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Court Mediation in China, Past and Present

Philip C. C. Huang
University of California, Los Angeles
People's University of China

What is called "mediation" in China today includes a wide variety of actions, ranging from the purely facilitative to the substantially adjudicative and yet still mediatory (those that are mainly adjudicatory and imposed regardless of the will of the litigants should be excluded). They show that contemporary Chinese court mediation as it has been practiced is very different both from Qing court practices and from current alternative dispute resolution (ADR) in the West. Qing courts generally did not mediate, despite the Confucian ideal of resolving disputes through (societal) mediation and despite the official ritualistic requirement that court actions always be voluntarily accepted by litigants. Contemporary Chinese courts, however, routinely mediate, a legacy not from the Qing but from the Maoist period. If mediation fails, arbitration or adjudication—under the same judge—will almost always follow. That makes the process very different also from current ADR in the West, where mediation is generally separate and distinct from court trials and mediators do not operate with nearly as much discretionary power as Chinese judges. For better or for worse, the contemporary Chinese approach to court mediation is predicated on an implicit epistemological method that contrasts sharply with the formalist ideal (which characterizes modern Western Continental law): instead of starting from universal premises about rights and then applying those by legal (deductive) logic to all fact situations, Chinese judges start instead from the nature of the fact situation and then decide to mediate or arbitrate or else adjudicate, as appropriate. In placing the concrete and the practical ahead of the abstract, they still share a good deal in legal reasoning with judges of the Qing.

Keywords: *adjudication; formalism; Confucian; Maoist; alternative dispute resolution (ADR); fact situation; legal reasoning*

Author's Note: This is the second of two companion pieces. The first is "Civil Adjudication in China, Past and Present" (Huang, 2006). The two articles are of course closely interrelated. My thanks to Kathryn Bernhardt, Donald Clarke, Brad Reed, Matthew Sommer, Preston Torbert, Margaret Woo, and L. (Liu) Yang for helpful comments.

Maoist ideology would have us believe that almost all Chinese court actions were mediatory. Such a claim obfuscates the realities of court practices and also greatly stretches the meaning of the language used. The root meaning of the word *tiaojie* (mediation) in Chinese in pre-Maoist times was in fact much the same as the English—namely, the voluntary settling of differences through third-party facilitation or intervention—and it mainly referred to societal mediation. Under Maoist justice, however, court and administrative mediation became widespread while societal mediation shrank drastically under the expansion of Party-state control. Tiaojie, which had originally emphasized voluntary agreement or at least compliance, came to incorporate the meaning of the term *tiaochu*, which earlier in some of the liberated areas had been carefully distinguished from tiaojie and applied mainly to administrative actions;[1] it included decisions imposed regardless of the will of the litigants. Maoist usage of tiaojie thus came to include adjudicatory and coercive actions even while they continued to be cast as demonstrating voluntary agreement or compliance.

This article will use the criterion of whether a resolution of a dispute is imposed against the will of one of the litigants to distinguish between genuine court mediations and adjudicatory actions that are represented as mediation. "Mediation" as used in this article will cover, first of all, the word's original core sense: voluntary settlement of differences through third-party facilitation. It will include also a range of actions that I term "adjudicative mediation"—that is, mediation with adjudicative features, so long as it is not imposed against the will of a litigant. But I will distinguish mediation from "adjudication,"[2] which results in a clear-cut finding of legal right and wrong, a "winner" and a "loser," as well as from a range of actions that I term "mediatory adjudication," which is adjudication with mediatory representations or features, imposed regardless of the will of the litigants. These different categories of course tend to shade into one another in practice; nevertheless, we must try to take into account the fundamental substantive difference between mediation and adjudication, a distinction made in fact by both Confucian and Maoist legal discourses themselves.

The article is based, once again, mainly on a sample of 336 civil cases that I have collected from two counties, county A in the South and county B in the North. The cases were drawn at regular intervals: for A county, 40 cases for each of the years 1953, 1965, 1977, 1988, and 1989, and for B county, 20 for each of those years, plus an additional 40 cases from 1995 for a glimpse at what happened in the 1990s. Four of the 340 cases thus gathered were incomplete and therefore discarded—hence the total number

of 336 cases.[3] Such cases are not generally available to researchers and are discussed in considerable detail in this article.

The purpose of the examination of the case records is, first of all, to delineate more exactly where mediation operated and where it did not. In addition, I will attempt to define what might be termed the operative logic of mediation, as opposed to its ideological constructions. My hope is to uncover the implicit logic guiding mediation in practice that is not apparent from an analysis of the official ideology alone.

Much has already been written on the subject of mediation. The early works by Jerome Cohen and Stanley Lubman pointed out some of complexities and ambiguities of the term "mediation" in contemporary Chinese law (Cohen, 1967; Lubman, 1967). The later work of Michael Palmer emphasized the high-handedness of contemporary Chinese mediation, while Donald Clarke stressed how its character differed according to the type of institution undertaking it (e.g., local judicial officials or government organs, the courts, "people's mediation committees," or a parent company) (Palmer, 1989; Clarke, 1991). In addition, K.-C. Hsiao highlighted compromise-working in traditional Chinese mediation, and Shiga Shūzō analyzed in depth the conceptual underpinnings of what he terms "didactic conciliation" by the Qing courts (Hsiao, 1979; Shiga, 1981). I aim to build on such past research as I emphasize a historical perspective and make still sharper distinctions between what was said and what was done, between official representations and actual practice.

This article will also seek to establish under what conditions Chinese court mediation has been effective and under what conditions not. The basic difference between adjudication, which is concerned with establishing legal right and wrong, and mediation, which is concerned rather with resolving disputes through compromise, has to a large extent determined when each has (or has not) worked well. And the operative logic contained in effective mediations tells us not only about the nature of Chinese court mediation but also about a distinctive characteristic of Chinese legal reasoning that has persisted from the Qing through the present, despite the great and obvious changes in Chinese society and law.

The Ideology of Mediation in the Qing

The point of departure of the formalist Continental legal tradition of modern Western law is universal principles about rights and their protection

by law. In Max Weber's characterization, such formalist law requires that all court judgments be derived by means of "legal logic" from principles about rights.[4] In Weber's terms, Qing civil law is substantive or instrumentalist, more preoccupied with the ruler's concern to maintain social order than with a guarantee of individual rights (Weber, [1968] 1978: 844-48). Lacking the formalist requirement that court actions be derived logically from abstract principles of rights, it is susceptible to arbitrariness. In Weber's eyes, even Anglo-American common law is "empirical justice," basing itself on precedents and the judgments of common people in a jury system rather than on experts who employ formalist legal reasoning (Weber, [1968] 1978: 976). His distinctions between formalist and substantivist, rational and irrational, though idealized and overdrawn and easily distorted into Eurocentric and modernist conclusions, nevertheless do point up some crucial differences between Chinese law and the formalist tradition of Continental modern Western law.

By contrast, Qing ideology regarding "civil" disputes among the people had as its foremost concern the resolution of disputes, not the protection of rights. To recapitulate, the ideal moral society is characterized by harmony and absence of conflict. No disputes, much less lawsuits, would exist. The moral Confucian gentleman was someone who would not stoop to disputes; he would rise above them by conciliation (*rang*) and forbearance (*ren*). The truly cultivated gentleman would not allow himself to be drawn into a dispute or lawsuit; such involvement was itself a sign of moral failure. It is a view, we might say, of disputes and lawsuits as inherently not matters of right or wrong but matters to be resolved through compromise.

If a dispute nevertheless arose, society itself, in the form of the community or the kin group, not the courts, should be the one to resolve it. The mechanism would be the facilitation or intermediation of a morally superior person, who would persuade and educate the disputants into voluntary compromises. Only failing such resolution, and only if the disputants were truculent enough to persist, would the courts become involved, though the courts would defer first to the intensified societal mediation that generally followed the filing of a lawsuit.

If such mediation failed, then and only then would the courts intervene. In that eventuality, the magistrates, consistent with the ideal of moral and benevolent governance, would engage in moral education and persuasion to gain the voluntary compliance of the litigants—an ideal evidenced in the standard practice of requiring litigants to file a pledge of "willingness to close the case" (*ganjie*) to show their voluntary acceptance of the court's decision (Huang, 1996: chap. 7; see also Huang, 2006).

Such an ideology led to civil matters being conceptualized as "minor" or "trivial" (*xishi*) affairs that local governments would handle on their own authority without troubling the higher levels of the bureaucracy; under those constructions, litigation came to be seen as the activity of the morally inferior (*xiaoren*). If litigation proliferated, the individuals responsible were perceived as "litigation mongers" (*songgun*) and "litigation instigators" (*songshi*), or "yamen worms" (*yadu*), who goaded good people into litigating. And the litigants themselves, of course, were morally inferior (*xiaoren*) or crafty people (*diaomin*) (Huang, 1996: 152-52, 156-57, 166-67, 185-89).

On the other side of this highly moralistic construct was the magistrate, who was supposed to govern by benevolence (*ren*) and moral example. In his able hands, litigation mongers and instigators and yamen worms would be curbed or suppressed, as would the impulses of morally inferior and crafty litigants. The Confucian magistrate, a superior gentleman, would rule as the "father and mother official" (*fumuguan*) over the childlike "good people" (*liangmin*); there would be few disputes and little or no litigation, and society would be in harmony.

On the basis of these moralistic representations, Shiga Shūzō (1981) has argued that Qing courts engaged not in adjudication but only "didactic conciliation," whose conceptual foundation lay in the triadic principle governing Chinese law: *qing*, *li*, and *fa*, or compassion based on Confucian humaneness (*ren*, *renqing*), moral principles governing both nature and society (*tianli*), and the laws of the state (*guofa*). In Shiga's analysis, laws occupy in the triad a relatively small place, which he likened to that of an iceberg in the ocean; the main guides to court actions are instead Confucian compassion and society's moral principles. Didactic conciliation, not adjudicatory judgment, was the task of the courts (Shiga, 1981).

It should be pointed out in this connection that even in the original Confucian representations, societal and not court mediation was paradigmatic. When it came to court actions, Qing law and Qing magistrates in fact acknowledged readily that in practice the courts adjudicated (*duan* or *duan'an*, and *pan*, not *tiaojie*), *pace* Shiga. I have discussed and documented this point at length elsewhere and will not repeat the argument and evidence here (Huang, 1996: chap. 8; see also Huang, 2006). Indeed, mediation by the courts was largely new to Chinese justice in its modern period, not a legacy from the Qing.

Shiga's construction of Qing court actions aside, the Confucian representations outlined above are at once revealing and misleading about the real nature of Qing justice. They are revealing in that they clearly set forth the mediation ideology and also disclose important aspects of the logic that

informed it. But they are misleading, we will see, because the ideal of societal mediation can obfuscate the practical reality of codified provisions and court adjudications over "civil" matters; they also tell us little about the unspoken logic of mediation as it actually operated.

The Actual Practice of Qing Courts

By analyzing 628 Qing court cases—drawn from the counties of Baxian in the southwestern province of Sichuan, Baodi in the capital prefecture of Shuntian, and Danshui-Xinzhu in the province of Taiwan—my 1996 volume showed that the courts did not engage in the kind of "didactic conciliation" suggested by Shiga. In the great majority of the 221 cases that persisted into a formal court session (most of the others being settled through societal mediation spurred by the filing of a lawsuit),[5] the courts ruled according to the law: in 170 of the cases (77 percent), they found outright for one or the other party; in 22 other cases (10 percent), they adjudged that there was no clear-cut violation of the law by either party; and in another 10 cases (5 percent), they ordered further investigation. In just 11 of the 221 cases did the courts arbitrate, ordering the litigants to accept court-fashioned compromises. In no case did the court engage in compromise-working through persuasion and moral education to obtain the supposedly voluntary agreement of the litigants in the manner suggested by Shiga (Huang, 1996: 241, table 3; see also p. 78).

In a later study (2001), I examined in detail the main areas of the specific laws involved, comparing Qing and Republican Guomindang laws. In the Qing, civil adjudication was guided by a host of laws in the Qing code about property (mainly land and houses), debt, inheritance or succession and old-age support, and marriage and divorce, all couched in the form of illustrative fact situations. These moral ideals (e.g., no household division while one's parents are alive) were placed in the foreground and presented a framework of punishment for offenses. They therefore are quite easy to mistake for provisions about criminal offenses. But the "civil" stipulations were in fact plentiful and specific, many of them in the form of substatutes added on over time that often originated—much like the precedents in common law—from actual case experiences reported by local officials. Thus did property "rights," for example, come to be formulated in terms of punishments for fraudulent sales or taking the fruits of another's land; debt obligations, in terms of punishments graded in severity by the amount of the

debt and the length of time it was unpaid; inheritance rights and obligations, in terms of punishments for not allowing sons to inherit, violating parents' wishes, and failing to support the parents in their old age; and rights involved in marital contracts, in terms of punishments for false representations to the other party, failing to comply with the time frame set by the marital agreement, and so on. Fact situations not covered by the law were to be adjudicated by analogy to those that were.[6]

The local courts adjudicated civil disputes accordingly, both because that was the law and because their sizable caseloads did not really allow the magistrates the time needed to persuade litigants to accept a conciliatory resolution voluntarily, certainly not in the manner expected of the later Maoist courts. Part of the difficulty was that litigants who insisted on a formal court session despite all the obstacles set up along the way were generally either the most truculent or the most aggrieved, and therefore also the least open to persuasion or compromise. For all these reasons, the magistrates adjudicated readily.

The adjudicatory practices of the courts could coexist with the ideology of societal mediation because of a distinctive mode of legal reasoning that went from fact situations to abstract principles, not the reverse, as I have analyzed in detail in the companion article on adjudication. It also emphasized practical application in conjunction with moral ideals, in what I have termed "practical moralism" (Huang, 2006; see also Huang, 1996: chap. 8). While insisting on the necessity of foregrounding moral ideals, it also acknowledged the reality of divergences from such ideals in practice—hence the moral packaging of the code, which simultaneously contained divergent or even contradictory provisions intended to guide actual practice. Practice and the practical adaptations of the law, however, were never allowed to supplant the original moral visions about what ought to be. Despite the reality of adjudicatory actions by the courts, the Qing held on tightly to the ideal of settling disputes among the people by societal mediation.[7]

Though societal mediation as it was practiced did not come close to resolving all disputes as the Confucian ideal required, it did conform with the official ideology in important respects. I dealt with this subject in my 1996 book and will also address it at greater length in a future article. To summarize very briefly here: our best available evidence shows that in most villages, there were one or more respected individuals to whom the community turned to mediate disputes as needed. These individuals were generally endogenous to the community and possessed no formal official connections. The moral norms they appealed to resembled those of the official ideology,

albeit interpreted in unsophisticated and commonsensical ways. The methods they employed were chiefly those of persuasion, as they talked with one party and then the other before seeking common ground, generally through compromise. It was a system that worked best among disputants who were roughly equivalent in status and power. Under those conditions, and so long as the disputants possessed the necessary resources, they could opt out of the process as they wished by deciding to go to court (Huang, 1996: chap. 3).

The system served some very practical needs. As entities in which people lived together year after year, generation after generation, villages did indeed find it necessary to do everything possible to seek amicable resolutions to disputes, in order to avoid the creation of lasting enmity if at all possible. The official ideology of mediation in fact both expressed and shaped the mechanisms and processes of village dispute resolution.

It was also in such relatively insular and cohesive communities that a certain number of respected individuals would come to be seen as "of advanced age and of moral uprightness" (*niangao youde*), or as particularly "trustworthy" (*you xinyong*). Someone who was especially effective as a mediator could even come to be known as "the well-doer of the village" (*yixiang shanshi*), perhaps even developing a transvillage reputation as a mediator able "to turn big problems into small ones, and small problems into non-problems" (*dashi hua xiao*, *xiaoshi hua liao*) (Huang, 1996: 58-59).

My concern here, however, is mainly with the courts. As we have seen, they operated mainly by adjudicating cases, within a system that held up societal mediation as the ideal. The combination of adjudication and mediation rested on the tendency to give priority to practical realities while continuing to foreground moral ideals, displaying the distinctive practical moralism of the Qing legal system and indeed of Qing governance as a whole (Huang, 2006; see also Huang, 1996: chap. 8).

Mediation in the Republic

During the Republican period, China tried almost wholesale Westernization in its legal system. The Civil Code of 1929-30 was modeled after the German Civil Code of 1900, one of the most formalist (in Weberian terms) of all Western models. It began with rights stated in the abstract, and constructed the entire code around such rights of the person, of property, of debt (rights and obligations), of marriage and divorce, and of inheritance (Civil Code of the Republic of China, 1930-31; German Civil Code, 1907).

The lawmakers themselves were mainly Western-trained (including in Japan), and Wang Chonghui, a major figure in the small group overseeing the drafting of the code, had published an authoritative translation of the German Civil Code. The courts were expected to adjudicate as to right and wrong for the protection of rights, in the manner of the formalist Western model (Huang, 2001: chap. 4).

The Guomindang government did try to implement a court mediation system as a way to lessen the burden on the courts.[8] It formally promulgated on 27 January 1930 a Civil Mediation Law (Minshi tiaojie fa), calling for all courts of first instance to establish a supplementary mediation office (*minshi tiaojiechu*) that would screen all cases. The express purpose was to "prevent disputes and lessen litigation" (*duxi zhengduan jianshao susong*) (*Fengxian xian fayuanzhi*, 1986: 187-88; see also *Zhonghua minguo fazhi ziliao*, 1960: 43, 44). Thus, in the years 1934, 1935, and 1936, just about the same number of cases reportedly underwent mediation as were concluded by the regular courts (*zhongjie*).[9] The numbers alone make clear that all cases received by the courts were routinely steered to the mediation office before they went on to the regular adjudicatory court.

The very frequency of the process suggests that the "mediation" was most likely rather perfunctory, as the mediation case records from Shunyi county, which had a mediation office in place well before the formal promulgation of the Mediation Law, illustrate quite well. To judge by those cases, the institutions and processes established for court mediation involved a minimal investment of time and effort. The mediation hearings tended to be rather simple and brief. The judge asked only simple questions of fact to see if the two parties themselves were willing to settle or compromise. When they were evidently willing, he would announce the settlement at the end of the brief session of questions, at which point the stenographic recording of the hearing would be signed by the two parties, and that would be the end of the process. When the parties seemed unwilling to settle, as happened the great majority of the time, the case would be referred on to the regular court for normal handling. The judge generally made little or no effort to work out a compromise between them.

In May 1931, for example, Liu Qixiang brought suit against Zhang Jizong. Two years earlier Zhang had purchased on credit, through a middleman, 34 yuan worth of chickens and eggs from Liu to peddle. Liu had tried repeatedly to collect from Zhang, and he had a receipt to prove his sale. At the mediation hearing on 21 May, according to the stenographic record, the judge first asked Xu, representing Liu, to explain why Liu was

not there. Satisfied that Xu had full authority to represent Liu, who was sick, he next asked for an explanation of why Liu had brought suit; Xu gave a brief three-sentence reply. The judge next turned to Zhang to ask why he had not paid. Zhang acknowledged that he owed the money, but explained that he had no money and needed to wait until after the coming harvest to pay. The judge turned back to Xu, urging him to allow Zhang to wait, and Xu answered that he would agree to wait if Zhang would pledge before the judge to pay by the 15th day of the 6th month. On Zhang's agreement to pay by that date, the judge had the stenographic recording read out loud for approval by both parties, and pronounced the case successfully mediated. The entire text of the questions and answers took up only seventeen lines (Shunyi 3:483, 1931.5.31 [debt 19]).

Of the fifteen cases in my Shunyi collection that came before the county's mediation office or court in the years 1924-31, just three were successfully mediated, corresponding roughly with the proportions reported nationally in 1936.[10] All had to do with a debt obligation that was documented and incontrovertible, as in the above example. In court, the defendants were placed in a position of having to acknowledge the obligation; the court was left simply to get the two parties to agree to a timetable for payment. All were settled in the same way (Shunyi 2:261, 1924.2.2 [debt 11]; 2:601, 1928.8.31 [debt 15]).

In the other twelve cases, mediation failed because the litigants themselves could not agree. In no case did the judge make a serious effort to help work out a compromise. For example, Wang Suoqing charged that Dan Yongxiang refused to pay rent for cultivating 24 *mu* of Wang's land. At the mediation session two weeks later on 19 May 1931, Wang stated that Dan's uncle Dan Fu had worked for his family as a hired laborer. Since Dan was related to his family by marriage (one of Wang's aunts had married into the Dan family), he was later allowed to cultivate the land (in Linhe village) rent-free. Later, after Dan Fu died, the Wangs allowed his descendants to continue to cultivate the land, for a rent of 5 diao, but no lease was signed; Wang Suoqing had a land deed to prove that the land belonged to his family. He had to raise the rent because of the recent military levies, which actually exceeded the rent he received. All this came out in Wang's brief answers to eight short questions. Next, Dan Yongxiang told the presiding judge that the land actually belonged to his great-grandfather, who had bought it in 1844. Dan, too, had a deed to prove his ownership. This information was elicited in two questions. The two parties, clearly, were some distance apart.

Whereas the later Maoist court might have taken upon itself the task of going down to the village to investigate the alleged facts and then tried to push the two sides toward a mutually acceptable settlement, the Guomindang mediation office simply declared that mediation had failed and that the case was now to go to the regular court for adjudication. The entire transcript of the hearing filled just three thirteen-line sheets (Shunyi 3:478, 1931.5.6 [land 22]).

Mediation operated to greater effect in the Republican period in society itself, where it continued to work much as it had in the Qing. Generally speaking, the Guomindang government did little to alter what was already in place in the villages. There was a short-lived, halfhearted attempt to establish "mediation committees" (*tiaojie weiyuanhui*) or "committees to prevent litigation" (*xisong weiyuanhui*) in North China villages. But those modern-sounding institutions did not take hold there; by the late 1930s, at the time of the Japanese Mantetsu investigations of the villages, nothing remained of them but their memory among a few village leaders (*KC*, 1952-58: 3.30-31).

To judge by both the documentation from villages and the 128 civil cases preserved in the Shunyi county archive, community mediation still played a significant role in the justice system as a whole. Many of the cases in Shunyi ended much as they had in the Qing: withdrawn or closed after the filing of a lawsuit provided the impetus for successful societal mediation. The business of the courts was mainly to adjudicate; mediation was done extrajudicially, by community and kin groups. In that respect, little had changed from the Qing (Huang, 1996: chap. 3; 2001: table A.2 and passim).

Thus, court mediation seems to have figured rather modestly in the Republic, especially by comparison with the Maoist justice that followed. While community and kin group mediation continued to operate in society, the Guomindang by and large adopted the adjudicatory court system of its German model. The Shunyi case examples and the national judicial statistics indicate that the courts' experiment with mediation had only limited impact, which should perhaps not be surprising. Guomindang lawmakers in fact prided themselves on their formalist German model. Court mediation was tried somewhat perfunctorily.

The Ideology of Mediation in Post-1949 China

Maoist ideology has put enormous emphasis on mediatory justice, in many ways even more than did the Qing. The language is different, to be sure.

Rather than the Confucian qing, li, fa (although those categories are still often used by judges and judicial officials in their work), the terms used are those of "socialism" in its distinctive formulations by Mao. Disputes are conceptualized as, or at least called, "contradictions." And contradictions, in turn, are separated into the "antagonistic" (i.e., between the enemies and "the people") and "non-antagonistic" (i.e., "among the people"). While those in the former group are seen as requiring violent resolutions (and punishments), the latter are to be resolved peacefully, relying especially on the mediation of differences to result in amicable settlements, much as in Confucian ideology (Mao, [1937] 1971, [1957] 1971; a representative academic statement of this same position is Han, 1982; see also Yang and Fang, 1987).

Of course, a very practical reality underlay this emphasis: in the Communist base areas (*bianqu*, "border regions"), severed from the urban centers where a Western-style court system had been instituted under Guomindang rule, the Communists needed to draw on rural practices and nonspecialists before 1949. The mediation tradition in local communities turned out to be an important source of inspiration for the entire Maoist justice system. Justice in the central Shaan-Gan-Ning border region, in fact, came to be conceptualized as a three-tiered system: "folk mediation" (*minjian tiaojie*) was at the bottom, and above it were "administrative mediation" (*xingzheng tiaojie*) by local government officials and organs and "judicial mediation" (*sifa tiaojie*) by the local courts. It was a system built on top of existing village traditions and practices.[11] The schema was formally stipulated in the 1943 Regulations for Mediating Civil and Criminal Matters of the Shaan-Gan-Ning Border Region (Han and Chang, 1981-84: 3.630-33).

Maoist mediation was also couched within the ideology of the "mass line": that is, judges do not just sit at court but must go down to the village to investigate the truth with the help of "the masses" and then resolve or "mediate" a case. Judges must rely on the masses because their eyes were "the clearest" (*zuiliang*) and because the justice system, like governance as a whole, was to proceed according to the formula "from the masses, to the masses." This method was supposed to minimize "contradictions" between the leadership and the followers, the courts and the masses. By this ideology, judges would ascertain from the masses whether a marriage was worth reconciling and, if so, would call on them to help work things out. The judges would manage other disputes the same way, investigating to learn the truth from the masses and then working with them to resolve the dispute. The entire approach was summed up as the "Ma Xiwu way of adjudging cases" (*Ma Xiwu shenpan fangshi*) (Mao, [1943] 1971; see also Huang, 2005: 173, 182-83).

Reinforcing this ideology of mediation was the nationalistic claim for the superiority of harmony-based Chinese justice over adversarial Western justice. On this account, mediation reflected the finest ideals of Chinese justice in the past and Chinese socialism in the present (Huang, 2005: 153-54). This theme has been sounded even in the post-Mao reform period, and it has struck quite a chord in recent years with some Western analysts, who believe that much can be learned from Chinese mediation by those who seek to overcome problems of excessive litigation and adversarial confrontation by developing ways to resolve disputes through arbitration or mediation (as discussed below).[12]

Nowhere was the mediation ideology applied more persistently and vigorously than in contested divorces: the goal of court action was to minimize the incidence of divorce through aggressively implemented "mediated reconciliations" (*tiaojie hehao*), as I have discussed in detail elsewhere (Huang, 2005; see also below). The stated rationale was that marriages would not be taken as lightly in "socialist China" as in the capitalist West. Divorce would be and should be much harder to obtain, despite the justice system's emphasis on freedom of marriage and divorce and on gender equality. Over time, the judicial system has come to rely on the standard of *ganqing*, or the quality of the couple's (emotional) relationship, for making decisions as to whether to grant divorce.[13] If the ganqing foundation is good and has not "ruptured," the couple would be required to attempt a mediated reconciliation rather than divorce. In this way, divorce law in contemporary China would be true to the twin ideals of socialist harmony and of gender equality and freedom of divorce, while making very practical concessions to the reality of peasant opposition to the radically new marriage laws. Thus did the law come in practice to reject the great majority of contested divorce petitions and engage in high-handed methods to impose mediated reconciliations, regardless of the will of the petitioners.

That aggressively interventionist ideology of Maoist mediation with respect to divorce has shaped the contemporary Chinese civil justice system as a whole. The strongly adjudicatory posture of the courts, the use of Party and community pressures, and even the use of material inducements have become methods entirely acceptable for mediation in other spheres of civil justice, even if less commonly employed there (Huang, 2005). As a consequence, the very word "mediation," or *tiaojie*, has taken on a far more adjudicatory, aggressive, and interventionist meaning than the mediatory ideal of voluntary settlement of differences through third-party facilitation.

The contemporary mediation ideology also envisions extrajudicial mediation. At the village level, "mediation committees" (*tiaojie weiyuanhui*) are

supposed to form "the first line of defense" (*diyidao fangxian*) of the entire justice system. By resolving disputes at early stages and amicably, mediation supposedly lessens the number of court cases and curbs more serious offenses. According to official constructions and tallies for 1989, for example, basic-level mediation of some 7.3 million disputes is credited with having "prevented" a total of more than 80,000 instances (*qi*) of possible fatal incidents (*fei zhengchang siwang*), affecting some 137,000 people, that the disputes might have provoked (*Zhongguo falü nianjian*, 1990: 62; cf. Shanghai shi lüshi xiehui, 1991: 264). Good local officials (village and township leaders) are those who stay below certain target numbers of disputes and lawsuits by resolving disputes early.[14]

Here I am focusing on the court system itself, leaving village mediation to a separate article. It is worth pointing out, however, that while the Maoist ideology of mediation bears close resemblance to the earlier Confucian ideology, its differences are also stark, in envisaging a much enlarged role for the new Party-state, in directing societal mediation, in instituting court mediation, and in expanding the meaning of mediation to include a range of interventions, up to and including adjudicatory actions taken irrespective of the will of the litigants.

The Practice of Court Mediation in Post-1949 China

Court-administered "mediated reconciliations" in contested divorce cases, as I have shown, had their origin in a very practical concern: trying to minimize conflicts with society over the new (1950) Marriage Law, especially peasant opposition, on a case-by-case basis (Huang, 2005). In effect, their default position came to be adjudication against divorce. As the court practices evolved over time, a host of more or less standardized measures were developed; these included the codified requirement that all contested divorces first go through mediation, obligating judges to make on-site visits to talk with the work units, relatives, and neighbors and friends to ascertain the quality of the couple's relationship and the roots of the problems ("contradictions"), and then to intervene actively to effect reconciliation through moral-political education, through political pressures (applied also by the local party leadership) and social pressures (applied also by relatives and neighbors), and even through positive material inducements.

Such actions and methods are better characterized as "mediatory adjudication," since the main thrust of the court action was adjudication against

divorce, regardless of the will of the litigants—though serious efforts were made toward mediating a reconciliation. A great deal of what is called *tiao-jie* by contemporary Chinese courts in fact falls into this category.

Yet voluntary mediation does occur in the contemporary Chinese justice system. Below I first delineate that mediatory sphere, in order to bring out more clearly its operative logic, before returning again to the subject of involuntary mediations.

No-Fault Mutual Consent Divorce Cases

In mutual consent divorce cases, there is generally no question about whether to permit divorce or about which party is at fault. The court is concerned almost exclusively with working out a settlement that both sides can agree to. Those were precisely the cases in which what transpired most closely approximated mediation in the word's original core sense.[15]

The basic approach of the 1950 and 1980 marriage laws to property settlements in divorce was to leave the specifics to mutual agreement (*xieyi*). The 1950 Marriage Law excluded from the divorce settlement only "such property as belonged to her [the wife] prior to her marriage," which would revert to her (Article 23). The rest was to be settled by mutual agreement. The 1980 Marriage Law reaffirmed this principle, stipulating simply that "the husband and wife shall seek agreement regarding the disposition of their jointly possessed property" (Article 31). (By implication, their individual properties would remain separate.) Beyond that, the laws added a provision that would give a woman unable to support herself fully some measure of protection. As to the property settlement, "If they fail to reach an agreement, the people's court shall make a judgment, taking into consideration the actual circumstances of the property and the rights and interests of the wife and the child."[16] As for support and custody of the child (*fuyang*),[17] neither law took any position on which parent should be responsible, beyond noting that "the mother shall have the custody of a breast-fed infant after divorce" (i.e., an infant still being breast-fed—Article 20 of the 1950 law, and 29 of the 1980 law). The code thus set up a broad negotiatory framework that allowed for much latitude and flexibility in working out mediated compromises.

In many cases in the sample, the court's role was to help work out the specifics of a divorce settlement. The county A sample alone includes 56 mutual consent divorces, in 33 of which the court took no adjudicatory posture as to fault. In those cases, once the courts had determined that both

parties wanted to divorce, they took a fairly low-key, facilitative approach to fashioning the property settlements.

Consider first a case from county B, in 1988. The marriage was a failure from day one. The husband suing for divorce said in his complaint that his wife mistreated his parents, and had wanted to separate the household from them after just 38 days of marriage. She countered in her response that he beat her, but she did not object to the divorce. The judge and the secretary (*shujiyuan*) went down to the village and interviewed the plaintiff husband at the village government office, in the presence of the village leadership (the village head and an unidentified villager—Party branch secretary?); he repeated much of what he had written in his divorce complaint. The judge then interviewed the wife, this time at the nearby local (Xinjun tun zhen) branch of the county court. She too basically reiterated her countercomplaint. Next the judge, as was standard in what I term "Maoist justice," interviewed the parents, and then the neighbor in the house east of the couple's home, and then the neighbor facing the couple's home, as he sought to ascertain the true nature of the couple's relationship. From those interviews, and presumably also from unrecorded discussions with the village cadres, the judge concluded that this divorce was an instance of mutual consent and not an adjudicative matter of fault or of right and wrong. The only issue was to work out a divorce settlement to which both parties would agree.

Using standard mediation techniques, the judge talked first with the husband and the wife separately. He learned that the wife wanted two articles left at the house when she had moved out: the bicycle she had been using and a luggage set that was hers. The husband resisted this demand but was open to some kind of a compromise. The judge then met with both of them at the same time, and initially they simply repeated their separate complaints about the other. After these were aired, the judge suggested a compromise solution: the husband would pay his wife 200 yuan in lieu of the bicycle and the luggage. This session ended with the husband agreeing to consider the solution. At the next session, the court obtained the couple's voluntary agreement along the lines of its suggestion. A mediation document (*tiaojie shu*) was drawn up, with the two agreeing to a (mutual consent) divorce (*xieyi lihun*) and to the terms of the settlement (200 yuan in compensation from the husband for the disputed bicycle and luggage set). The court fee of 30 yuan was to be borne by the plaintiff husband (B, 1988-20).

We have numerous other examples of such mediatory work by the courts. In 1977, a woman in county A sought divorce from her husband. She claimed that he was sexually too demanding and was too crude in his behavior. The husband did not object to the divorce. The court ascertained that the couple

"lacked understanding before they married," that they had argued frequently after marrying because of personality differences, that tension had grown worse after he had been punished for mishandling archival materials in his charge, and that matters had degenerated to the point that the man sometimes mistreated the woman verbally and physically. The relationship between the two had in fact ruptured, the court concluded. At issue then was only the property settlement and the support and custody of their 9-year-old son. The court was able to bring the two parties to agreement fairly easily: the properties that each had brought to the marriage would go back to each. As for their joint properties, the sewing machine would go to the woman, and the large wardrobe to the man. The child's custody and support would go to the mother (A, 1977-012).

In 1989, to give one more example, a man in county A sued for divorce. The court ascertained that the marriage's foundation had been weak: the woman had married hastily because she wanted to move away from her stepmother, while the man had borne a grudge because he thought she had demanded too much money for the marriage agreement. After the marriage, the couple never got along well and frequently fought over small matters of daily life and over their child. They had in fact separated six years earlier, in 1983. Both wished to divorce. The court concluded that "the relationship between the two had in fact ruptured" and went along with the divorce. Once again, only the specifics of the divorce settlement were at issue. The court helped to work out the following agreement: (1) the child would live with his father; (2) the house the two had rented would be rented by the woman; and (3) the bed, the chest of drawers, the large wardrobe, the square table, the pair of bedside chests, and two wooden chairs would go to the woman and the rest of their property to the man. A mediated agreement spelling out the specifics was drawn up accordingly (A, 1988-02).

The role played by the courts in cases such as these in some ways resembles the no-fault approach that has come to dominate Western divorce cases since the transitional period of the 1960s and 1970s. Earlier in the West—mainly because of the legacy and influence of the Catholic Church, which steadfastly maintained the sanctity of marriage—divorce was possible only when fault could be proved. The result was an adversarial framework for divorce cases similar to that for other kinds of civil lawsuits about violations of rights. But recent Western divorce law has moved steadily away from assigning fault toward a greater emphasis on dispute resolution (Phillips, 1988), rendering fault largely irrelevant.[18] It is an approach with some similarity to the reasoning underlying Chinese mediation.

There is a crucial difference, however. Weberian Continental legal formalism, as we have seen, demands that law start with universal principles, to be applied by "legal logic" to concrete fact situations. The recent no-fault approach to divorce, though a striking departure from the fault-based divorce of the past, retains the formalist mode of thinking. Thus, the no-fault approach begins with the no-fault premise, which is then applied to all divorces. The Chinese approach, by contrast, takes the fact situation as the starting point. The court first determines whether the divorce is by mutual consent; if so, then divorce will be granted. It also seeks to determine whether fault is involved; if not, then the working out of the divorce settlement will strictly be finding a compromise agreement that both sides will willingly accept.

The Chinese approach in fact inverts the formalist method. Instead of starting from a generalized principle that would be applied to all fact situations, it acknowledges that in real life both fault and no-fault situations obtain. The court begins by determining which kind of fact situation it is dealing with, and then acts accordingly.

No-Fault "Tort" Cases

Chinese court mediations have worked similarly to determine compensation in damages (*peichang*, "tort") cases that involve no fault. The 1986 General Principles of Civil Law, even though it adopted the Western conceptual framework of "wrongful acts" for tort cases (thereby requiring the establishment of fault—the violation of another's rights—before granting monetary compensation), went on to acknowledge the reality of no-fault "tort" situations. Thus, Article 106 begins: "Citizens and legal persons who through their fault (*youyu guocuo*) encroach upon state or collective property or the property or person of other people shall bear civil liability (*minshi zeren*)." But it continues, "Civil liability shall still be borne even in the absence of fault, if the law so stipulates." And Article 132 makes that stipulation explicit: "If none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances."

The key here is the recognition that compensation for damages may arise in some fact situations that do not involve fault. To the extent that the defendant accepts the principle of civil liability even in the absence of fault, such cases truly follow the mediatory ideology: to resolve disputes, courts focus not on establishing legal right and wrong, but rather on minimizing conflict and working out a compromise that both parties can accept.

For example, in one case in county A in 1989, a 7-year-old boy rushing home from school ran into an old woman carrying a bottle of boiling hot

water. She dropped the bottle, spilling the water on the boy's chest, back, limbs, and face. The medical treatment of his burns cost more than 2,000 yuan, of which the township government paid less than 600 yuan. The father of the boy brought suit against the woman for the balance.

The judge investigated the case and concluded that the woman was not at fault. Nevertheless, he held that she had civil liability, citing precisely Articles 106 and 132 of the General Principles of Civil Law. Under that legal rubric, the court then persuaded both parties to agree to a settlement: the woman was to pay 250 yuan to help cover (a part of) the boy's medical expenses. In the course of trying to gain their assent, the judge appealed especially to the (old) moral ideal that the two, living in the same small community, should be compassionate and not create lasting enmity (A, 1989-9).

In a "vehicular tort" case from county B (also in 1988), on a rainy day a small tractor following a woman riding a bike ran into her when she suddenly slipped and fell; as a result, she broke her collarbone. The driver willingly paid for the medical care she received at the first hospital where she was treated. But then complications developed, because the bone had not been set properly, and the woman brought suit for the additional expenses. Once again, under the legal stipulation that the defendant bore civil liability despite not being at fault, the judge worked on both parties to persuade them to accept a 350 yuan settlement (B, 1988-3; see also B, 1989-16, a similar case).

These cases, it can readily be seen, are similar to mutual consent divorces in that the court's concern was to devise a settlement that both parties could willingly accept, once it had determined that no fault was involved. In contrast, a "wrongful acts" rubric imposes an adversarial framework on cases, encouraging savvy lawyers to establish that the other party is at fault—as seen in divorce cases in the West before the transition to no-fault divorce.

They also may bring to mind recent developments in the United States regarding no-fault auto insurance. Under such insurance, drivers are covered by their own policies, regardless of who is at fault. It is intended to be more cost-effective than the old fault-based approach to auto torts, and to date has come to be adopted in twelve states in the United States ("No Fault Insurance," 2004).

However, once again there is a crucial conceptual difference. U.S. no-fault auto insurance takes as its point of departure a principle that is generalized to apply to all fact situations, regardless of actual circumstances. The basic premise remains "no fault, no liability," and there is no role for mediation. In the Chinese approach, by contrast, the courts begin from the fact situation, and mediation comes into play after the courts have determined that the specific case involved no fault.

Both Parties Equally at Fault

Disputes in which both parties are seen as more or less equally at fault are also generally mediated according to the same reasoning and methods used in mutual consent divorce and no-fault compensation cases. In county A in 1989, for example, two neighboring couples in an apartment building fought over water that collected in the hallway. First the plaintiff wife began fighting with the defendant husband, then their respective spouses joined the fray. All were injured to some degree, and all incurred medical expenses. The plaintiff husband's right little finger was broken at the last joint (208.95 yuan), and his wife's breastbone was bruised (126.57 yuan); the defendant husband's left index finger was fractured (186.60 yuan), and his wife's stomach was bruised (25.25 yuan). The township and village governments tried to mediate, but failed. The plaintiffs sought 500 yuan in damages and the defendants countersued, seeking 800 yuan.

The court investigated and concluded that in this situation, both parties were at fault. Because there was no one "wrongful act," the court was not concerned with adjudicating as to right and wrong. In the end, it succeeded in working out an agreement: the defendants were to pay the plaintiffs 120 yuan, to more or less even things out (the parties suffering the lighter injuries bore more of the medical fees), and the court costs of 100 yuan were to be equally split (A, 1989-16).

In a similar case in county B in 1988, two neighbors had a fight over the boundary of their residential plots (*zhaijidi*), the subject of two previous disputes. This time, the defendant had planted two trees on the disputed property. The plaintiff uprooted the trees when the defendant refused to remove them, and the two women then got in a physical fight that left the plaintiff with a concussion. The village leaders tried to mediate, arranged for the defendant to visit the plaintiff bearing a gift, and suggested that she pay 200 yuan in compensation to resolve the matter. But the plaintiff, left with headaches that persisted after her two-week hospital stay and complaining that she could not do housework or farm her 5 mu of "responsibility land," would not agree and brought suit.

The judge (and a secretary) came down to the village to investigate and talked with the village leaders and the witnesses to the fight. Apparently the defendant had first grabbed the plaintiff's hair, and the plaintiff in turn had scratched the defendant's face with the stick in her hand before receiving the more serious injury. The judge concluded from his investigations that "both sides have responsibility" and "both should be criticized." He then turned to working out an agreement acceptable to both parties.

The judge met first with the defendant and summarized his findings: though both bore responsibility, it was the plaintiff whose injury caused her to be unable to farm or do housework, while the defendant's injury was very slight with no lasting consequences. The plaintiff's medical expenses alone came to about 300 yuan, he pointed out, and by law, the defendant had civil liability (even in the absence of fault). He spoke with all the authority not only of the court but also of the knowledge gleaned from his thorough investigation of the facts. After initial resistance, the defendant and her husband finally said that they would follow the court's opinion. The judge got them to agree to compensation amounting to "no more than 700 yuan." He then met with the plaintiff, represented by her husband, and urged a compromise. The plaintiff insisted on no less than 600 yuan. At that figure, agreement was reached (B, 1988-15; see also B, 1977-12, a similar case).

Again, the court followed logic similar to that used in mutual consent divorce cases and no-fault tort cases. Once it had determined that both parties were at fault, not just one of the two, its task was then to fashion a mutually acceptable agreement regarding the shared "civil liability" for the damages, through a mediated compromise.

Both Parties Bearing Equally Legitimate Claims or Obligations

The operative logic in situations involving no fault or equal fault applies also to cases in which both parties have equally legitimate claims or equal obligations in the eyes of the law. Thus the court's main role, once again, is not to adjudicate as to legal right and wrong, but rather to resolve the dispute by working out a compromise solution acceptable to both parties.

For example, in county B in 1988, a widow sued her parents-in-law for her husband's death benefit and for her and her husband's property. The young couple and the parents had not undergone household division (*fenjia*), even though they had eaten separately since 1986. The main issue was how to distribute the husband's 5,000 yuan death benefit (he was killed while working in the village's hillside production facility), but there were other complications: the widow wanted her dowry and everything she and her husband had bought as a couple, while the parents-in-law wanted custody of their 9-year-old grandson and some of the couple's property. The court took a straightforward adjudicatory posture on those issues that did involve legal right and wrong: by law, the dowry she brought into the marriage was unequivocally hers, and a mother had precedence over grandparents for

custody of her child. That left just the property of the couple and the insurance benefit, to which both parties (the widow and her child on the one hand, and the two parents on the other) had equal claim, with all four persons of the same family (of undivided household) being the "first in order" to inherit the property of the deceased, according to Article 10 of the 1985 Law of Succession.

The court, after verifying the facts by interviewing the relevant parties (including the insurance agent and the village government) and going to the couple's home to inventory their property, worked out a solution acceptable to both sides: the couple's belongings were divided up according to the wishes of both sides, with a 100 yuan adjustment in cash to be made in the sharing of the death benefit to even out the division. Both parties then agreed (B, 1988-17; for similar cases, see B, 1988-16; B, 1977-7).

We see here the court performing simultaneously its adjudicatory and mediatory roles. On issues involving clear-cut right and wrong in law (i.e., the widow's rightful claims to her dowry and custody of the child), the court took straightforward adjudicatory positions. But concerning the couple's shared property and the death benefit, to which both parties had equal claim, the court acted as a facilitative mediator to work out a resolution acceptable to both sides.

In another case in 1989, also from county B, a mother sued her three surviving sons for maintenance support, seeking 50 yuan a month from each of them. At the time, the widowed mother was living with her 16-year-old granddaughter fathered by her deceased third son (whose wife had remarried). From the start, it was clear that the three brothers still living were all obligated to contribute to her support, as everyone agreed. At issue were the specifics of how the burden was to be shared among the brothers, whose financial situations differed and who felt different degrees of obligation. The first son, relatively well-off, wanted to provide just 10 yuan a month—possibly a few yuan more, he said. The second son said he was willing to give whatever was agreed to by everyone. The fourth son, a worker on temporary status (*linshigong*) in the worst financial situation of all the brothers, earning just 70 yuan a month, said he wanted the mother to live with him (which would improve his financial situation). Otherwise, he said, he would be able to provide just 8 yuan a month. There was also a daughter, quite well-off, who volunteered to contribute 30 yuan a month, even though she had not shared in the inheritance from her deceased father as had the brothers (and therefore had no legal obligation to provide old-age support for her mother).

The court's first proposal, that each of the four (the three brothers and their sister) give 25 yuan a month, was resisted by the two elder brothers; it

was also clearly unrealistic for the low-earning youngest brother. The mother, though the original plaintiff, was not involved in these disagreements. Discussions between the court and all the siblings ensued, until they finally came to an agreement: the first and second sons, and the daughter, were to give their mother 20 yuan a month; the fourth son, 10 yuan a month. In addition, the brothers were each to provide half a ton of coal a year and to share equally in their mother's medical expenses, as needed. Everyone then signed the mediated agreement (B, 1989-10).

Here again, no one disputed the obligation and willingness of the brothers to provide old-age support for their mother. Only the specifics of the arrangement were in question. Under those circumstances, the role of the court was to facilitate the working out of terms acceptable to everyone. What could have become a rancorous dispute among the siblings was thus resolved through discussion and compromise.

Between Mediation and Adjudication

Despite its ideology of mediation and its from-fact-to-concept mode of thinking, contemporary Chinese justice in the reform era has also drawn heavily on formalist Continental law, as did the Republic before it. The official adoption in the 1980s of laws modeled after Continental civil codes makes clear the intention of incorporating their features. The 1986 General Principles of Civil Law begins with rights, much as its formalist models do, and also attempts to stipulate provisions that follow logically from those abstract principles. The courts have adjudicated many cases accordingly, issuing verdicts of right or wrong, determining winner or loser, as do those in formalist legal systems, as I have documented in my companion article on adjudication (Huang, 2006). In fact, the legal system comprises both adjudicatory and mediatory spheres.

We should recall that the new General Principles of Civil Law of 1986, the Marriage Law of 1980, and the Law of Succession of 1985 were not utterly new transplantations from Western models. Rather, in many respects they formalized principles that had been tested on a trial basis in the People's Republic for decades, mainly in the form of Supreme People's Court directives and opinions (Huang, 2006). Their scope has widened with formal codification, to be sure, but we can see an essential continuity (the extremely politicized Land Reform and Cultural Revolution years aside) in laws and court actions in older areas of civil law such as those discussed

above: divorce, rights of ownership or inheritance of the family house and residential plot, debt obligations, obligations to maintain aged parents, obligations to compensate another for damages from "wrongful acts," and so on. These should be distinguished from the newer areas of the law born of the rapid growth of private enterprises and foreign trade in the reform era, such as the laws on income tax (1980; revised, 1993 and 1999), trademarks (1982), foreign trade (1994), insurance (1995), and contracts (1999), for which there is little Maoist precedent (Huang, 2005, 2006).

Of course, I do not mean to deny that important changes occurred between the Maoist and reform eras. In divorce law, for example, I have considered in detail the repercussions of the liberalization brought in 1989 by the so-called fourteen articles, which set forth how courts should determine whether the emotional relationship of the husband and wife has truly ruptured ("Zuigao renmin fayuan," [1989] 1994; see Huang, 2005, 2006). Moreover, court mediation in general is unquestionably becoming a less and less prominent part of the total justice system, because of both mounting caseloads and changing ideas about the rule of law. I have nevertheless elected to focus in this article mainly on some of the abiding characteristics of contemporary Chinese law, for they seem to me much less readily apparent than the changes. Persisting features include the mode of practical moralism in legal thinking, the combination of mediatory and adjudicatory justice under a single system, and basic characteristics of court adjudication and mediation. Between adjudication and mediation, of course, is a large intermediate zone in which the two overlap to varying degrees. But within that intermediate zone, two broad categories can be identified, as noted above: mediatory adjudications and adjudicative mediations.

Mediated reconciliations of contested divorces, as has been seen, were more often than not basically adjudications against divorce. To recapitulate with just one example out of the large number considered in my study of mediated reconciliations: in county B in 1977, a peasant woman sought divorce because her father-in-law had molested her, and her husband, thoroughly dominated by the father as he was, could or would not stand up for her. The judges went down to the village and found that the woman and her family were determined to divorce. Nevertheless, the judges were bent on rejecting the woman's petition and working out a "mediated reconciliation."

They ascertained that the father-in-law had indeed made inappropriate advances toward the woman, and tried their best to resolve the problem by lecturing and warning him. They worked out a solution with the village leadership to help the young couple build a new house, and also threw in

the additional material inducement of arranging a better position for the husband in the seed farm of the brigade. At the same time, they worked hard on the woman and her family, bringing pressure to bear from the village leadership in addition to making completely clear that the court did not look favorably on the proposed divorce. They also pushed the father-in-law into helping the young couple build their new home and promising to leave them be.

In the end, they managed to make all sides agree to the mediated reconciliation, after the team of three people from the court (the senior judge, junior judge, and a "people's assessor," *peishenyuan*) made no fewer than four separate and joint trips to the husband's village and two to the wife's. The entire process was then concluded with a "family reconciliation meeting" at the young couple's newly built home (B, 1977-16; see also Huang, 2005: 156-66). This case may be considered a good example of the lengths to which Maoist courts went in their attempts to effect mediated reconciliations of couples.

In the later reflections in the 1990s about such mediated reconciliations, the Chinese legal community acknowledged that very often such aggressive "mediations" produced no lasting "reconciliation." By the reckoning of the Songjiang judges interviewed, perhaps half the time the "reconciled" couples would eventually end up divorcing (INT93-9). One widely read study of Chongming county's divorce cases in 1985-86 even claimed that only 3 percent of all the couples "reconciled" by the court later made genuine attempts at reconciliation.[19] In a context in which one-party divorce petitions were almost routinely denied, most of those who nevertheless elected to come to court strongly desired a divorce. The denials of such petitions as a matter of course were necessarily often imposed against the will of the petitioner, as has been dramatized in Ha Jin's award-winning novel *Waiting* (1999), whose protagonist, the physician Liu Kong, sought again and again, and yet again, to divorce his village wife for the woman co-worker he loves, over the course of eighteen years of "waiting." The fact is that mediated reconciliations could not reshape the emotional relationships of couples in quite the manner that the Party-state had hoped. Such court actions, in the end, can be called "mediatory" only by greatly distorting the word's normal sense.

But this is not to say that all cases with adjudicative features necessarily went against the will of the litigant. We have seen in the preceding section how the court exercised adjudicatory powers even in cases involving no fault or equal fault, insofar as it had the final authority to determine the nature of the fact situation. We have also seen a variety of cases in which the court

mediated under an adjudicatory posture: these concerned civil liability even in the absence of fault, equal entitlement to the property of a deceased man on the part of the "first-order" heirs, the obligation to support an aged parent on the part of the sons, and so on. To the extent that those factual determinations and adjudicatory principles were accepted by the defendants, voluntary mediation took place. Some additional types of such adjudicative mediation are considered below.

In one case from county A, in 1965, the peasant couple had been married in 1960 and were separated in 1961 when the husband joined the army. She had an affair with a "third party." The husband filed a complaint to have that person disciplined, under the regulations protecting enlisted men. The court had verified that the charge was true, and the man involved was consequently "locked up in punishment" (*guanya chuli*) for an unspecified period. The husband, represented by his father, went on to seek divorce from his wife, on the grounds that their relationship was irreparably damaged. She opposed the petition when she first met with the judge, but then, when the judge talked with her at greater length, she admitted that she did not really object to the divorce. Because the divorce at bottom was by mutual consent, it would unquestionably be granted. The only issues for the court were the property settlement and the custody of their young daughter.

The judge, consistent with usual procedures, met with the parties separately—first, the wife. She wanted to be given custody of the child and to continue to live with her husband's family until she found a new mate (*duixiang*). But her husband's father wanted her to move out; he also sought to keep custody of their child as well as the couple's property. The court then brought both parties together to work out a compromise resolution—arrived at with the understanding of everyone involved that the wife was the one at fault. The final terms were (1) the wife would be allowed to stay with the husband's family for one year, with use of the couple's furniture for that time only; and (2) during that time the wife would be given temporary custody of her daughter, and the husband's family would be required to provide child support, but the husband and his family would have custody thereafter. Both sides agreed to the terms, and a "mediation agreement" was executed spelling them out (A, 1965-014; see also A, 1977-06, a similar case).

The final agreement plainly favored the husband. As my Songjiang informant judges made clear, the courts customarily viewed the adulterous party as the offending party, and the other as the victim. If suit for divorce was brought by the offending party, it would generally be denied. If the

aggrieved party brought suit, as in this case, then that party would be favored in the court's efforts to help work out a settlement (INT93-9). Here, the husband had the advantage both in the property settlement and in child custody.

Even in such a situation, there was probably a substantial voluntary dimension. To be sure, the outcome was strongly influenced by the adjudicatory posture of the court. But the court's posture also represented the general mores of society. Thus the wife too most likely felt, at least to some degree, that she was the offending party and could not expect to be treated the same as the husband she had cuckolded. That was no doubt a factor at work in her willingness to accept the arrangement arrived at, or at least not insist on her position and force the court to adjudicate outright. Insofar as she truly shared the court's views on fault, her compromise may be seen as voluntary.

In the 1990s, the courts relaxed their posture against divorce to a considerable extent, specifically in cases in which the "offending party" brings suit for divorce. In large measure, two factors were responsible for the change. One was mounting caseloads: with marketization came the return of property and debt disputes, plus many new types of cases, especially concerning contracts. The courts of the 1990s could no longer afford to devote to Maoist "mediated reconciliations" the time and energy they required. The other was the increasing evidence that such forced reconciliations more often than not merely postponed the inevitable. In addition, the considerations of peasant opposition that had given rise to this approach to contested divorces no longer figured quite so prominently as they had earlier. The altered circumstances of the reform era, of course, were accompanied by altered conceptions of law and the role it should play (Huang, 2006).

Thus, in a case from county B in 1995, the wife brought suit for divorce after ten years of marriage, saying that she and her husband lacked a "common language" and that he was often jealous for no reason. He countered that she behaved improperly with other men—in fact, he had twice seen her with other men. She did not dispute the allegations. The court, consistent with the directives of the Supreme People's Court set forth in the fourteen articles, approved the divorce petition instead of attempting to force a mediated reconciliation. It did, however, favor the husband quite strongly in the settlement: he received custody of their child, their three-room home, and the "big items" owned by the couple—the television, refrigerator, chests and bureaus, and the motorbike (B, 1995-10). To the

extent that the wife voluntarily accepted these unfavorable terms, the case may be seen as falling within the scope of adjudicative mediations.

Another type of case in which the court's judgment as to fault on the part of one party entered the picture involves the physical abuse—ranging from light to severe—of one spouse (generally the wife) by the other. The sample from county A contains four such cases. In 1988, for example, the woman sued for divorce on the grounds of mistreatment by her husband. She had become seriously ill after giving birth to their second child, but her husband continued to make unreasonable sexual demands on her. When she would not oblige, he beat her, the last time actually rupturing her liver and spleen. The husband admitted his fault, but pleaded that they should stay together for the sake of their two children. When his wife continued to insist on divorce, he relented. The court helped to work out the specifics of the settlement, clearly favoring the victimized wife. The couple had loaned out a total of 950 yuan to three parties. All was to go to the wife, plus another 300 yuan of the couple's savings. While the wife gave up her share of their furniture, the defendant husband was to provide her an additional 35 kilograms of (polished) rice, plus 150 kilograms of unhusked rice. Custody of the two children was to be divided, one to each parent (A, 1988-09).[20]

The Nature of Contemporary Chinese Judicial Mediation

It is mainly in no-fault cases and in cases involving equal fault, or equal entitlement or obligation, that mediation in contemporary Chinese courts comes closest to the term's original core meaning of voluntary compromise. Once the court concludes from its fact-finding that fault cannot simply be assigned to one party, it becomes concerned only with working out a solution that both parties can accept. Such mediations have a greater chance of gaining the voluntary acceptance of the litigant. Even in those cases, however, we should not minimize the adjudicative role and power exercised by the court in first determining the facts of the situation.

Cases in which the court attempts to mediate specific terms of a settlement under an adjudicatory rubric (e.g., civil liability even in the absence of fault, obligation to support an aged parent, preferential treatment of the wronged spouse in a divorce settlement, and so on) may also be seen as mediatory to the extent that the defendant willingly shares or accepts the court's adjudicatory posture. We have seen how the courts have used methods

and procedures similar to traditional societal mediation, first talking with the litigants separately to search for common ground and then helping to facilitate the working out of a compromise that both can accept.[21]

As pointed out above, though Chinese no-fault mediation may call to mind the contemporary Western no-fault approach to divorce, as well as the more recent development of no-fault auto insurance in the United States, it is fundamentally different. In both of the Western approaches, a "no fault" principle is applied to all (divorce and auto tort) cases, regardless of the particular situation. In contrast, the Chinese approach takes as its point of departure the fact situation as determined by the court. Only after the court has concluded that the case involves no fault does the no-fault mediatory approach come into play. Arguably, each approach has advantages: one provides formalist consistency, while the other offers flexibility. In one, complex legal maneuvers to demonstrate fault have been rendered pointless, because a victimized or wronged litigant can gain no preference in the settlement; in the other, litigants still can benefit from such efforts, which may become more elaborate with increasing wealth and reliance on high-powered attorneys by the new elites of Chinese society.

Chinese court mediation might also be compared to U.S. out-of-court settlements in which the judges play a substantial role in bringing opposing counsel to agreement. Marc Galanter, who calls such negotiations "judicial mediation," points to a survey of trial judges: a high proportion (more than 75 percent) of the 2,545 respondents categorized their own role in out-of-court settlements as "intervention," while 22 percent saw themselves as not involved at all. The majority of judges surveyed viewed the intervention as "subtle," involving suggestions and making themselves available for conferences with the lawyers; 10 percent called their own involvement "aggressive," citing the use of pressure tactics (Galanter, 1985).

Yet such intervention is quite unlike Chinese judicial mediation, as its very name makes clear. U.S. out-of-court settlements are just that: they take place outside the courtroom, and outside the judge's formal capacity. In China, however, mediation is part of the formal role of the judge, thereby giving the judge greater authority and more power to intervene. In addition, the impetus for mediation is very different in the two systems. In the United States, litigants generally opt for out-of-court settlements after calculating how costly, in time and money, a trial would be. In China, at least in the kinds of disputes between individuals examined in this article (as opposed to contract disputes between corporate entities, which are a recent development), such cost considerations have yet to figure prominently. Cases are

more likely to undergo court mediation on the court's initiative than the litigants', and the primary consideration is the judges' view of the nature of justice. Indeed, we have seen, in China adjudication and not mediation is seen as the less costly and quicker approach—a major factor leading to the decline in Maoist-style "mediated reconciliations." Finally, Chinese judges readily pass judgment on whether the fact situation involves fault in their formal capacity, something that U.S. judges do only informally, outside the courtroom.

To the extent that "mediation" or "alternative dispute resolution" (ADR) in the United States (as well as most other Western countries) is understood as an extrajudicial rather than judicial action (*pace* Galanter above), undertaken largely by organizations in civil society rather than judges in court, it differs sharply from contemporary Chinese mediation, which is mainly court-based rather than societal. That too makes the nature of the processes very different. When mediation is outside of and distinct from the courts, the proceedings are generally kept confidential, with the understanding that they cannot be used subsequently in court (in part to encourage the disputants to be more forthcoming). But when mediation is a court activity, the mediator and trial judge are one and the same person, and fact-finding during mediation is not separate from that during trial. Thus, in the Chinese system, a failed court mediation is almost always followed by arbitration or adjudication by the same judge, a feature that gives much more weight to the suggestions of the judge and puts greater pressure on the disputants. The same is not true of current extrajudicial mediation in the United States or Europe.[22]

There are arguments for and against all the approaches to mediation discussed above. What seems indisputable, however, is that court or judicial mediation, or "the use of conciliation in arbitration," has recently been gaining considerable momentum in some parts of the world as a possibly viable alternative to court trials for settling disputes.[23] Even in the United States and Europe, there has been increased talk of "combining arbitration with conciliation" in an approach dubbed "Med-arb" (Schneider, 2003).

The Qing, the Republic, and Post-1949 China

Though contemporary Chinese mediation resembles traditional Chinese mediation in important ways, the institutional frames of the two are very different. The Qing courts almost never mediated; the contemporary courts, however, mediate a great deal—more than 80 percent of the time in the Maoist period, and still about half the time today, more than two decades

into the reform era, according to the official judicial statistics (*Zhongguo falü nianjian*, 1990: 993; 2001: 1257). Mediation in the Qing was almost entirely done by informal leaders of the communities; Maoist justice replaced most of those informal leaders with Party-state cadres and instituted wide use of court mediation. In the Qing and the Republic, when societal mediation failed, the litigants could decide whether to go to court; today, failed court mediation—unless the plaintiff withdraws the case—is almost always followed by court arbitration or adjudication (by the same judge), those being parts of one and the same court process.

But official representations from the People's Republic often conflate historical and contemporary mediation. Nationalistic reasons and historical exigencies lead to the assertion that mediation is simply "Chinese," the core of the great Chinese legal tradition that distinguishes it from and, by implication, makes it in some ways superior to that in the modern West. The state has, in other words, made of mediation an officially sponsored ideology, with all the exaggerated claims that such an ideology entails (Huang, 2005).

To be sure, the Qing-Republic and contemporary China are alike in that mediation has played a large role in the total justice system of both. But this similarity should not obscure the fact that court mediation in China is very much an invention of the modern period. Indeed, the contemporary Chinese example is above all characterized by in-court mediation, with all that such actions imply about the powers of the court and the blurrings of the lines between mediatory and adjudicatory justice.

There have of course been major changes from the Maoist to the reform period. In the Maoist era, there was tremendous ideological pressure to make the great majority of court actions mediatory, in appearance even not in actuality. The reform era, in contrast, has seen explicit espousal of Western-model codes and an adjudicatory system. The space occupied by mediatory justice has shrunk considerably both in representation and in action. In many situations, adjudication has come to be seen as more efficient and appropriate than mediation. Where the balance between the two will be struck in the total justice system remains to be seen. Nevertheless, there can be no mistaking the continued reliance on and significance of court mediation in the contemporary Chinese civil justice system, both as a practice and an ideal.

The Logic of Chinese Court Mediation

This review of the operative realities of the contemporary Chinese justice system shows that its point of departure, though only implicit, is the

presumption that real-life disputes cover a wide range of fact situations, both involving clear-cut questions of right and wrong and not, both fault and no fault, with all mixes in between. This assessment of practical reality forms the basis of the legal system's inclusion of both imported, rights-protecting adjudicatory justice and traditional, compromise-working mediatory justice. The presumption is that either, or some mix of the two, is to be applied as the particular case might warrant, an outlook that underlies the paradoxical formulation in codified law about "civil liability even in the absence of fault." It is also what directs the courts to select an appropriate course of action, whether mediation or adjudication, after determining the nature of the fact situation.

This approach has created a mediation system that contrasts quite sharply with both traditional Chinese and current Western ADR approaches. The mediating Chinese court exercises great discretionary powers, as it determines the fact situation, decides whether to mediate, and decides whether to employ adjudicatory considerations in mediation. Moreover, the authority of its mediatory efforts is enhanced because it will arbitrate or adjudicate should mediation fail. That is a great deal more power and discretion than traditional Chinese or current Western ADR mediators (or even trial judges in out-of-court settlements) wield, and more than most Western jurists would likely find acceptable.

Yet there can be no denying that Chinese courts have been quite effective in resolving disputes with compromises that are at least to some degree voluntary. Success is more likely in cases in which fault or questions of right and wrong are truly not involved, or those in which the disputants accept as legitimate the adjudicatory position under which the court mediates. In contrast, court mediations have clearly been unsuccessful when the courts have acted with utter disregard of litigants' wishes, employing highly coercive methods to impose resolutions. Such cases reveal the courts' scope for abusing their great discretionary power. But those aside, it is perhaps not going too far to say that Chinese mediatory justice has been able to mitigate at least to some extent the kinds of adversarial excesses that advocates of alternative dispute resolution have criticized in Western legal systems.

At the same time, we must acknowledge that Chinese mediatory justice can turn clear-cut cases of legal right and wrong into unclear cases for compromise. Indeed, this is a common complaint of foreign observers and businesses operating in the Chinese environment, and even of some Chinese citizens themselves. The courts sometimes seek compromises rather than uphold rights and obligations. Since Chinese legal theory itself has not

distinguished clearly between the circumstances under which mediation or arbitration is to operate and those under which it is not, or provided guidelines to judges for making these determinations, the blurring of clear-cut cases happens all the more easily. Adjudications on matters of right and wrong can be sacrificed for the sake of the mediatory ideology and approach.

But before we simply dismiss Chinese justice as unmodern, fuzzy, or overly authoritarian, we should consider formalist law through the eyes of Chinese justice (or of the advocates of ADR). With their insistence on beginning with abstract premises about rights, and of subsuming all legal decisions by deductive logic under such principles, formalist legal systems can drive almost all disputes into an adversarial framework of rights violations and of fault, even when neither party is at fault or when both parties would prefer a compromise resolution. Lawyer advocates and the general legal culture can impose an adversarial approach that insists on clear-cut right and wrong on every case. With such a legal culture, even cases undergoing alternative dispute resolution can be pushed into an adversarial framework requiring winners and losers.[24] The resort to and demand for mediation have in any case remained relatively low compared to that in China, perhaps because of its still relatively limited effectiveness.[25] This is true even of the more empirical, pragmatic common law legal cultures of the United States and Britain, which have led the Western world in the development of ADR.[26]

The practice and logic of court mediation in contemporary China, we have seen, are largely predicated on an epistemological approach that gives priority to facts over universalized principles. The very logic of mediation—as the voluntary settlement of differences through compromise, not an effort to establish right and wrong—works best in cases not involving clear-cut right and wrong or fault, whose plaintiffs are much more likely to be satisfied with a compromise resolution. The case records suggest that relying on the courts to separate those fact situations appropriate for a mediatory approach (followed by arbitration if mediation fails) from those that are not has contributed significantly to the success of court mediation in China.

Practical objections to the Chinese judge-*cum*-mediator wielding excessive power aside, advocates of formalist reasoning of the type outlined by Max Weber are understandably resistant to the Chinese epistemological approach, which begins with fact situations rather than abstract principles about rights. Imperial Chinese lawmaking born of that mode of thinking has enjoyed remarkable longevity, however. And case records show that such a mode of legal reasoning has been fundamental to contemporary

Chinese court mediation and its relative effectiveness. The courts are to choose adjudicatory or mediatory justice, or some mix of the two, depending on their determination of the facts of each case. This implicit logic of contemporary Chinese law and legal practice, not clearly spelled out even in Chinese lawmaking itself, may yet have something to offer to both Chinese and formalist law as they change and evolve in the years to come.

Notes

1. Thus, a 1944 Jin-Cha-Ji border region directive distinguished sharply between "village mediation" (*cun tiaojie*) and ward government tiaochu, making precisely the distinction drawn here (Han and Chang, 1981-84: 3.640-43). In the Shaan-Gan-Ning border region, by contrast, the terms "administrative mediation" (*xingzheng tiaojie*) and "judicial mediation" (*sifa tiaojie*) were used in addition to "popular mediation" (*minjian tiaojie*), foreshadowing the expanded usage of tiaojie to come (Han and Chang, 1981-84: 3.630-33). In nineteenth-century case records, tiaojie was used interchangeably with words such as *tiaochu* and *shuohe* to refer to mediation by relatives and friends, as in *jing qinyou tiaochu* / *tiaojie* / *shuohe*. Older terms for mediation include *tiaoting*, *shuohe*, and *hejie* (Morohashi, 1955-60: 10.504, 485; 8.971).

2. In traditional Chinese, *duan*, *duan'an*, *duanding*; also *pan*, *pan'an*, *panjue*; in modern Chinese, mainly *panjue* (Morohashi, 1955-60: 5.648, 2.233).

3. The names of the counties are withheld to maintain confidentiality of recent court records. For a more complete description of the cases, see Huang, 2005: 152. See also Huang, 2006.

4. Thus, in Max Weber's words, "every concrete legal decision [must] be the application of an abstract legal proposition to the concrete 'fact situation,' " and "it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic" (Weber, [1968] 1978: 657).

5. Of the remaining 407 cases, 31 percent (126 cases) were closed because the litigants petitioned to withdraw the lawsuit after the dispute had been successfully resolved either by community/kin mediation (114 cases) or by the litigants themselves (12 cases) (Huang, 1996: 241, table 3). For an additional 65 percent (264 cases of 407), cases stalled without any conclusion because litigants neither petitioned to close the case nor sought a formal court session, in many instances because societal mediation or the litigants themselves had successfully resolved the matter and no one bothered to return to court (Huang, 1996: 118-21).

6. For the specific legal areas that saw the highest incidence of litigation, see Huang, 2001; a more detailed summary is given in Huang, 2006.

7. The conceptual underpinnings of Qing adjudication are analyzed in my companion article (Huang, 2006).

8. The irony is that mediation as practiced by the later Maoist courts proved to be more time-consuming than adjudication.

9. In 1934, 113,757 cases underwent mediation and 75,149 were concluded by the regular courts; the numbers in 1935 were 82,174 and 105,286; in 1926, 84,317 and 83,121 (*Sifa tongji*, 1936: 16, 98).

10. Of the cases received for mediation in 1936, 12,409, or 15 percent, were reported as successfully settled, compared to 68,016 not (*Sifa tongji*, 1936: 98).

11. The categories of "administrative mediation" and "judicial mediation" clearly anticipated the expansion of the meaning of tiaojie to include the more high-handed tiaochu.

12. This new emphasis on finding alternatives to confrontation is perhaps another important reason that past Western scholarly works on Chinese justice, cited at the beginning of this article, have focused on mediation. Among Chinese works, Fan (2000) is representative of this line of analysis.

13. Official translations render *ganqing* as "mutual affection," but that translation, as I have suggested elsewhere, does not allow for the routine grading by the courts of *ganqing* as very good, good, average, or poor. "(Emotional) relationship" seems to me to more accurately capture the term's customary legal usages (Huang, 2005: 155 n8).

14. In 1991, with the formal promulgation of the Resolutions on Strengthening Public Order in Society by Unified Governance (Guanyu jiaqiang shehui zhi'an zonghe zhili de jueding), a kind of blueprint or master plan for public security, villages, towns, and townships actually "contracted" with their superior agencies for certain quotas of disputes and lawsuits (INT91-KB: 2). Huayangqiao township, for example, had a target figure of three disputes (to be handled at the township level) per thousand residents (INT91: 4).

15. Not all cases categorized as "mediated divorce" involved mediated compromises. Sometimes, the parties involved managed to reach agreement on their own and came to court merely to formalize it and their divorce, leaving the court merely a pro forma role (see, for example, B, 1977-19, 20; B, 1988-11). But those cases too would be included in the count of mediated divorces, consistent with the judicial system's tendency to claim for "mediation" as high a proportion of cases as possible. At other times, the court's role could be mainly adjudicatory—for example, when one party withheld agreement to divorce in order to extract more favorable terms in the settlement, terms that the court saw as unreasonable. Such cases would likewise be categorized as "mediated," so long as the court managed to get both parties to accept the settlement, even if it were largely court-imposed (see, e.g., A, 1988-4).

16. In the 1950 Marriage Law this sentence concludes "and the principle of benefiting the development of production," a clause deleted in the 1980 law.

17. Here I deliberately render *fuyang* as "child support and custody" (where the official translation has "child custody") to emphasize that the issue of support looms much larger in the Chinese countryside than in America.

18. Even in divorces by mutual consent, relative fault may be assigned, as discussed later in this article.

19. The article was published in the *Zhongguo fazhi bao* (Bulletin on China's Legal System) in 1988 (Palmer, 1989: 169).

20. In the third and final type of divorce settlements involving what the court perceived as "fault" in one party, one spouse had some involuntary disability. In such cases, the court typically took the position that the able spouse seeking divorce should take on some responsibility for the support of the disabled spouse. Our sample contains five examples of this type for county A. One occurred in 1953, when a man sued to dissolve his contract to marry the *tongyangxi* (young girl brought into the home to be raised as a prospective daughter-in-law) who had lived in his family since she was about 12 years old. She had required medical attention four years earlier and the doctors had concluded that she would not be able to bear children. The woman was willing to agree to the dissolution but asked for some financial consideration. Through the mediation of the court, the man agreed to provide a cotton suit for her, plus 60,000 yuan (in the currency of the time) (A, 1953-14).

21. This is not to say that court mediations always work as they should. As caseloads increase, the courts can be expected to look for ways to save time—and mediation can be extremely time-consuming. Woo (2003: 101 n161) refers to the complaint of a litigant who felt the court rushed things too much.

22. These characteristics of mediation are well illustrated by examples from the Netherlands, whose experiments with mediation in recent years are perhaps the best documented anywhere (de Roo and Jagtenberg, 2002). See also the Committee of Ministers of the Council of Europe's "European Principles on Family Mediation" (1998).

23. According to Tang Houzhi, countries beginning to use judicial mediation include Australia, Canada, Croatia, Hong Kong, Hungary, India, Japan, and South Korea (Tang, 1996). See also Chodosh, 1999; Schneider, 2003.

24. Construction disputes in California, for example, are typically handled by arbitration under the ADR rubric; one might therefore expect mediatory approaches different from those found in the regular court system. In practice, however, the disputants typically do everything possible to arrive at the finish line as the "prevailing party"—defined as the side with more legitimate claims against the other, even if by just $1, after the arbitration court has reviewed all the claims and counterclaims. The "loser" is expected to bear the court and attorney fees, which can run to tens of thousands of dollars even if the amount at question is much less. This system encourages a win-lose adversarial mentality (heightened by the coaching of seasoned attorneys who make a living on such disputes), even when both sides might have been willing to seek a compromise. An "alternative" approach seeking to place greater emphasis on dispute resolution through compromise cannot make much headway within a legal culture that remains fundamentally adversarial (interview with attorney Rodney Moss of Moss, Levitt & Mandell, Los Angeles, specialists in construction disputes, 28 June 2004).

25. In the Netherlands, for example, in 2002 a total of more than 2,000 accredited mediators were registered with the Netherlands Mediation Institute; but in the five years from 1996 to 2001, only 1,222 mediation cases were initiated through the institute (de Roo and Jagtenberg, 2002: 130).

26. For an overview of ADR in the United States, see Subrin and Woo, n.d.; on ADR in the United Kingdom, see Mackie, 1996.

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Interviews

Kathryn Bernhardt and I conducted interviews separately in Songjiang county, Huayang township, and Huayangqiao (Ganlu) village from 17 to 26 September 1990, 13 to 27 September 1991, and 6 to 10 September 1993. The interviews were conducted from 9 to 12 in the morning and 2 to 5 in the afternoon. They are cited in this article by INT (for interview), the year, and the number of the interview (e.g., INT90-6). Those conducted by Kathryn Bernhardt are identified by her initials after the year (e.g., INT91-KB: 2).

Case Records

The A county case files are cited by the abbreviation A, year, and my own case number, from 1 to 20 for each of the years 1953, 1965, 1977, 1988, and 1989, for the first batch of case

records I obtained, and 01 to 020 for each year for the second batch I obtained (e.g., A, 1953-20; A, 1965-015). The A court itself numbers its case records by year and in numerical order by date of closing of a case. I have avoided using the court's own identification numbers, and the names of the litigants, for reasons of confidentiality.

The B county cases are cited by the abbreviation B, year, and my own case number, from 1 to 20 for each of the same years (1953, 1965, 1977, 1988, 1989), and 1 to 40 for 1995.

Republican period Shunyi county case records are cited by the archive's category number, juan number, and date by year, month, and day (e.g., 1931.5.6). The bracketed numbers refer to my own files, which are organized by category with an assigned case number.

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Philip C. C. Huang is working on the third volume of his study of civil justice from the Qing to the present.