gongzuo* [Take the Courts of the Whole Country as a Single Chessboard; Actively Assist Courts from Other Areas to Do Implementation Work Well], FAZHI RIBAO, Apr. 5, 1988, at 3.

can be unenforceable.⁸⁶ In one case, a local court refused to help enforce an outside judgment despite two specific orders from the Supreme People's Court to do so.⁸⁷

In the face of this protectionism, local governments have begun to make treaties pledging to protect each other's enterprises as their own. Shanghai, for example, is reported to have signed agreements "on the protection of the legitimate rights and interests of enterprises" with nine provinces.⁸⁸ These treaties can play a useful role so long as the parties have an interest in continued cooperation, and are more practical than the usual pious exhortations to local authorities.⁸⁹ They are, however, essentially unenforceable.

B. Dispute Resolution Out of Court

Because of the weakness — indeed, often the irrelevance — of courts, institutions other than courts are extremely important in dispute resolution in China.

1. Informal

Few disputes and disagreements generated by the everyday frictions of social life ever make it to the level of formal resolution institutions. In this respect, China is no different from other societies. The particular ways in which third-party dispute resolution can be carried out, however, are different simply because of China's different history, culture, and politico-economic system.

Among informal third-party dispute resolvers, the most obvious candidates are neighbors, relatives, and friends. Beyond this immediate circle, disputes may be handled by the Chinese version of local notables. In areas where clans are strong, such as south China, these

86. See Yao Jianchun, *Bingchu Difang Baohu Zhuyi, Yi Fa Weihu Qiye Quanyi* [Get Rid of Local Protectionism; Uphold the Rights and Interests of Enterprises According to Law], FAZHI RIBAO, Apr. 14, 1989, at 3.

87. See Chen Shibin, *Dawu Xian Fayuan Jianchi Difang Baohu Zhuyi, Tuoyan San Nian Ju Bu Xiezu Zhixing Waidi Panjue* [Dawu County Court Persists in Local Protectionism; After Delaying Three Years, Still Refuses to Assist in the Execution of an Outside Judgment], FAZHI RIBAO, June 4, 1988, at 1.

88. See Yang Jisheng, "East-West Dialogue" in China — the Strategy of Unbalanced Economic Development on the Mainland in Perspective, 1989 LIAOWANG [OUTLOOK] (Overseas Edition) No. 9, at 5, reprinted in FBIS-CHINA, Apr. 10, 1989, at 37, 39.

89. See, for example, the "solution" proposed by one writer: "The best way of solving the problem [of court judgments not being implemented] is for the relevant units and personnel to truly do things according to law." Su, *supra* note 77, at 4.

could be clan leaders.⁹⁰

Another important type of notable is the locally powerful Communist Party or public security official. A 1967 study of mediation in China found that despite the existence of formal mediation committees in rural communes, "the bulk of civil disputes are handled by [production] team and brigade leaders or by security defense activists."⁹¹ Nor was their role confined simply to facilitating voluntary agreements. The power and prestige of local officials such as the public security chief was such that they could often impose a solution against the will of one or more parties, with no effective appeal to any other body such as a court.⁹²

Despite the dismantling of the people's communes, it is likely that local officials with no formal judicial powers still play a prominent role in rural dispute resolution. A 1989 study described the role of a Party secretary in a Fujian village in the following way:

As the de facto ruler of Lin Village, Party Secretary Ye behaves like a benevolent county magistrate, the so-called father-mother official, of imperial China. In that capacity he literally wrote the laws and ordinances for villagers, presided over their litigations, and dispensed justice in whatever way he saw fit.⁹³

In such an informal system, it makes little sense to attempt to distinguish between mediation, arbitration, and litigation. The degree to which the local cadre can impose a decision will depend on a myriad of factors: whether economic reform has made the villagers more independent of officials, whether the cadre or a party to the dispute belongs to a powerful family, and the distance to the nearest court, to name just a few. More likely than not, the cadre and the

90. On clans, guilds, and other non-state institutions of dispute resolution in traditional Chinese society, see, *inter alia*, H.C. LIU, *THE TRADITIONAL CHINESE CLAN RULES* (1959); SYBILLE VAN DER SPENKEL, *LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS* 80-111 (1966); KUNG-CHUAN HSIAO, *COMPROMISE IN IMPERIAL CHINA* (1979); Cohen, *supra* note 14.

91. Lubman, *supra* note 14, at 1336; see also sources cited in *id.*, n.181. Another study found that in one commune in 1964, "the top Party and public security officials tended to monopolize [the] role [of mediator] In Brigade B, all the brigade's cadres were, in a sense, regarded as potential mediators" A. DOAK BARNETT, *CADRES, BUREAUCRACY AND POLITICAL POWER IN COMMUNIST CHINA* 403 (1967).

92. See Lubman, *supra* note 14, at 1337 & n.182.

93. HUANG SHU-MIN, *THE SPIRAL ROAD: CHANGE IN A CHINESE VILLAGE THROUGH THE EYES OF A COMMUNIST PARTY LEADER* 107 (1989).

parties to the dispute will all be involved in a complex bargaining relationship with each other, where willingness to make trouble for others can give significant leverage. In short, while Party Secretary Ye may dispense justice in whatever way he sees fit, his view of what is fit is powerfully influenced by his perception of what will be deemed acceptable. He is a politician and cannot afford to alienate the entire village.

In urban areas, mediation can be conducted by the police in minor criminal matters by virtue of their power to impose punishments under the Security Administration Punishment Regulations.⁹⁴ If the offender makes proper amends to the satisfaction of the injured party, the police can decide not to pursue the matter further.

2. People's Mediation Committees

a. Introduction

People's Mediation Committees (PMCs) are, with courts, the most widely known institutions for dispute resolution in China. It is difficult to determine from Chinese sources just how important PMCs are relative to other institutions for dispute resolution. For every civil dispute that goes to court, probably five to ten are resolved by PMCs.⁹⁵ While statistics on the recourse to various fora for dispute

94. *Supra* note 46.

95. According to one source, from 1981 to 1984 inclusive, PMCs mediated approximately ten times as many civil disputes as were accepted for hearing by people's courts. See Chai Fabang & Li Chunlin, *Gaige yu Wanshan Renmin Tiaojie Zhidu (Reform and Perfect the System of People's Mediation)*, 1986 ZHENGFA LUNTAN No. 1, at 50, 50. The same proportion was reported for 1981 to 1986. See Han Yue, Wang Yan & Yang Xiaobing, *People's Mediation Unique to China*, BEIJING REV., Nov. 30–Dec. 6, 1987, at 15, 17.

Another source reports that from 1981 to the end of 1988, PMCs mediated a total of 57.6 million disputes among the people (*minjian jiu fen*), an average of 7.2 million per year. This average is 7.6 times the number of civil cases accepted in the first instance by people's courts every year. See Si Qi, *Zai Gaige Zhong Fazhan, Chuangxin, Wanshan de Renmin Tiaojie Zhidu [The People's Mediation System: Development, Innovation, and Perfection in the Course of Reform]*, FAZHI RIBAO, July 15, 1989, at 3.

Still another source reports that 50 million civil cases were settled by mediation committees from 1982 to 1988, "five to ten times" the number of cases (presumably civil cases) that went to court during the same period. See Gao Aming, *China's Mediation System Unique*, CHINA DAILY, Oct. 10, 1989, at 4.

A report from Changde County in Hunan Province indicated that PMCs there handled twenty-two times the number of civil and minor criminal cases dealt with by local people's courts. See *Wo Xian Shi Zenyang Jiaqiang Renmin Tiaojie Gongzuo [How Our County Strengthened People's Mediation Work]*, in GUO XIANG ET AL., *RENMIN TIAOJIE ZAI ZHONGGUO [PEOPLE'S MEDIATION IN CHINA]* 230 (1986). In the city of Nanchang in Jiangxi Province,

settlement must be used with care — the statistical sample includes only those disputes that end up being handled by an institution that keeps records — it is clear that mediation by official and quasi-official organizations such as PMCs occupies a major place among techniques for dispute resolution. While PMCs are not the sole institution for mediation, they are clearly the dominant one.

With the exception of a brief period during the Cultural Revolution, PMCs have traditionally been the subjects of unstinting and unanimous encomia in the legal press. A typical statement of the virtues of “people’s mediation” in China can be found in a recently published handbook:

The current system of people’s mediation . . . is a great creation in the construction of our country’s socialist legal system, it is a legal system with Chinese characteristics, and it is an important component of our country’s judicial system. . . . [I]t plays an immense role in resolving contradictions among the people, strengthening unity and friendship among the people, and promoting socialist material and spiritual civilization [I]t has received praise in international jurisprudential circles and has been called “the most distinctive system of the Chinese judicial system.”⁹⁵

Another article provides a specific list of the virtues of mediation: It embodies the traditional Chinese virtues of harmony and yielding, it softens social contradictions⁹⁷ and enhances unity, it has the flexibility needed to deal with cases where there are gaps in the law, it simplifies judicial procedure for the masses and decreases the backlog of cases in the courts, it gives the greatest possible control to the parties over their own rights and interests, and it provides a settlement that is relatively easy to implement because it is based on the agreement of the parties.⁹⁸

Recently, however, Chinese legal scholars have begun to question

PMCs dealt with sixteen times the number of civil cases that went to the local courts. See *Women Shi Zeryang Zhuahao Chengshi Renmin Tiaojie Gongzuo de* [How We Improved Urban People’s Mediation Work], in *id.*

96. MEDIATION COMPENDIUM, *supra* note 31, at 11.

97. It was on these grounds that mediation was criticized during the Cultural Revolution.

98. See 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. For a presentation in English of the orthodox Chinese view of mediation, see CHINA’S LEGAL SYSTEM: A GENERAL SURVEY 200–212 (Du Xichuan & Zhang Lingyuan eds., 1990).

this rosy view of mediation. Their objections can be summarized as follows.

First, it is argued that the emphasis on mediation has led to a denial of proper remedies to those whose rights have been infringed. Courts spend an inordinate amount of time attempting to mediate cases that should simply be adjudicated and dispensed with. Thus, it may not even be true that mediation reduces the load on courts.⁹⁹

Second, mediators are criticized for often failing to make clear the rights and wrongs of a case and coming up with muddled settlements not based on a clear understanding of the facts and the law.¹⁰⁰ This type of mediation, which looks merely to the agreement of the parties, is criticized as “unprincipled” mediation.

Somewhat contradictory to the second objection is a third: that mediators ignore the principle of voluntariness and attempt to impose decisions on the parties through illegitimate pressure tactics.¹⁰¹ That coercive mediation does in fact occur can be seen from references in the legal literature to “appeals” from mediated settlements.

This section will introduce mediation and people’s mediation committees and then explore their role in China today in order to provide a basis for assessing the validity of these claims and counter-claims.

b. Historical background and current regulatory regime

Mediation committees in the PRC first received a national statutory basis in 1954 with the promulgation of the *Provisional Organizational Principles for People’s Mediation Committees* (Mediation Principles).¹⁰² This was not, however, the beginning of mediation committees: mediation organizations had existed for years in the areas under Chinese Communist Party (CCP) control, and by the time the Mediation Principles were promulgated, a number of local governments at the level of city, province, and military region had already issued their own regulations or directives.¹⁰³ By 1953, for example, the East

99. See Ji Weidong, *Fazhi yu Tiaojie de Beilun* [A Contrary View of Legality and Mediation], 1989 FAXUE YANJIU No. 5, at 21, 22; Zheng et al., *supra* note 98, at 26.

100. See Zheng et al., *supra* note 98, at 26.

101. See *id.*

102. Renmin Tiaojie Weiyuanhui Zanzing Zuzhi Tongze, 1954 [Jan.–Sept.] ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN [COLLECTED LAWS AND DECREES OF THE CENTRAL PEOPLE’S GOVERNMENT] 55.

103. See Han Yanlong, *Woguo Renmin Tiaojie Gongzuo de Sanshi Nian* [Thirty Years of People’s Mediation Work in Our Country], 1981 FAXUE YANJIU No. 2, at 44, 44.

China region already had 46,000 mediation committees covering 80% of its townships.¹⁰⁴

Article 3 of the Mediation Principles set forth the jurisdiction and tasks of PMCs in terms that remained unchanged for 35 years: to mediate ordinary civil disputes among the people and minor criminal cases and to conduct propaganda and education in state law and policy.¹⁰⁵ PMCs were to operate under the leadership and supervision of local governments and basic-level People's Courts.¹⁰⁶ The decision to mediate was to be entirely voluntary on the part of the disputants, and failure to mediate could not be raised as a bar to court proceedings.¹⁰⁷ On the other hand, mediation proceedings and settlements had to be in line with state policies and laws.¹⁰⁸

Mediation was fundamentally designed to address disputes among the people,¹⁰⁹ who are defined to include those classes allied with the workers and peasants and to exclude those classes deemed fundamentally hostile to socialism.¹¹⁰ Thus, mediation was associated with such principles as voluntariness, persuasion, education, and democracy.

With the onset of heightened political repression accompanying the Anti-Rightist Campaign in the latter half of 1957, the role of PMCs was downgraded in favor of *tiaochu*, a local government institution that seems to have combined elements of mediation, arbitration, and adjudication. The Chinese word is probably best left untranslated, in view of the paucity of information about the institution,¹¹¹ but "settlement" will be used throughout this discussion for lack of a better term. It is not clear whether settlement organs formally replaced PMCs, and I have found no evidence that PMCs were ever formally abolished. They did, however, become less prominent. It does seem clear that unlike PMCs, settlement organs were able to impose judgments on the parties and were more concerned with criminal than with civil matters.¹¹² Their main job was to "restrain, dispose of, and reform" those who "often broke minor laws but did not break major laws" (*da fa bu fan, xiao fa chang fan*). Following communization in

104. *See id.* at 44.

105. For more on jurisdiction, *see infra* text accompanying notes 137-142.

106. Mediation Principles, *supra* note 102, Arts. 2, 10.

107. *Id.*, Art. 6.

108. *Id.*, Art. 6.

109. *Id.*, Art. 1.

110. On the "people" versus the "enemy," *see infra* text accompanying note 170.

111. Neither the Jurisprudence volume of the Great Encyclopedia of China (*Zhongguo Da Baike Quanshu*) nor any number of legal dictionaries contain any entries under *tiaochu*.

112. *See Han, supra* note 103, at 46 (distinguishing mediation (*tiaojie*) from *tiaochu*); MEDIATION COMPENDIUM, *supra* note 31, at 30.

1958, a number of settlement organs were simply merged with local security defense committees, an indication of their coercive authority. They were responsible for enforcing “pacts”(gongyue)—the local rules formulated at the level of the work unit or village. Their role can perhaps be seen best from a report of settlement activities in Ding County, Hebei Province in 1960: a total of almost 5,300 disputes were handled, and among them were 542 cases of “making trouble and not obeying the leadership” and 124 cases of “lazy persons unwilling to labor.”¹¹³

The most complete picture that is publicly available of the power of settlement organs comes from a 1944 set of regulations for the Shanxi-Chahar-Hebei Border Region,¹¹⁴ which gave settlement powers to the district (*qu*) office under the county. These powers included the right to detain criminals (this class probably included suspects) for up to two days and to impose punishments of hard labor and fines. Settlement decisions, like court judgments, became legally effective and enforceable if not appealed within a certain time. While the author has seen no documents relating to settlement from the 1950s, it is reasonable to suppose that the model from the 1940s shaped the common understanding of the term and its significance when it was revived. A 1981 article quotes a set of 1958 regulations to the effect that “settlement committees” (*tiaochu weiyuanhui*) could impose punishments of re-education through labor,¹¹⁵ a form of detention

113. HEBEI SHENG WU DIQU SHEHUI ZHUYI AIGUO GONGYUE HE RENMIN TIAOCHU GONGZUO DE JIANCHA BAOGAO [REPORT OF AN INVESTIGATION INTO SOCIALIST PATRIOTIC PACTS AND PEOPLE'S SETTLEMENT WORK IN FIVE REGIONS OF HEBEI PROVINCE] (May 1961), quoted in Han, *supra* note 103, at 46.

114. Jin-Cha-Ji Bianqu Xingzheng Weiyuanhui Guanyu Qu Gongsuo Tiaochu Anjian de Jueding [Decision of the Administrative Committee for the Shanxi-Chahar-Hebei Border Region Regarding the Settlement of Cases by District Offices] (June 1, 1944), reprinted in 3 ZHONGGUO XIN MINZHU ZHUYI SHIQI GENJUDI FAZHI WENXIAN XUANBIAN [SELECTED DOCUMENTS ON THE LEGAL SYSTEM OF THE BASE AREAS DURING THE PERIOD OF NEW DEMOCRACY IN CHINA] 643 (Han Yanlong & Chang Zhaoru eds., 1981). The *Decision* is introduced by another document of the same date: Jin-Cha-Ji Bianqu Xingzheng Weiyuanhui Guanyu Jiaqiang Cun Tiaojie Gongzuo yu Jianli Qu Tiaochu Gongzuo de Zhishi [Directive of the Administrative Committee for the Shanxi-Chahar-Hebei Border Region Regarding the Strengthening of Village Mediation Work and the Establishment of District Settlement Work], reprinted in *id.* at 640.

115. See Zhong-Gong Hebei Sheng Weiyuanhui Guanyu Zhiding Aiguo Gongyue, Jianli Tiaochu Weiyuanhui Zanzing Banfa (Cao'an) [Chinese Communist Party Hebei Provincial Committee Provisional Measures on Formulating Patriotic Pacts and Establishing Settlement Committees (Draft)] (Sept. 12, 1958), cited in Han, *supra* note 103, at 47.

which at that time had no maximum term.¹¹⁶ Moreover, the article asserts that there was no difference in principle between settlement in the 1950s and settlement in the 1940s.¹¹⁷

The displacement of mediation by settlement in the late 1950s proved to be temporary. In the early 1960s mediation once again dominated, displacing settlement.¹¹⁸ That the two institutions could not long co-exist suggests that although the ideals of mediation were far from the reality of settlement, the reality of mediation, with its emphasis on conformity to law and policy, its jurisdiction over minor criminal matters, and its educative function, was much closer.

With the coming of the Cultural Revolution in 1966, people's mediation again suffered a setback as it was labeled an instrument for class reconciliation.¹¹⁹ Dictatorship over class enemies had become the dominant paradigm in the analysis of conflict, and ominous political undertones were read into the most trivial events.¹²⁰

Mediation committees recovered in the late 1970s and early 1980s. A spate of articles appeared in the press praising the institution of mediation, and the numbers of mediation committees and mediators began a steady rise that continues to the present. The statutory basis remained the same, however, until the passage in 1989 of the Regulations on the Organization of People's Mediation Committees (Mediation Regulations).¹²¹ The Mediation Regulations did not greatly change the institution of PMCs. Their work continues to be under the leadership of local governments and basic-level courts, although it is now specified that their daily work is under the guidance of a locally-appointed judicial assistant (*sifa zhuli yuan*).¹²² The principles of voluntariness and fidelity to law and policy have been maintained.¹²³

Bureaucratic authority over PMCs is in the hands of organs of

116. See Guowuyuan Guanyu Laodong Jiaoyang Wenti de Jueding [Decision of the State Council on the Question of Re-education Through Labor] (Aug. 1, 1957), reprinted in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU [COMPENDIUM OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter COMPENDIUM OF PRC LAWS] 1573 (1939).

117. See Han, *supra* note 103, at 47.

118. See *id.*

119. See *id.*

120. See, for example, CHEN JO-HSI, "Chairman Mao Is a Rotten Egg," in THE EXECUTION OF MAYOR YIN AND OTHER STORIES FROM THE GREAT PROLETARIAN CULTURAL REVOLUTION 37 (1978), where a small child causes panic in his household by shouting a "reactionary slogan" in play.

121. Renmin Tiaojie Weiyuanhui Zuzhi Tiaoli, 1989 STATE COUNCIL GAZETTE 515 [hereinafter Mediation Regulations].

122. See Mediation Regulations, *supra* note 121, Art. 2.

123. See *id.*, Art. 6.

judicial administration (*sifa xingzheng jiguan*) (that is, local versions of the central Ministry of Justice, not the police or the courts), while they are to receive “professional guidance” from the Basic-Level People’s Court in their area.¹²⁴ The local organs of judicial administration are responsible for providing mediators with some legal education and practical training and checking on their work. Authority over the day-to-day work of PMCs is in the hands of the locally-appointed judicial assistants,¹²⁵ who assist in the formation of mediation committees and the training of mediators in addition to their other duties of publicizing laws and regulations. Judicial assistants may also be called upon to mediate cases that local PMCs for some reason cannot handle. Mediation presided over by a judicial assistant is considered a species of administrative mediation.

c. *Neighborhood PMCs*

Under the Mediation Regulations, PMCs, which have the authority to mediate disputes occurring within their geographical jurisdiction, are established by Residents’ Committees (*jumin weiyuanhui*) in urban areas and by Villagers’ Committees (*cunmin weiyuanhui*) in rural areas.¹²⁶ They are supposed to have three to nine members.¹²⁷ Although committee members are supposed to be elected, there is no doubt a large degree of governmental control in this as in other electoral processes. The Mediation Regulations stipulate, for example, that in minority nationality areas some of the mediators should be members of the local minority nationalities.¹²⁸

Not mentioned in the Mediation Regulations but apparently sanctioned is the existence of mediation institutions below the level of the PMC. Mediation groups (*tiaojie xiaozu*) can exist at the workshop level within the enterprise or at the level of groups within a village or residential area. Below that, one mediator may be appointed for every ten or so households in the village or in the urban courtyard or

124. See MEDIATION COMPENDIUM, *supra* note 31, at 12.

125. See Mediation Regulations, *supra* note 122, Art. 2.

126. See MEDIATION COMPENDIUM, *supra* note 31, at 12. The Constitution also contains a provision to this effect. See ZHONGHUA RENMIN GONGHEGUO XIANFA (1982) [CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA], Art. 111, reprinted in COMPENDIUM OF PRC LAWS, *supra* note 116, at 3.

127. See Mediation Regulations, *supra* note 121, Art. 3.

128. See *id.*, Art. 3.

apartment block.¹²⁹ This system is known as the "three-level mediation network" (*sanji tiaojie wang*).¹³⁰

d. Workplace PMCs

Although neither the Constitution nor any of the regulations establishing mediation committees provided for their presence in urban enterprises, mediation was in fact carried out within enterprises since the 1950s.¹³¹ The number of intra-enterprise mediation committees was reported to have reached 133,000 by the end of 1987, with a staff of over one million enterprise employees who conducted mediation in their spare time.¹³² A single enterprise in Baotou, Inner Mongolia, was reported in the mid-1980s to have had over 2,000 mediators with jurisdiction over more than 75,000 employees and dependents.¹³³

The current Mediation Regulations permit but do not require the establishment of PMCs within the work unit.¹³⁴ This recognizes the large number of such PMCs already existing, but at the same time represents a concession to the policies of economic reform, which aim to make the work unit more a purely economic entity and less a branch of local government.

Enterprise mediation committees no doubt arose and continue to exist despite their lack of legal basis because of the importance of the workplace in Chinese urban society. The urban population receives, through the work unit, various welfare benefits such as cheap housing, special wage subsidies, ration coupons, theater tickets, vacations, health

129. Palmer, noting the resemblance of the ten-household group to the Imperial and Republican *baojia* systems of administrative control, writes that "[i]t is hard to escape the conclusion that the ten household and courtyard mediators have been introduced not only to mediate disputes but also to serve as instruments of administrative and political control." Palmer, *Extra-Judicial Mediation*, *supra* note 14, at 269. On the *baojia* system in Qing (Ch'ing) China, see KUNG-CHUAN HSIAO, *RURAL CHINA: IMPERIAL CONTROL IN THE NINETEENTH CENTURY* 25-83 (1960).

130. See Xiao Sheng, *Renmin Tiaojie Weiyuanhui Jianshe he Weiyuan de Xuanren [The Establishment of People's Mediation Committees and the Election of Committee Members]*, FAZHI RIBAO, Sept. 8, 1989, at 3.

131. See Jia Jingping, *Jianlun Jianquan Woguo Renmin Tiaojie Fazhi [A Brief Discussion on Strengthening Our Country's System of People's Mediation]*, 1986 FAXUE (Shanghai) No. 10, at 58, 59.

132. See *Renmin Tiaojie Weiyuanhui Fahui le Jiji Zuoyong [People's Mediation Committees Have Played a Positive Role]*, FAZHI RIBAO, May 6, 1989, at 1. An article written in 1986 stated that there were 170,000 intra-enterprise mediation committees but gave the same figure for the number of mediators. See Jia, *supra* note 131, at 59.

133. See Palmer, *Extra-Judicial Mediation*, *supra* note 14, at 257.

134. See Mediation Regulations, *supra* note 121, Art. 15.

care, child care, and old age pensions. There is no effective way to distribute these benefits save through the work unit.¹³⁵ In addition, the government depends on the work unit for social control. The work unit holds the personal dossiers (*dang'an*) of its members. These dossiers follow citizens through life and contain all the information the state wishes to know. Letters of introduction from the work unit are often needed for travel or access to all but the most public facilities. Family planning policy is enforced through the work unit, whose permission is needed to marry (even though the Marriage Law says nothing about this).¹³⁶

Because the social life of many urban Chinese revolves around the workplace, the parties to many disputes will be members of the same work unit. Thus, it is the natural forum for the resolution of disputes because of the power of the work unit leadership to bring sanctions to bear on recalcitrant parties.¹³⁷

e. Jurisdiction of PMCs

PMCs generally mediate minor disputes of a civil nature, although they may also be called upon to handle matters that would not be cognizable by a court, such as discord between a daughter-in-law and the husband's parents.¹³⁸ Under the original enabling legislation of 1954, PMCs also had the authority to mediate minor criminal matters. There is some confusion over how far this authority goes.

The usual understanding has been that PMCs may mediate any

135. Cf. Deborah Davis, *Chinese Social Welfare: Policies and Outcomes*, 1989 CHINA Q. 577, 581 (noting that Chinese welfare policy "defines most social welfare goods as rewards to job statuses").

136. See, for example, the letter from a 24-year-old worker to the Legal Adviser column of the Legal System Daily, where he complains that although the Marriage Law says he may marry at twenty-two, his factory says he must wait until he is twenty-five. Violation of the factory rule can lead to a fine or dismissal. The Legal Adviser's reply is that although technically he has the right to marry immediately, the factory's rule is reasonable and understandable and he should wait. See Letter to the Editor, *Changgui yu Guofa Xiang Dichu, Gai Zhixing Nei Yige?* [When There Is a Conflict Between Factory Rules and State Law, Which Should Be Implemented?], FAZHI RIBAO, Sept. 27, 1988, at 4.

137. For more on the power of the Chinese work unit over the lives of employees, see generally Andrew G. Walder, *Organized Dependency and Cultures of Authority in Chinese Industry*, 43 J. ASIAN STUD. 51 (1983) and his fuller treatment in ANDREW GEORGE WALDER, COMMUNIST NEO-TRADITIONALISM (1986).

138. Such disputes are a staple of the Chinese literature on mediation. See, e.g., MEDIATION COMPENDIUM, *supra* note 31, at 391; Wen Jia, *Community Mediators Heal Family Discord*, CHINA DAILY, Mar. 18, 1989, at 1.

criminal cases that may in effect be privately prosecuted.¹³⁹ The 1954 Mediation Principles specifically included “minor criminal cases” within the scope of disputes subject to mediation. This provision probably stemmed from the great lacunae in criminal law in China prior to the promulgation of the Criminal Law in 1979. Various statutes were passed criminalizing serious acts such as counterrevolution and corruption, but there was little if any national legislation criminalizing acts such as minor battery or theft. Only in 1957 were the Security Administration Punishment Regulations (SAPR)¹⁴⁰ passed, which allowed the police to penalize persons who committed what could be characterized as minor crimes.¹⁴¹

“Minor crimes” includes certain cases of injury, theft, maltreatment of family members, swindling, and defamation, to name a few.¹⁴² However, the 1989 Mediation Regulations, which replaced the 1954 Mediation Principles, omitted “minor criminal cases” from the scope of disputes subject to mediation. Nevertheless, academic commentary on mediation since the promulgation of the Mediation Regulations continues to assert, for reasons that are unclear, that “minor criminal disputes” are subject to mediation by PMCs.¹⁴³

139. “Private prosecution” in China may be briefly and inadequately summarized as follows. The Criminal Law provides for three types of cases that courts will hear only upon complaint: defamation in non-serious circumstances (Art. 145), violent interference with the freedom of marriage where death does not result (Art. 179), and abuse of family members where serious injury or death do not result (Art. 182). Courts may also, however, “directly accept” without procuratorial participation a number of other “minor criminal cases . . . that do not require the conducting of an investigation” such as intentional injury, refusal to implement court judgments, and abandonment of dependents. Criminal Procedure Law, *supra* note 18, Art. 13; Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gonganbu Guanyu Zhixing Xingshi Susong Fa Guiding de Anjian Guanxia Fanwei de Tongzhi [Supreme People’s Court, Supreme People’s Procuracy, and Ministry of Public Security Notice on Implementing the Scope of Jurisdiction over Cases Provided for in the Criminal Procedure Law] (Dec. 15, 1979) [hereinafter 1979 Jurisdiction Notice], reprinted in COMPENDIUM OF PRC LAWS, *supra* note 116, at 228. Although no statute stipulates who is to act as plaintiff and bear evidentiary burdens in the latter class of cases, it is customary for the injured party to do so.

Giving to the injured party or his legal representative the right to bring suit and the responsibility for presenting evidence [in minor criminal cases that do not require investigation] not only effectively deals blows at crime and protects the people, but can also reduce the burden on the procuracy and simplify the litigation process.

Yang Shi, *Lilun Zisu Anjian de Fanwei* [A General Discussion of the Scope of Self-Prosecuted Cases], 1990 FAXUE YANJIU No. 5, at 37, 38.

140. *Supra* note 46.

141. The 1957 SAPR are discussed in detail in COHEN, *supra* note 58, at 200–37 (1963).

142. See Li Chunlin & Pan Xiaming, *Renmin Tiaojie Wenti Zhengyi Zhi Wo Jian* [Our View of the Debate Over Issues in People’s Mediation], 1990 ZHENGFA LUNTAN No. 2, at 16, 18.

143. See, e.g., *id.* at 18.

3. Administrative Organs

Administrative mediation (*xingzheng tiaojie*) is a Chinese legal category referring to mediation carried out by officials in government organs other than courts or PMCs (the latter are not deemed government organs in Chinese mediation theory).

a. *Organs of Judicial Administration and Judicial Assistants*

One type of administrative mediation is carried out by the organs of judicial administration,¹⁴⁴ whose tasks include publicizing the law and educating citizens as well as supervising the work of lawyers, notaries, and people's mediation committees. The local level organ of judicial administration is the judicial assistant.

Judicial assistants are officially under the "leadership" (*lingdao*) of the local judicial bureau and under the "guidance" (*zhidao*) of the local court.¹⁴⁵ Their duties are, *inter alia*,

- (1) to manage the work of People's Mediation Committees; and
- (2) to guide and investigate the work of mediation among the people, to participate in the mediation of difficult disputes, and to accept and to handle letters and visits concerning people's mediation work¹⁴⁶

144. The term denotes the Ministry of Justice at the central level and its counterparts at the local level.

145. See Sifa Zhuliyuan Gongzuo Zaxing Guiding [Provisional Rules on the Work of Judicial Assistants] [hereinafter Rules on Judicial Assistants], Art. 2, reprinted in *MEDIATION COMPENDIUM*, supra note 31, at 819, translated in T. CHIU, *CHINA TRADE DOCUMENTS* 163 (rev. 2d ed., 1988); see also Zou Qihua, *Sifa Zhuliyuan Tizhi Gaige Po Zai Mei Jie [It Is Urgent to Reform the System of Judicial Assistants]*, 1986 FAXUE (Shanghai) No. 9, at 62, 63. The Rules on Judicial Assistants were promulgated in November, 1981 by the Ministry of Justice, but to my knowledge have not yet been officially published.

146. See Rules on Judicial Assistants, supra note 145, Art. 3; Zou, supra note 145, at 63; see generally Zhang Dacheng, *Wo Dui Sifa Zhuliyuan Gongzuo de Jidian Yijian [Some Ideas of Mine Regarding the Work of Judicial Assistants]*, 1986 FAXUE (Shanghai) No. 5, at 47. The other duties listed are:

- (3) to integrate practical needs and carry out relevant propaganda and education in policies, laws, decrees, and morals;
- (4) To investigate and study the causes, special characteristics, and regular features of disputes occurring in the jurisdiction and to suggest methods of preventing disputes;
- (5) To find out and report to superiors the opinions and demands of the masses regarding current laws and decrees and judicial work.

Thus, in addition to overseeing the work of PMCs, judicial assistants can conduct mediation themselves. Because judicial assistants are government officials, this kind of mediation is considered administrative in nature. However, judicial assistants are not supposed to usurp the functions of the PMCs they supervise; they are to mediate only especially difficult cases. Neither are they supposed to usurp the role of courts and issue summonses to the parties or coercively enforce their settlements. Apparently, though, both practices are fairly common.¹⁴⁷ According to one report, when a farmer in Hebei lost hundreds of kilograms of wheat, the judicial assistant, who was merely supposed to advise the village mediation committee, instead ordered a search of all the villagers' houses.¹⁴⁸

Other problems include the generally low level of legal training among judicial assistants and their paucity in number — probably around fifty thousand.¹⁴⁹ Each judicial assistant supervises about twenty PMCs. Thus, they often have insufficient time to deal with the cases referred to them.¹⁵⁰

In practice, the judicial assistant stands somewhere between the mediation committee and the court. Theoretically, he or she has no more power to impose a settlement in a dispute than does a mediation committee. However, reality is more complex. Articles in the Chinese legal press reflect two viewpoints. Some writers complain that judicial assistants, in imposing settlements in the cases they handle, have usurped the role of courts.¹⁵¹ Others hold that judicial assistants *should* have the power to impose settlements — to make a judgment — in disputes where the parties refuse to come to a mediated agreement.¹⁵²

According to one writer, the organs of judicial administration are

147. See *MEDIATION COMPENDIUM*, *supra* note 31, at 21.

148. See Zhong Hua, *People's Mediation Needs Improvement*, *CHINA DAILY*, Dec. 22, 1986, at 2.

149. The number of judicial assistants grew considerably during the 1980s. It was estimated at over 16,000 as of the end of 1981. See *Justice Minister on Judicial Administration*, in *SWB/FE*, Aug. 5, 1982, at B11/8. One source reported about 50,000 judicial assistants in late 1988, see Yang Xiaobing, *Mediation: A Defense Line Against Crime*, *BEIJING REV.*, Oct. 24–30, 1988, at 24, 24, while another put the figure at 43,618 as of July, 1989, see Si, *supra* note 95, at 3.

150. See Zhang, *supra* note 146, at 47. The figure of twenty PMCs per judicial assistant is consistent with figures for the number of PMCs (about one million) and judicial assistants (about 50,000) as of 1989 provided by other sources.

151. See, e.g., *MEDIATION COMPENDIUM*, *supra* note 31, at 21.

152. See Yao Zixiu, *Sifa Xingzheng Tiaojie Caijuequan Chuyi* [A Preliminary Discussion of the Power to Make Decisions in Judicial Administrative Mediation], 1986 *FAXUE* (Shanghai) No. 2, at 38; Zhang, *supra* note 146; Zou, *supra* note 145.

anomalous in the Chinese legal system because of all government administrative organs, they alone lack the power to enforce law through administrative decisions (*caijue*).¹⁵³ The writer proposes that in certain cases where mediation is unsuccessful, the organ of judicial administration (usually the judicial assistant for the jurisdiction) should have the power to make an authoritative ruling on the issue that will have the effect of an administrative decision.

Giving judicial assistants the power to make administrative decisions over a dispute, even if those decisions could be appealed to a court, would substantially change the current regime for dispute resolution. Under current doctrine, only courts (or arbitration organs, if the parties have agreed to arbitration) can impose a settlement on disputing parties against their will. A court decision is to be based on the substantive merits of each party's case. If a case comes before a court on administrative appeal, however, the court may be unwilling or unable to consider the merits. No longer is one citizen asking for relief against another. Instead, a citizen is asking the court to rule that an administrative organ — one which is probably at the same administrative level as the court — acted illegally and erroneously. Moreover, because the defendant in an administrative action is not the party with whom the plaintiff is actually disputing, judicial mediation is out of the question.¹⁵⁴

Administrative decisions do not, by themselves, carry what Chinese legal theory calls "coercive" effect. Where the losing party does not appeal but simply refuses to carry out the administrative decision, the administrative organ that issued the decision must apply to a court for a coercive enforcement order. While the Chinese legal literature is not very clear on this point, it is probably difficult at that stage for defendants to mount a substantial defense on the merits.¹⁵⁵

Thus, the effect of proposals to give the organs of judicial

153. See Yao, *supra* note 152, at 38, 39. One judicial assistant complained in an article that judicial assistants were called the "four unlikes": having no power to adjudicate, they were unlike judges; having no power to impose security administration sanctions, they were unlike police; having no power to bring suits, they were unlike procurators; and they were unlike the mediation committees. See Zhang, *supra* note 146, at 47.

154. See Administrative Litigation Law, *supra* note 30, Arts. 50, 67 (providing that mediation shall not be conducted in administrative cases heard by people's courts except where damages are concerned).

155. Article 168 of the Civil Procedure Law provides, for example, that courts should refuse to grant coercive execution to a notarial document in favor of a creditor only when the document is "definitely wrong," thus seeming to preclude a full re-examination on the merits. On the other hand, Chinese courts may in practice not make fine distinctions between 'definitely wrong' and 'more likely than not wrong.'

administration the power to make administrative decisions in disputes is to entrust the decision on the merits to persons who may have even less legal training than judges and to bypass the provisions of the Civil Procedure Law intended to ensure that parties have their fair day in court. Nevertheless, this appears to be the effect of a set of regulations recently promulgated by the Ministry of Justice.¹⁵⁶

b. Common Administrative Superior

A favored technique of dispute resolution is through the common administrative superior of the disputing parties. Because this is essentially a form of internal dispute resolution, the common superior has a number of means at its disposal for enforcing the decision, whether or not it is formally reached through a process labeled "mediation."

The mediation of commercial disputes, for example, is governed by the 1989 *Trial Procedures for the Resolution of Commercial Economic Disputes*.¹⁵⁷ The Trial Procedures cover disputes where both parties are state or collective entities — entities with a governmental administrative superior — involved in trade, and apply "by reference" to economic disputes between such entities and non-commercial economic organizations or individual businesses.¹⁵⁸

The Trial Procedures call for government departments at all levels in charge of commerce to establish mediation organs.¹⁵⁹ Jurisdiction to mediate disputes is allocated in accordance with the principle of preference for a common superior: where a common administrative superior for both parties can be found, that organ has jurisdiction to carry out mediation.¹⁶⁰ In short, the Trial Procedures evince a clear preference for internal dispute resolution where possible. Article 19 provides that where both parties belong to the same administrative

156. *Minjian Jiufen Chuli Banfa* [Procedures for Handling Disputes Among Citizens] (Apr. 19, 1990), 1990 STATE COUNCIL GAZETTE 597 [hereinafter *Dispute Procedures*]. I have translated *minjian* as "among citizens" instead of "among the people" because the latter term has a specific, limited meaning in Maoist terminology. Article 3 defines *minjian* disputes as "disputes among citizens (*gongmin*) relating to status or property interests or otherwise arising out of daily life." The *Dispute Procedures* are discussed more fully *infra* at text accompanying notes 183-84.

157. *Shangye Jingji Jiufen Tiaojie Shixing Banfa* [Trial Procedures for the Resolution of Commercial Economic Disputes] (Ministry of Commerce, Nov. 23, 1989), 1989 STATE COUNCIL GAZETTE 1014 [hereinafter 1989 *Trial Procedures*].

158. *Id.*, Art. 5.

159. *Id.*, Art. 2.

160. *Id.*, Art. 10.

“system” (*xitong*) and one party does not carry out the mediation agreement, its leadership may be subjected to disciplinary sanctions. Where the parties are from different systems, the aggrieved party may request that the administrative superiors of the recalcitrant party impose disciplinary sanctions. Those superiors, however, may find few benefits in pleasing outsiders at the expense of subordinates whom they themselves may have appointed. Moreover, given the often autarkic nature of Chinese bureaucratic finance, anything that hurts a subordinate organ financially can hurt the superior as well.

c. *Industrial-Commercial Bureau*

When parties to business contracts, for example state-owned enterprises, have a dispute they cannot resolve between themselves, mediation can be carried out by the Industrial and Commercial Administration Bureau (ICAB)¹⁶¹ at the central or local level, depending upon the importance of the case and the amount in controversy.¹⁶² Parties have the choice of seeking mediation through the ICAB, seeking arbitration through the ICAB (which will be preceded by an attempt to mediate), or bringing suit directly in court.¹⁶³ Neither mediation nor arbitration is a prerequisite to a lawsuit. Settlements mediated by ICAB share an important characteristic with court-mediated settlements: they are legally enforceable upon delivery to the parties.¹⁶⁴

A noteworthy feature of dispute resolution by the ICAB at any level is that, like a court, the ICAB is an external dispute resolver. In

161. For more on the ICAB(or SCIAB), see Spanogle & Baranski, *supra* note 11.

162. See Zhonghua Renmin Gongheguo Jingji Hetong Zhongcai Tiaoli [People's Republic of China Regulations on Arbitration in Economic Contracts], 1983 FGHB 527, Art. 10 [hereinafter Arbitration Regulations].

163. Article 48 of the 1981 Economic Contract Law provides that either party to a dispute “may apply to the contract administration authorities specified by the state for mediation or arbitration[.]” These “authorities” were subsequently specified to be the ICAB. See Guowuyuan Pizhuan Guojia Jingwei, Guojia Gong-Shang Xingzheng Guanli Ju, Guowuyuan Jingji Fagui Yanjiu Zhongxin Guanyu Zhixing Jingji Hetong Fa Ruogan Wenti de Yijian de Qingshi de Tongzhi [Notice of the State Council Approving and Transmitting the Request of the State Economic Commission, the State Industrial and Commercial Administration Bureau, and the State Council Research Center on Economic Laws and Regulations Concerning Suggestions on Several Problems in the Implementation of the Economic Contract Law] (May 4, 1982), reprinted in JINGJI HETONG FA SHIYONG ZHISHI SHOUCHE [PRACTICAL HANDBOOK OF KNOWLEDGE ON THE LAW OF ECONOMIC CONTRACTS] 393, ¶ 4 (Zhou Dewu ed., 1988).

164. See Zhonghua Renmin Gongheguo Jingji Hetong Fa [Economic Contract Law of the People's Republic of China], 1981 FGHB 1, Art. 52 [hereinafter Economic Contract Law]; MEDIATION COMPENDIUM, *supra* note 31, at 19.

the traditional system, contract disputes between two enterprises controlled by the same ministry would be resolved internally by the ministry.¹⁶⁵ In 1983, however, regulations were promulgated making the ICAB the proper body with jurisdiction to resolve economic disputes between enterprises.¹⁶⁶ The State ICAB is a body directly under the State Council and not subordinate to any ministry. Additionally, since it does not own any enterprises or engage in commercial activity itself, ICAB can function something like a court.

Many disputes could be subject to resolution by both ICAB and a common administrative superior under the 1989 Trial Procedures.¹⁶⁷ Although the relationship between the two modes is unclear, neither appears to be a prerequisite for the other. If the parties are engaged in industry, agriculture, or services, for example, as opposed to commerce, then the 1989 Trial Procedures would not apply and ICAB would appear to be the favored forum. Similarly, the Trial Procedures would not apply where both parties were private businesses. Interestingly, the granting to ICAB in 1983 of jurisdiction to resolve disputes shows a preference for external resolution, yet the promulgation of the Trial Procedures six years later, when reform was supposed to be much more advanced, seems to be a reversion to the internal resolution model. This suggests a number of intriguing possibilities. Perhaps ICAB has been unable to make or enforce judgments against many state-owned enterprises and internal resolution by a common superior is the only resolution with clout. The promulgation of the Trial Procedures may also reflect a view that disputes between government-run enterprises should be treated in a fundamentally different way from disputes between privately-owned businesses.

d. Other Bureaux

The Chinese legal and administrative landscape is dotted with any number of other administrative agencies that have various powers to enforce their decisions in matters within their purview. Neighbors disputing the upkeep of a party wall might take their case to the local housing bureau. Farmers worried about pollution from a nearby factory might complain to the local Environmental Protection Office. In all such cases, the administrative agency concerned would probably try to reach a mediated solution before coming down in favor of one party

165. See Spanogle & Baranski, *supra* note 11, at 777.

166. See Arbitration Regulations, *supra* note 162.

167. 1989 Trial Procedures, *supra* note 157.

or the other.¹⁶⁸

IV. VOLUNTARINESS AND COMPULSION IN DISPUTE RESOLUTION

A. *Dictatorship, Democracy, and the Role of Law*

Chinese legal theory has traditionally been ambivalent about the proper way to resolve ordinary civil disputes among citizens and the role of law in such proceedings. This ambivalence stems from Mao Zedong's famous distinction between "antagonistic" and "non-antagonistic" contradictions.¹⁶⁹

Antagonistic contradictions are those between parties with fundamentally opposed interests: "the people" and "the enemy." The people are "all classes, strata, and social groups that approve of, support, and work for the cause of socialist construction," while the enemy are all those who "oppose the socialist revolution and are hostile to and sabotage socialist construction."¹⁷⁰ Such contradictions can be resolved only through victory for one side or the other.

Non-antagonistic contradictions are those that occur between parties with fundamentally identical interests: the people. They are resolved not through the defeat of one party or the other, but by the movement of both to a new plane of unity higher than the one out of which the contradiction originally developed. For example, a son contesting his sister's right to any share in their father's estate would be educated in the provisions of the Inheritance Law calling for equality between the sexes, while the daughter might be persuaded to accept less than half on the grounds that her brother had contributed more to their father's care during his old age. In this way, not only

168. For more on dispute resolution by administrative agencies of various kinds, see Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT'L L. 15, 55-60 (1989).

169. For the most commonly cited source for this theory, see MAO ZEDONG, *Guanyu Zhengque Chuli Renmin Neibu Maodun de Wenti* [On the Correct Handling of Contradictions Among the People], in 5 MAO ZEDONG XUANJI [SELECTED WORKS OF MAO ZEDONG] 363 (1977), translated in 5 SELECTED WORKS OF MAO TSETUNG 384 (1977). The version published in the *Selected Works* is a considerably edited version of the original 1957 speech.

The origins of Mao's theory of contradictions have been the subject of much debate. See STUART R. SCHRAM, *THE POLITICAL THOUGHT OF MAO TSE-TUNG* 43-46 (1963); ARTHUR COHEN, *THE COMMUNISM OF MAO TSE-TUNG* 14-28 (1964); FREDERIC E. WAKEMAN, JR., *HISTORY AND WILL: PHILOSOPHICAL PERSPECTIVES OF MAO TSE-TUNG'S THOUGHT* 295-301 (1973); STUART R. SCHRAM, *THE THOUGHT OF MAO TSE-TUNG* 61-67 (1989).

170. MAO, *supra* note 169, at 364; see also YEE-FUI LAU, WAN-YEE HO & SAI-CHEUNG YEUNG, *GLOSSARY OF CHINESE POLITICAL PHRASES* 301, 465-66 (1977) (definitions of "people" and "enemy").

would the dispute be resolved, but both parties would have a higher consciousness than before of their social obligations and of state law.

Closely tied to the theory of contradictions are Mao's notions of dictatorship and democracy. Dictatorship is that which is exercised over the enemy and is identified with compulsion. Democracy is that which is practiced among the people and is identified with persuasion and education.

[T]wo different methods, one dictatorial and the other democratic, should be used to resolve the two types of contradictions which differ in nature — those between ourselves and the enemy and those among the people. . . . [I]n order to settle problems within the ranks of the people, "the method we employ is democratic, the method of persuasion, and not the method of compulsion."¹⁷¹

The picture is completed by the frequent identification of law with dictatorship and compulsion. To be sure, Mao occasionally spoke as if there were a role for law and courts in the resolution of non-antagonistic contradictions among the people:

Our state organs are state organs of the proletarian dictatorship. Take courts, for example — they are directed at counterrevolution but they are not completely directed at counterrevolution. They have to handle many problems involving disputes among the people. From the look of things, we'll need courts for another 10,000 years. That's because after the extinction of classes, there will still be a contradiction between the advanced and the backward, there will still be struggles between people, there will still be fights, all sorts of disorders might arise — if you didn't have a court what would you do?¹⁷²

The primary thrust of his speech on contradictions, however, and its subsequent interpretation, is that law, compulsion, and dictatorship over

171. MAO, *supra* note 169, at 371. Mao is here quoting his 1949 speech *On the People's Democratic Dictatorship*.

172. MAO ZEDONG, *Zai Zhongguo Gongchandang Diba-Jie Zhongyang Weiyuanhui Di'er-Ci Quantu Huiyi Shang de Jianghua* [Speech at the Second Plenum of the Eighth Central Committee of the Chinese Communist Party] (Nov. 15, 1956), in 5 MAO ZEDONG XUANJI, *supra* note 169, 312, 319.

enemies go together, whereas "the people" are regulated by "administrative orders issued for the purpose of maintaining social order . . . accompanied by persuasion and education" ¹⁷³ This was made quite clear during the anti-crime campaigns of the early 1980s: "[T]he primary function of [law] . . . is to suppress enemies." ¹⁷⁴ "Political-legal organs . . . are organs of dictatorship. . . . If they deviated from striking blows and punishing, [they] would not be organs of dictatorship any more." ¹⁷⁵ "Using the weapon of law to exercise dictatorship over enemies is an inherent part of strengthening socialist democracy and legality." ¹⁷⁶

There is no doubt that ordinary civil disputes belong to the category of non-antagonistic contradictions among the people. The traditional identification of law and compulsion with dictatorship and enemy classes, however, has made it difficult to accept the notion that courts and law are the proper institutions for handling such disputes. This is one way of understanding the widespread resort to non-court dispute resolution institutions in civil disputes and the reluctance of institutions handling ordinary civil disputes to impose and enforce truly coercive sanctions. At the same time, it is a way of understanding how it is that processes labeled "mediation" can exhibit features normally associated with coercive adjudication. To call a process "mediation" may be no more than to identify it as a proper forum for the resolution of contradictions among the people. As has been shown, even traditional Chinese Communist legal theory recognizes that occasionally compulsion is necessary among the people, although such compulsion is "different in principle" from dictatorial compulsion. ¹⁷⁷

B. Legal Effect of Mediated Agreements

The question of the legal effect of mediated settlements has been a vexing one for Chinese mediation theory and practice. The general rule is said to be that court-mediated agreements, once delivered to the

173. MAO, *supra* note 169, at 369. See also Lubman, *supra* note 14, at 1302 & n.67; Palmer, *Extra-Judicial Mediation*, *supra* note 14, at 229-30.

174. Cui Min, *Xuehui Shiyong he Yonghao Falü Wuqi* [Learn How to Use and Use Well the Weapon of Law], 1983 FAXUE ZAZHI No. 5, at 13, 14.

175. Song Tao, *Dui Zuifan de Daji Chengfa Shi "Zonghe Zhili" de Zhongyao Cuoshi* [Striking at and Punishing Criminals Is an Important Measure of "Comprehensive Control"], 1983 FAXUE ZAZHI No. 5, at 10, 12.

176. Sun Guohua, *Yunyong Falü Wuqi Fahui Zhuanzheng Zhineng* [Use the Weapon of Law to Give Full Play to the Function of Dictatorship], 1983 FAXUE ZAZHI No. 6, at 10, 10.

177. See MAO, *supra* note 169, at 366.

parties, are "legally binding" in the sense that they have the same effect as a court judgment. Similar practices are common in the United States, and indeed, consent decrees may operate to convert into court orders agreements which have been reached before the complaint is even filed.¹⁷⁸ Parties in China may repudiate a court-mediated settlement any time before delivery (*songda*).¹⁷⁹

It is important to note here that court judgments in China do not have the same effect as court judgments in a common-law system. Chinese law does not generally make punishable the mere failure to comply with a judgment.¹⁸⁰ Instead, the aggrieved party must make a separate application to the court for coercive enforcement (*qiangzhi zhixing*). Coercive enforcement allows measures such as the garnishment of wages or freezing of bank accounts.

Settlements reached through other mediation institutions are said to have no binding legal effect. The concrete implications of this general proposition, however, are unclear. It may simply mean that mediated agreements are like any contract between two parties; they are "legally binding" only to the extent that a subsequent court judgment makes them so, whereas agreements mediated and approved by courts are precisely that subsequent court judgment. On the other hand, it could also mean that a party can at any time repudiate a mediated agreement and take his case to court for a hearing on the merits as if the mediated agreement never existed. This would give a mediated agreement even less effect than an ordinary contract. Moreover, it is not clear what the effect of partial or complete performance of the mediated agreement by one or both parties would be.

Evidence from Chinese sources is mixed and unclear. Let us consider people's mediation (mediation conducted by PMCs) alone. Article 9 of the Mediation Regulations reads in its entirety:

178. See Judith Resnick, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 47.

179. The importance of the requirement of delivery is illustrated in a debate over whether a man who had had forcible sexual intercourse with his wife after they had reached a mediated divorce agreement but before the agreement had been delivered was guilty of the crime of rape. One side held that because the agreement had not been delivered, the parties were still married, and hence the act could not constitute the crime of rape under Article 139 of the Criminal Law. (Article 139, which does not define rape, does not compel this conclusion.) It could, however, constitute the crime of abuse of family members under Article 182. The other side leaned more toward the idea that forcible sexual intercourse under any circumstances was rape, but stressed that it had occurred after the divorce settlement had been agreed upon. See Liu Defa, *Lihun Zhong de "Zhangfu" Neng Fou Chengwei Qiangjian Zhuti?* [Can a "Husband" in the Process of Divorce Be the Subject of the Crime of Rape?], 1990 FAXUE (Shanghai) No. 9, at 49.

180. See *supra* text accompanying notes 67-73.

The parties should (*yingdang*) carry out mediation agreements reached under the auspices of People's Mediation Committees.

Where after mediation the parties have not reached an agreement or after reaching an agreement then repudiate it, any party may request the basic-level people's government to handle the matter (*chuli*), and may also bring suit in the People's Court.

The relevant part of Article 16 of the new Civil Procedure Law is similar but not identical:

The parties should (*yingdang*) carry out an agreement achieved through mediation; where the parties are unwilling to mediate, where mediation is unsuccessful, or where a party goes back on the agreement, suit may be brought in the People's Court.

These apparently simple provisions raise a host of questions. First, the meaning of *yingdang* (provisionally translated here as "should") is, despite its very wide use in Chinese legislation, still unsettled in Chinese legal theory. According to one writer, "'*Yingdang*' is an ordinary behest [*yibanxing de yaoqiu*] and has no coercive force [*bu juyou qiangzhixing*]."¹⁸¹ Article 9 of the Mediation Regulations, quoted above, certainly appears to contemplate the possibility of repudiating a mediated agreement.

Other writers, however, hold that *yingdang* is synonymous with *bixu* (must), and moreover make this claim specifically with respect to Article 9 of the Mediation Regulations and Article 14 of the Civil Procedure Law. They assert that if mediation agreements are not carried out, they may (like court judgments) be coercively enforced.¹⁸²

181. Pan Jianfeng, *Tantan Lihun Susong de Jige Wenti* [A Discussion of Some Issues in Divorce Litigation], FAZHI RIBAO, Aug. 26, 1988, at 3. The *yingdang* with which the writer is concerned appears in Article 25 of the Marriage Law, *supra* note 36, concerning mediation prior to the granting of a divorce. The writer argues that mediation should not be understood to be required where one party, for example, has married abroad, has committed treason, or has been sentenced to death.

182. See Li & Pan, *supra* note 142, at 20. Certainly *yingdang* at times appears to mean "must." The duty of citizens to obtain identity cards upon reaching sixteen years of age is described using *yingdang*, see *Zhonghua Renmin Gongheguo Jumin Shenfenzheng Tiaoli* [People's Republic of China Regulations on Residents' Identity Cards], 1985 FGHB 35, Art. 2,

The problem with this view is that it makes non-court-mediated settlements (settlements reached through mediation outside of court) the equivalent of court-mediated settlements. Every other Chinese source, whether academic or legislative, insists that there is a distinction.

It remains to be seen, however, how much of a distinction there is. Suppose one party repudiates a non-court-mediated settlement and the other party, in accordance with the second paragraph of Article 9 of the Mediation Regulations, requests the basic-level government to "handle" the matter or brings suit in court. What exactly is the nature of the complaint to the government or the court, and what standard should the government or court use in deciding the matter?

Government handling of complaints is governed by the *Procedures for Handling Disputes Among Citizens*¹⁸³ (Dispute Procedures) promulgated in 1990 by the Ministry of Justice. The Dispute Procedures first of all give concrete authority over disputes referred to government to the local judicial assistant. Any disputes that have not yet been through mediation are to be referred first to a PMC for attempted mediation. The government may not handle a dispute where one party has already instituted an action in court, but the produced consequences are unclear where one party institutes an action in court after the government dispute-handling process has begun.

The government, in the person of the judicial assistant, decides a dispute in two cases. First, where mediation has not produced a settlement, the case is to be decided "taking the facts as the basis and law, rules, administrative regulations, and policies as criteria."¹⁸⁴ The language is similar in form to that of Article 7 of the Civil Procedure Law,¹⁸⁵ which provides the standard for courts to use in deciding cases. In short, the judicial assistant should decide the case as a judge would, although with reference to a broader base of normative material (Article 7 of the Civil Procedure Law does not mention rules, administrative regulations, or policy).

Where mediation has produced a settlement that is later repudiated by one party, the settlement should be upheld if it is in accord with law, rules, administrative regulations, and policy; otherwise, the settlement should be voided and a different resolution reached.¹⁸⁶

yet it cannot be supposed that the government intended to make it optional.

183. See *supra* note 156.

184. Dispute Procedures, *supra* note 156, Art. 4.

185. "In trying civil cases, the people's courts shall take facts as the basis and law as the criterion." Civil Procedure Law, *supra* note 32, Art. 7.

186. *Id.*, Art. 18.

This provision is of key importance because in effect it requires the judicial assistant to give considerable deference to the original mediated agreement. Chinese law has always required mediated agreements to be in accord with law and policy, yet this has never been interpreted to mean that any dispute has a unique mediated solution in the same way that any dispute has a single legally required adjudicated solution. A wide range of mediated solutions can therefore all be considered to accord with law and policy. Any agreement that falls within this permissible range should therefore be upheld by the judicial assistant.

In contrast to mediated agreements, which “should” (*yingdang*) be carried out by the parties, the government decision “must” (*bixu*) be carried out. There are, however, some distinctions that remain between the judicial assistant’s decision and a court judgment. First, a party has fifteen days following the judicial assistant’s decision to take the original dispute to court.¹⁸⁷ This language would appear to mean that the court would hear the dispute *de novo* and would not simply be reviewing the decision of the judicial assistant, although it is hard to be confident that this would never happen in practice. Second, even where a party does not appeal, the enforcement powers of the local government are limited to necessary measures “within the scope of its [official] powers [*zhiquan*].”¹⁸⁸

The standard to be used by courts in handling repudiated mediation settlements is less clear. Article 16 of the Civil Procedure Law provides only that “[i]f the People’s Mediation Committee violates law in mediating a dispute among the people, the People’s Court should rectify the violation.”¹⁸⁹ This may or may not imply that a mediation agreement not in violation of policy or law should be upheld. Such is certainly the view taken by some writers, who hold that a party in court proceedings can raise the mediation agreement as an argument in its favor. The court should uphold the agreement if it is “correct” or “basically correct.”¹⁹⁰ Once again, this implies deference to the mediated settlement.

C. Coerced Mediation

Whether non-court-mediated settlements receive deference in court proceedings is important because there is considerable evidence that

187. *Id.*, Art. 21.

188. *Id.*

189. *Id.*, Art. 16.

190. See Li & Pan, *supra* note 142, at 20–21.

mediation “settlements” are sometimes imposed upon an unwilling party.¹⁹¹ One article speaks not only of parties who “repudiate” (*fanhui*) an agreement, but also of parties who “do not accept” (*bifü*) the agreement. This language would make no sense if the agreement were truly voluntary.

Furthermore, coerced mediation settlements should not be seen as merely an aberration. The phenomenon is closely tied to the logic of the system as a whole.

Mediation institutions in general and PMCs in particular should perhaps most appropriately be viewed as a kind of small claims court. Like the decisions of a small claims court, their decisions can be reviewed by a higher court, whether *de novo* or subject to some standard of deference.

There are a number of reasons for taking this view. Chinese courts simply will not accept minor cases for adjudication,¹⁹² yet at the same time China has no small claims court system. The only available substitutes are PMCs or judicial assistants. Because it would be unjust even in minor cases to allow stubborn wrongdoers to get away with their misdeeds, the principle of voluntariness tends to yield in favor of the principle of fidelity to law and policy.

We have seen that Chinese mediation theory places a great emphasis on the fidelity of mediation settlements to law and policy. It is not sufficient merely that the parties agree; a one-sided emphasis on simply making the parties happy is criticized as “unprincipled mediation.” Mediation is supposed to clarify right and wrong and protect the rights of the participants. Some effort is put into providing mediators with some legal training in order to meet the goal of fidelity to law and policy.

It is plausible to suppose that an element of compulsion has come to be seen as acceptable by mediators and others involved in non-court dispute resolution — although not, it should be said, by most Chinese legal scholars — because of the very obvious inadequacies of the court system. Indeed, because of the ambivalence over the use of law and compulsion to resolve disputes among “the people,” the procedures used by courts and PMCs to resolve civil disputes have tended to

191. See Chai & Li, *supra* note 95, at 53; Ji, *supra* note 99, at 22; Zheng et al., *supra* note 98, at 26; *Feifa Tiaojie de Eguo* [The Evil Consequences of Illegal Mediation], *ZHONGGUO FAZHI BAO*, Sept. 30, 1985, at 2.

192. See Wu Mali, *Dui Xin Shiqi Renmin Tiaojie Gongzuo de Chubu Tanta* [A Preliminary Inquiry Into the Work of People's Mediation in the New Period], 1987 *FAJUE* (Shanghai) No. 4, at 50, 50; Zou, *supra* note 145, at 63.

converge.

Many scholars have noted the similarity between dispute resolution by courts and by PMCs.¹⁹³ Courts have a number of incentives to dispose of cases by mediation. Not only are they often statutorily encouraged or even required to attempt mediation before adjudication,¹⁹⁴ but in many courts the proportion of cases settled through mediation is an important criterion for evaluating the job performance of judges.¹⁹⁵ In addition, given the lack of strong enforcement powers by courts, judges may believe quite correctly that a mediated settlement which gives both parties at least something has a much better chance of being implemented than a judgment.¹⁹⁶

V. CONCLUSION

It is clear that the set of institutions and practices going generally under the name of "mediation" (*tiaojie*) in China is of great importance in the field of dispute resolution. It is equally clear, however, that what is called mediation in China is very different from what is called mediation in the ADR literature, to the point where it would be seriously misleading simply to use the English word without further explanation. Throughout this article, "mediation" has been used as a convenient translation of *tiaojie*, but is not intended to convey much in the way of substantive meaning.

As mediation in China has become institutionalized, it has come more and more to resemble adjudication. This is both because of the coercive features of mediation and because of the weakness of adjudicatory institutions such as courts. But the coercive features of

193. See, e.g., Lubman, *supra* note 14, at 1357–58; Palmer, *Judicial Mediation*, *supra* note 14, at 158–59.

194. See, e.g., Civil Procedure Law, *supra* note 32, Art. 6; Marriage Law, *supra* note 37, Art. 25 (mediation required prior to granting of divorce).

195. See Han Shuzhi, *Renmin Fating Shezhi ji Gongzuo de Jige Wenti* [Several Problems in the Establishment and Work of People's Tribunals], 1990 FAXUE (Shanghai) No. 10, at 18, 19; Huang Shangheng, *Minshi Susong Nei "Zhuzhong Tiaojie" Yi Gai Wei Zhuzhong Caipan* [The "Stress on Mediation" in Civil Litigation Should Be Changed to a Stress on Adjudication], 1988 ZHENGZHI YU FALÜ [POLITICS AND LAW] No. 5, at 58, 59; Zheng et al., *supra* note 98, at 27. This may explain why many cases where one party appears to win everything it asked for are still described as voluntary or mediated settlements. See, e.g., David Zweig, Kathy Hartford, James Feinerman & Deng Jianxu, *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L L. 319, 340–42 (1987) (Case 1).

196. This was the finding of a study of a small claims court in Maine. See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV 11 (1984).

mediation do not stem solely from its role as a small-claims court. Perhaps equally important is the fact that as mediation becomes institutionalized, it becomes an arm of the state, and the Chinese state is generally uncomfortable with the idea of letting individuals make their own deals, whether in dispute resolution or in the marketplace.

Why should institutionalization lead to state control? In principle, the Chinese state permits the existence of *no* organization — not stamp clubs, not alumni associations — not subject to government direction.¹⁹⁷ Thus, any mediation institutions operating at a level where they are visible to the state must be under state direction.¹⁹⁸

Once it is accepted that an institution is under state direction, it follows (in the logic of the prevailing ideology) that it should act according to and enforce state norms. There is little room in this logic for “private law”: rules that parties to a dispute can invoke in their favor or decide not to invoke, but to the invocation of which the state is indifferent. Chinese law, traditionally and today, is almost all “public law” in the sense that it is designed to regulate behavior and the parties cannot decide on their own to opt in or out. Because this is the kind of law that mediation institutions have to work with, it is hardly surprising that they are not allowed to let parties come to an agreement without reference to the values embodied in state norms.

Yet, just as non-state mediation institutions in traditional China grew from the desire of individuals to avoid the loss of control associated with complaints to the magistrate, so we may expect that there will continue to be a demand in China for the kind of mediation that can be found only beyond the horizon of official “mediation” institutions. Thus, there are reports of more and more persons turning to lawyers as mediators. This is a trend worth watching, for lawyers in China are themselves an arm of the state. The state may eventually move to insist that they too, apply state norms and not engage in “unprincipled mediation.” In that case, lawyers will have now become official mediation institutions, and those who want to escape the

197. Even the leaders of the non-communist political parties that the government allows to exist are paid a state salary and appointed by the Communist Party. See JOHN P. BURNS, *THE CHINESE COMMUNIST PARTY'S NOMENKLATURA SYSTEM: A DOCUMENTARY STUDY OF PARTY CONTROL OF LEADERSHIP SELECTION, 1979-1984*, 36-40 (1989); JAMES D. SEYMOUR, *CHINA'S SATELLITE PARTIES* 80 (1987).

198. The Chinese state is not, of course, unique in its desire to dominate the dispute resolution process. See Merry, *supra* note 6, at 2069-71 (discussing the interest of governments in controlling dispute resolution). Where it differs from many other states is in its ambition to *prohibit* the existence of organizations not under its leadership, and not simply put them at a competitive disadvantage by refusing to provide funds or other forms of cooperation.

imposition of state norms will have to look elsewhere once more.