

When some cities
tend to modernize
and others tend to
conserve
traditionalism?

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Introduction

It can happen that sometimes you have a personal dispute with a family member, friend or neighbour, or a legal dispute involving business. There are three main ways as alternatives to going to court to resolve a dispute in China: negotiation, mediation and arbitration, they are ADR. ADR means “ Alternative Dispute Resolution” and it refers to various processes, commonly used in civil law tradition, which have in common the aim of a better communication between the parties during a dispute and the saving in managerial and legal time, expense and worry (Bevan, 1992).

We can clearly distinguish the advantages of the ADR, comparing to the formal dispute settlement at court. ADR processes are quicker, as they can be arranged within days or weeks rather than months or years (example of one case in litigation). They are also less expensive, as earlier settlements save managerial time and they are confidential. They are voluntary, which means that the parties are free to walk out every time without interfering the legal procedures and their rights (Bevan, 1992). Mediation, one of the most used ADR, involves a neutral third party, called a mediator, to help the disputing parties to reach an agreement.

Mediation in China has been existed in China for more than 2, 000 years. It was used in the Western Zhou Dynasty (1146 BC-771 BC) and then used during the Qin Dynasty (221 BC-207 BC). There was always a preference for mediation throughout all the history of Imperial China. The mediation system and the legal system were developed together after the establishment of the People's Republic of China in 1949. People's Mediation Committees appeared

during this period, helping local people to resolve civil disputes and to preserve harmony in the society.

However, the Mao's economic reforms have brought some physical and social changes of the Chinese cities. Reforms have promoted the development of the legal system and other formal legal institutions. They have also permitted more individual freedoms, since the decentralization of the political control. Moreover, the fast-growing economic developments, the modernization and the Westernization have led to the apparition of new cities which advocate the ideas of individualism, competition and private space, ideas totally at the opposite of the Chinese traditional culture which advocates the social harmony in community and society. In my essay, I will try to answer to this question: To what extent the role of the People's mediation committees in China now is still significant when some cities tend to modernize and others tend to conserve traditionalism? First, I will present the evolution of the traditional Chinese legal system to the contemporary Chinese legal system. Second, I will focus on the case of mediation, one Alternative Dispute Resolution, and the People's Mediation Committees.

And finally, I will explore the importance of the teachings of Confucianism in the evolution of mediation. I. From traditional Chinese legal system to contemporary Chinese legal system Chinese history, even in the last century, has gone through several events which have affected the development of its judicial system. Conscious that traditional Chinese law was backward and that a Western legal system, more modern, would improve a lot the

development of Chinese society, Mao attempted to establish a modern legal system based on rules and law in 1949 (Utter, 1987).

The Communist Party recruited first former nationalists, who knew all about the Western legal systems: “ To staff the new legal system, the Communists retained a number of legal specialists who had worked for the Nationalists, primarily because the Communists did not have within their own ranks people with skills and knowledge to run a complex legal system”, but they were completely “ politically unreliable and elitist” (Utter, 1987).

The Party then replaced them by “ new cadres” selected for their political allegiance to the Mao government, and not for their abilities in legal system, “[t]he new cadres lacked legal skills and knowledge” (Utter, 1987). This decision of the Chinese Mao’s government influenced the development of the legal system. They were convinced that complex processes were only burdens to the modernization of the legal system, so they developed a system easily understandable and accessible to the people:

During the first few years of the communist party, the “ new cadres” helped to establish law codification commissions, judicial and police structures. Law schools opened and some legal books were published. In 1954, the first Chinese constitution which established a tripartite governmental design consisting of the supreme people’s courts, the supreme people’s procuracy, and the state council, all responsible to the standing committee of the national people’s congress, was introduced (Utter, 1987).

However in 1957, the improvements of the Chinese legal system began to stop: During the anti-rights movement, the communist party’s sentiment

towards the need for a “ modern” legal system changed dramatically. Many specialists were removed from their posts and then attacked and denounced for the very policies they were initially retained to develop. Law schools were closed and plans for further codification were terminated. The communist party went as far as to undo and supplant existing laws as well as to replace the role of the courts and procuracy with public security bureaus (Utter, 1987).

After Mao’s death in 1978, during the “ Four modernizations” (in industry, agriculture, national defence, science and technologyin Chine), the new government of Deng Xiaoping (1904-1997) established the 1978 Constitution, which restored the emergence of lawyers, law schools and legal publications. Finally, with the promulgation of the 1990 Procedural Law of Administrative Litigation and the 1991 Civil Procedure Law, Chinese legal system significantly evolved to a more structured system. Even with all these progress, mediation remains the most used dispute resolution process.

The 1989 legislation, that placed the people’s mediation committees under the jurisdiction of the Ministry of Justice, allowed the modern mediation system to be more independent, professional and efficient. Many cases are diverted from the courts and passed on mediation committees: [T]he mediation committees have settled cases covering a wide variety of topics such asdivorce, inheritance, parental and child support, alimony, debts, real property, production, and torts, as well as other civil and economic disputes and criminal misdemeanour cases.

They have also played an important role in preventing crime, reducing litigation in the courts, enhancing the people's unity, and promoting social stability. Over seven million disputes are satisfactorily resolved through the use of mediation each year in China, far surpassing the number of cases brought to Chinese courts (Ge, 1996). However, this support of mediation retarded the development of judicial law and the implement of existing laws because the mediation procedure is based on local beliefs of fairness and communist ideas. The adoption of the 1991 Code of Civil Procedure affirmed the commitment to mediation of China's government.

Mediation and the People's Mediation Committee In the Chinese legal system, dispute settlements can be classified into two different categories: formal dispute settlement (at courts) and informal dispute settlement or alternative dispute resolution (ADR) (negotiation, mediation and arbitration). ADR has long existed in China and traditionally been preferred to the courts for many reasons. Mediation, as one of the different means of dispute resolution, is widely practised in China. To define it, mediation is " an effort by a third party to encourage parties to a dispute to voluntarily reach an agreement to resolve their dispute".

There are currently various types of mediation in China: civil mediation, judicial mediation, administrative mediation and arbitration mediation. Civil mediation is also known as the People's mediation, by People's Mediation Committees, outside the court. I will focus on it further in the essay. Compared with judicial mediation, People's mediation offers a more amicable way to resolve disputes and to avoid many disadvantages of judicial

mediation, like the rigidity of the judges and mediators in the mediation process. It is used by People's Mediation Committees which help parties voluntarily reach an agreement.

People's Mediation Committees (PMCs) are, with courts, the most largely known institutions for dispute resolution in China. They are informal mediation institutions, which have been existed in China for centuries, allowing people to avoid a legal system and court procedures which have always been subjects of fear in the society. Article 111 of the Constitution of the People's Republic of China states that " People's Mediation Committees are a working committee under grassroots autonomous organizations - Residents Committee, Villagers Committee - whose mission is to mediate civil disputes" China's Judiciary, <http://www.china.org.cn>). They were established in the early years of the foundation of People's Republic of China in 1949 and of its legal system and helped to maintain social control, to resolve non-class-struggle disputes and to conserve harmony: Mediation " serves to articulate and apply the ideological principles, values and programs of the Chinese Communist Party and helps to mobilize China's people to increase their commitment to party policies and goals.

Rather than settling disputes between individuals, mediation also serves to suppress such disputes, which are regarded as harmful social conflict that interferes with the construction of a strong socialist China (Utter, 1987). They appeared again in the late 1970s and early 1980s after the Cultural Revolution (1966-1976), with the China's 1982 Constitution, as a way to resolve minor disputes involving families, villages, workplaces and

neighbourhoods, or to facilitate parties to find resolution to disputes before reaching court, a process of mediation which still continues today (Clarke, 1991).

Excepted the period of the Cultural Revolution, PMCs have traditionally been praised by the press, as we can see in the following citation: The current system of people's mediation...is a great creation in the construction of our country's socialist legal system, it is a legal system with Chinese characteristics, and it is an important component of our country's judicial system... [I]t plays an immense role in resolving contradictions among the people, strengthening unity and friendship among the people and promoting socialist material and spiritual civilization...[I]t has received praise in international jurisprudential circles and has been called "the most distinctive system of the Chinese judicial system". (Mediation Compendium, 1990) People's Mediation Committees are typical in the contemporary Chinese society in the dispute settlements within neighbourhoods. Their mission, states by the Article 5 of the Regulations for the Organization of People's Mediation Committees, is "to mediate civil disputes and, through such mediation, publicize laws, regulations, rules and policies and educate citizens to abide by laws and respect" (China's Judiciary, <http://www.china.org.cn>).

PMCs are today institutionalized under the direction of the local government department of justice, they are non-governmental organizations and supplement to the judicial system. People's Mediations Committees are set up by local residential community in villages, workplaces and in regional or professional organizations to handle civil matters and small criminal matters.

It is composed of individuals from the community who are believed to be fair and impartial. They are generally selected for 3 years and remunerated by the government for their services as mediator. Mediation by People's Mediation Committees is completely free of charge. The procedure is more transparent and more institutionalized today. During the mediation, a mediation agreement, which can be in written and/or oral forms, is reached by both parties.

This mediation agreement signed by both parties must clearly provide information on facts, resolution methods and enforcement in relation to the dispute. Article 20 of the Several Opinions issued in 2009 states that “ for an agreement in the nature of a civil contract reached through mediation by an administrative organ, a people's mediation organization, a commercial mediation organization, an industrial mediation organization or any other organization with a mediation function, the parties may apply to the people's court having jurisdiction for confirming validity of such an agreement after the mediation organization and mediator affix their signatures or seals to it”. This judicial confirmation of settlement agreement is a method to improve the enforcement of a mediation agreement.

To request this confirmation, parties to the dispute can apply to the people's court within a period of 30 days by submitting the mediation agreement and a letter of commitment signed by both parties and responded to the two following statements: “ Both parties voluntarily reach the agreement for the purpose of resolving disputes and have no act of malicious collusion or circumvention of law; and if any damage is caused to any other person due

to the content of this agreement, both parties are willing to bear the corresponding civil liability and other legal liabilities. " (Wei & Ying, 2011b). If the court validates the mediation agreement, the court can oversee the enforcement of the agreement. If it doesn't validate the agreement, parties to the dispute can file for lawsuit at the court. The court decision validity of the agreement becomes effective when the court's decision is communicated to both parties.

If a party rejects the decision of the court, the other party may apply to the people's court for enforcement (Wei & Ying, 2011b). If we take a look at the figures, it is estimated that at the end of 2010, there were 818, 100 People's Mediation Committees, 4, 668, 900 mediators who resolved more than 8, 418, 400 cases of mediation, with a success rate of resolution of disputes of 97% (Wei & Ying, 2011a). The teachings of Confucius closely linked to the mediation For decades, Confucian philosophy has been the foundation of the Chinese culture. Its fundamental values structured all the aspects of the Chinese society. Today, the mediation is founded on the principles of Confucian philosophy and Maoist thought. (China Insight issue 2010, <http://chinainsight.info/>).

Two important principles of the Confucianism laid the foundations of the mediation: the principle of Li, which supposes the preservation of natural harmony and the principle of Rang, which supposes the compromise or the yielding to others in resolution of disputes. Moreover, mediation is a mean of " educating people and implementing Communist party policy", based on the Maoist principles. China has been one of the world's most committed nations

in the use of mediation to resolve disputes. One other reason of that is the troubled court system in China. There are corruption among judges, a lack of meaning qualifications to become a judge and an inaccessibility of published codes and case law. Mediation in China is a natural " outgrowth of traditional, family-centred support systems and its principles are based on the ethical teachings of Confucius" (Pierce, 1994).

The Confucian ethics are based on " social harmony, moderation, respect for authority, humility, benevolence and so on in contrast to the Western mediation which endorses an individualistic utilitarian value system of fairness, justice, equality, equity and autonomy" (Jia, Ma, Yang, 2009). The respect of the family structures the relations between individuals and the life in community. Therefore, harmony (he), relations among people (guanxi), face (mianzi) and yielding to others (rang), which are major concepts underlying the Confucianism, play an important role in the process of mediation in China and are reflected in Chinese social interaction and conflict resolution. In order to understand how the concepts from the Confucian philosophy are important in the process of mediation in China, I will focus on these different notions.

In the Chinese culture, harmony is one of the most important values. Chinese people are convinced that harmony is the universal path that everybody should pursue because " only when harmony is reached and prevails throughout heaven and earth can all things be nourished and flourish" (Legge, 1995). To the Chinese, conflicts are considered more like detractors from harmony rather than problems of communication. Chinese people

therefore are only aiming to establish a conflict free interpersonal and social relationship (Chen ; Chung, 1994). The conflict prevention in China is maintained by the principle of li (rites). “ Li refers to norms and rules of proper behaviours in a social context.

It is an external means to achieve the ideal state of harmony by showing a feeling of respect or reverence to others” (Chen ; Xiao, 1993). Mediation is mainly based on the li principle. As we know, mediation is an alternative dispute resolution with the priority of a mutual respect and harmony between the two parties during the process. It is also based on the rang principle. Chinese people know how to yield to the other party to end a conflict, in order to keep the relationship “ guanxi”. The harmony pursued in a dispute resolution is supported by two traditional notions: guanxi and mianzi. During the mediation, both parties are trying to reduce the negative impact of conflicts in order to save face and to keep the guanxi.

Guanxi means the relationships between two parties. It gives some specific communication rules and patterns in order to avoid an embarrassing encounter or serious dispute. It is deeply connected to the mianzi. Mianzi refers to “ the projected image of ourselves in a relationship network” (Ting-Toomey, 1988). It supposes a mutual respect from the parties to save faces because any conscious act of making the other party to lose face will damage their own image and destruct the relationship. “ It represents our social position and prestige gained from the successful performance of our specific social roles that are well recognized by other members in the society” (Hu, 1944).

To conclude, due to the accent heavily put on the harmony, Chinese people have recourse to a mediator to help them to resolve dispute. Conclusion For more than 2, 000 years, China has used mediation as its major form of dispute resolution. It has long been recognized that the “ Chinese legal system has been one the world’s most committed institutions in the use of mediation to resolve disputes and a leader in developing ways to maximize its benefits and effectiveness” (Colatrella, 2000). In the traditional China, the popularity of mediation came from the fact that it is grounded on traditional Confucian values, such as social harmony and compromise in resolving disputes. It aims to limit costs and time to resolve civil disputes involving neighbours, families or colleagues.

Even during the Maoist period, mediation continued to be largely used in the conflict resolution. The Confucian principles and the mediation process were mainly used by the Communist Party as a means of control of the masses and of promotion of social harmony, with the assistance of People's Mediation Committees (Colatrella, 2000). During the many years of economic reform, China has encountered important changes in its culture and society, as well as in its ways of resolve disputes. In Mao era (1949-1976), the dispute resolution institutions were enhanced through reforms which established a code of civil law and officially institutionalized commissions.