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MODERNISATION OF MEDIATION IN THE PEOPLE'S REPUBLIC OF LA

Abstract

In recent years, mediation in China has seen a revival in both public and professional interest due to the advent of new legislation and technology. Traditionally, mediation in China was based on Confucian principles focusing on collective harmony. However, rapid changes in contemporary Chinese society necessitate a more modern and flexible approach. Against this backdrop, the article examines the legal and institutional changes that have taken place in China's mediation system, including the introduction of new regulations, the establishment of mediation institutions at different levels of government, the development of industry rules and the promotion of novel technologies. Through detailed analysis of various sources, this article argues that while the reforms have brought about much-needed improvements in terms of efficiency, accessibility and fairness, there are still challenges to be addressed, such as the need to ensure the quality and impartiality of mediators, the protection of participants' rights and interests, and the integration of mediation with other legal and judicial processes. Overall, this article provides a comprehensive – albeit regrettably thin – review of the modernisation of mediation in China and offers broader insights into the opportunities and challenges of using mediation as a means of resolving disputes in a rapidly changing society.

Key words: *China, mediation, evolution, accessibility, fairness, efficiency*

1. Introduction of Chinese mediation

Since the very beginning of the Chinese civilisation, mediation has played an integral role in the way in which Chinese Society functioned and developed. With over 4000 years of history, it comes hardly as a surprise that legal philosophy in China is highly sophisticated and adaptable to modern challenges. That said, the modern Chinese legal system, which is currently in place, was conceived less than 50 years ago during one of Deng Xiaoping's massive economic and political reforms in the late 80s. With much of the framework still

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'in construction', the law of the People's Republic of China ('PRC' hereinafter) is undergoing many changes. One area of law which suffered significant changes over the recent years is mediation which, since the 2000s, has gained significant popularity. In its modern context, mediation presents a novel challenge to both China and the world. But it is well-known that with every new challenge comes a new opportunity. Therefore, this essay shall examine the ways in which recent legal reforms have transformed the role of mediation in the Chinese legal system. It will also offer a critical analysis regarding the extent to which such reform is successful. Finally, it will offer some recommendations for the future by gleaning experience from the rest of the world.

2. History of mediation

Historically, mediation in China was predominantly practised in an informal setting, most usually by village elders. The subject matter of mediation is diverse, ranging from loan repayments to inheritance disputes amongst siblings. Typically, the village elder would convene a meeting and hear both sides of the story. After that, he will express his opinions and potentially offer recommendations. Though the recommendations are not generally binding, the elder would greatly persuade the parties to adopt them by appealing to their conscience and morals. This uniquely paternalistic approach is quintessential of classical mediation in China and reflects the revered teachings of Confucianism.

Despite having its roots in classical Chinese philosophy, mediation has primarily been tolerated and indeed encouraged as a means of settling trivial disputes during the early days of the People's Republic, even amidst the Cultural Revolution (1966 – 1976). Back in Mao's China (1949 – 1976), grassroots associations mainly practised mediation and were monitored by community mediators. In those days, mediation was highly accessible and was employed across a wide range of disputes. Compared to western-style mediation, if it may be so called, Chinese mediation focuses less on personal choice and more on the 'collective good' of the parties in dispute.¹ One advantage of this approach is that the settlement reached is more equitable and mutually beneficial, depending less on the parties' bargaining powers and negotiation tactics. However, such an approach

¹ Guodong Du and Meng Yu, 'Mediation in China: Past and Present' (*China Justice Observer* 2019). <<https://www.chinajusticeobserver.com/a/mediation-in-china-past-and-present>> accessed 20 December 2022

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undermines party autonomy and may result in solutions with which neither party will be happy.

Therefore, when China opened its economy in the late 80s, Chinese people began turning away from mediation and resorted to litigation where they could vindicate their rights without compromise.² Undoubtedly, this change in the tide has opened the floodgate for lawsuits in courts, a phenomenon which grimly reflects the inadequacies of traditional Chinese-style mediation. Reacting against this perceived need for greater personal autonomy and to alleviate the court's burden, China has since unleashed several legal reforms which aim at the liberalisation, professionalisation, institutionalisation and digitalisation of mediation. With greater emphasis on the rule of law and individual rights, China has seen the so-called 'rebirth of socialist legality'.³

3. Recent changes: Higher personal autonomy

One of the critical legislations bringing about this change is *the Law of the People's Republic of China on People's Mediation* (the 'Law'), enacted at the 11th session Standing Committee of the National People's Congress ('NPCSC' hereinafter).⁴ Article 1 of the Law, which sets out the general principles, states that the purpose of the law is to improve and harmonise the law on mediation in accordance with the Constitution; ensuring timely resolution of disputes and social stability. Article 3 further stresses that mediation is conducted based on equality and consent, and that resorting to mediation shall not prejudice the parties' right to the access to justice or judicial review. Importantly, Article 23 sets out the rights of the parties, including the right to select or accept mediators, to commence or terminate the mediation process, to request that mediation be conducted in public or in private, and to enter into agreements voluntarily. This is complemented by Article 24 which obligates the mediator to respect the rights of the parties to mediation.

In contrast to past practices, the mediator of today's China is much more of a background character whose role is limited to overseeing and facilitating the settlement process.

² Eric W. Orts, *The Rule of Law in China*, 34 *Vanderbilt Law Review* 43 (2021) 63.

³ Richard Baum, *Studies in Comparative Communism*, (1986) Vol. 19, No. 2, 84.

⁴ The People's Mediation Law of the People's Republic of China was adopted at the 16th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on August 28, 2010.

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Whilst the mediator may still be able to offer solutions to the mediating parties, the focus of mediation is placed heavily upon the parties themselves. Unlike the traditional mediation, parties are free to choose or reject any terms upon which a settlement of agreement is reached. Such a form of mediation is more conformant to the party-centric approach practised in the West and affords parties with a greater degree of flexibility. That said, classical Chinese mediation has recently seen considerable resurgence under Xi's Government in response to the perceived 'coldness' and 'unresponsiveness' of modern mediation.⁵ Such a revival means that Chinese mediation will still retain its unique Confucian touch.

4. Professionalisation of mediation

Before Deng's ground-breaking reforms, the laws of the PRC were largely administered in informal settings where judges often comprised the 'masses' themselves.⁶ This form of vigilante justice which involved public shaming and denunciation of 'class enemies' was notorious and especially prevalent during the Three-anti and Five-anti Campaigns. However, when China opened its doors to the world after the reinstatement of Deng,⁷ businesses from across the globe saw an unmissable opportunity and began fighting their way into the country. This sudden hysteria has sparked unthinkable economic miracles across China, but at the same time unleashed a sea of litigation upon the incompetent courts, which were still asleep in a lacuna.

Realising the ineptitude of the judiciary, the Chinese Communist Party unleashed several reforms to 'professionalise the unprofessional'. While in the late 1970s there were no more than a couple of hundred practising lawyers in China, the number quickly rose to 45,000 in 1992 and by 2008, reached 143,000.⁸ In 1986, the Chinese National Lawyer's Association was established in Beijing. The association is an organisation akin to the Law Society of the UK and aims to harmonise the rules and standards which govern legal practitioners of the country. A decade later, the *NPC enacted the Lawyers Law*, which

⁵ Guodong Du and Meng Yu (n 2).

⁶ Xiuyuan Lu, 'A Step toward Understanding Popular Violence in China's Cultural Revolution' (1994) 67 *Pacific Affairs*.

⁷ Shigeo Kobayashi, Jia Baobo and Junya Sano, 'The "Three Reforms" in China: Progress and Outlook' (1999) 45 *JRI Research Journal*.

⁸ Xinhua News Agency, 'China Has More than 143,000 Lawyers - People's Daily Online' (15 October 2012).

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further consolidated and unified the rules. Importantly, the definition of a lawyer was changed from a 'state legal worker' to a 'professional who legally obtains a Lawyer's Certificate and who provides society with legal services'. Such a change is symbolic of the era of professional lawyers towards which the nation was striding.

Simultaneously, entry requirements for the field were made increasingly stringent. To qualify as a judge, one must train at the National Judges Colleges on top of completing at least one university-level degree.⁹ The rigorous manner through which judges are selected ensures a highly efficient and robust judicial system that can handle a variety of novel challenges. The professionalisation of the legal profession is especially apparent in the field of commercial mediation. At present, mediators in China are subject to the rules and guidelines of numerous associations, for example, the Shenzhen Commercial Mediation Association.¹⁰ Major work undertaken by such associations includes developing rules for the industry and mediators' work ethics, promoting market-oriented development of commercial mediation, improving the connection between commercial mediation, litigation and arbitration, and building a certification system for commercial mediators.

Despite these changes, reports indicate that China still lacks professionally trained mediators. Furthermore, there is some doubt as to the neutrality of lawyers given that they must swear an oath of allegiance to the Chinese Communist Party, though this is unlikely to be significant in the field of ADR.

5. Institutionalisation of mediation

In the past, mediators were scattered across the country like sand; There was very little collaboration between individual mediators, if any. In recent years, however, China has seen the institutionalisation of mediation through legislation and setting up bodies that

⁹ Henry Liao, Danhua Huang and William Deng, 'Regulation of the Legal Profession in China: Overview' (*Thomson Reuters Practical Law*, 1 October 2022).

<[https://uk.practicallaw.thomsonreuters.com/w-020-3499?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-020-3499?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 6 January 2023.

¹⁰ Ministry of Justice of the People's Republic of China, 'China's First Commercial Mediation Association Established in Shenzhen' (17 June 2021).

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govern ADR. To understand how mediation has been institutionalised, one must first understand the current types of mediation in China. At present, mediation in China can be placed neatly into six categories: (1) Court-led mediation, (2) People's Mediation, (3) Industry mediation, (4) Administrative mediation, (5) Lawyer mediation, (6) Commercial mediation.¹¹

Court-led mediation refers to mediation that takes place in the court as part of the litigation process. Under the Civil Procedure Law of the PRC (CPL),¹² parties to a lawsuit may choose to enter mediation at any stage of the case. In fact, this is largely welcomed and encouraged by the judges, who themselves become the mediators once this option has been chosen. Recently, there has been a push towards the greater separation between the lawsuit and the mediation process, with courts devising a 'docking mechanism' whereby the court commissions the case to a mediator to proceed. Besides the judiciary, mediation can also be conducted by an administrative organ in what is typically known as administrative mediation. Though less common than its judicial counterpart, administrative mediation sees its importance in minor civil disputes such as traffic accidents or domestic violence.

Outside the courtroom, the predominant type of mediation is people's mediation, which refers to the mediation of community residents. Governed mainly by the People's Mediation Law (PML) (2010),¹³ people's mediation is conducted by mediation committees set up by self-governing organisations in community settings such as a town or a village. Because it is considered part of the public welfare system, people's mediation is free and is employed to resolve a wide range of disputes. Alternatively, mediation committees can be set up within a particular industry to hear and settle disputes in what is known as industry mediation. Depending on the rules under which the committee was established, such a form of mediation may be subject to specific industry rules or the rules under the PML.

11 Guodong Du and Meng Yu (n 2).

12 Civil Procedure Law of the People's Republic of China Adopted at the Fourth Session of the Seventh National People's Congress and promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991

13 People's Mediation Law (n 5).

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Whereas the previous four types of mediation are cheap and largely for the public welfare, lawyer mediation and commercial mediation may involve substantial fees and are mostly market oriented. To begin with, lawyer mediation refers to mediation conducted by fee-charging lawyers from mediation institutions. On the other hand, commercial mediation refers to mediation conducted by a specialised commercial mediation institution. As with lawyer mediation, commercial mediation comes with a fee.

Whilst all six of the forms of mediation have seen some degree of institutionalisation, the change is most apparent with respect to the lawyer and commercial mediation since they are most profitable in nature. With regards to lawyer mediation, a 2018 notice¹⁴ issued by the Ministry of Justice called for further development by setting up lawyer mediation studios, public legal service centres, bar associations and law firms. According to the notice, setting up the relevant bodies shall improve the certification standards for lawyers and mediators, clarify the selection and removal processes, allow for better training and support, encourage regular evaluations, and reinforce a system of 'survival of the fittest' amongst mediators. At the same time, several associations have been set up to monitor and guide commercial mediation, including the China Council for the Promotion of International Trade, the Beijing Arbitration Commission Mediation Centre and the Shanghai Commercial Mediation Centre.¹⁵ Undoubtedly, the number of mediation institutions in China will continue to grow as demand for mediation continues to skyrocket. However, these institutions are inexperienced and largely unrelated to each other. If mediation were to succeed in China, the country must bring reforms that unite the rules and practices of all these institutions.

6. Digitalisation of mediation

As China pushes towards greater digitalisation – greater digitalisation of commerce, digitalisation of public services, digitalisation of finance etc. – it is inevitable and desirable that mediation also be digitalised.¹⁶ To this end, the Supreme Court established

14 Ministry of Justice of the Supreme People's Court, 'Circular of the Supreme People's Court and the Ministry of Justice on Expanding the Pilot Work of Lawyer Mediation' (2018).

15 Heping Jiang and Andrew Wei Lee, 'From the Traditional to the Modern: Mediation in China' (*Weinstein International Foundation* 1 September 2018).

16 Vincent Chow, 'China Pushes for Increase in Online Dispute Resolution as It Reboots Economy' (19 March 2020).

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an online dispute resolution (ODR) platform in 2017. Through the platform, parties can go through the entire mediation process in the comfort of their homes or offices, making it a convenient and efficient option for individuals and businesses alike. As of 2018, more than 1000 courts and 12,000 mediation institutions have joined the platform, highlighting its widespread and growing popularity. Furthermore, there are informal options available for the public, such as SMS mediation, WeChat mediation and video mediation, all of which can be conducted with only a smartphone or a tablet. In 2021, it was estimated that a total of 13.6 million disputes have been handled on China's online mediation platform since its establishment in February 2018; the resolution rate was 65%¹⁷ Through greater exploitation of digital technology and platforms, mediation is made more accessible and transparent – more accessible in that more people can now benefit from its use; more transparent in that information and resources can be shared more freely across the internet. Above and beyond, online mediation helps break down physical barriers which delimit the boundaries of mediation, making it much easier for people from across the country to connect and settle their disputes.¹⁸ Finally, digital technology can be used to replace manual work and thus achieve outcomes that are free of human error. Although the technology is still in a nascent state, the drive and determination of the relevant actors will ensure that ODR will become a common form of dispute resolution in the near future.

7. Closing remarks and recommendations

It is evident that mediation in China is still in a budding state. However, there has been a fresh impetus to modernise mediation in China to make it more accessible and efficient. In summary, reforms have aimed towards the liberalisation, professionalisation, institutionalisation and digitalisation of mediation. Through these reforms, public awareness and desirability of mediation have been on the rise, thus alleviating the burden on the court system. Simultaneously, mediation as a commercial activity has been promoted through the passing of relevant legislation and the establishment of regulatory authorities. With the incorporation of new technology, mediation has become even more

17 Aybek Akshar, '13.6 Million Disputes Mediated Online' (*global.chinadaily.com.cn* 10 March 2021). <<https://global.chinadaily.com.cn/a/202103/10/WS604816e5a31024ad0baae13a.html>>.

18 Qian Zhou, 'Dispute Resolution in China: Litigation, Arbitration, and Mediation' (*China Briefing News* 7 September 2022) <<https://www.china-briefing.com/news/dispute-resolution-in-china-litigation-arbitration-and-mediation>>.

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widespread and has found ways in the general public through online mediation. In short, the future of mediation in China appears promising.

That said, it is obvious that China still severely lacks professionally trained and educated lawyers, especially in the field of mediation. Though many institutions have sprung up in recent decades to monitor and regulate the growth of ADR, these associations are loosely organised with minimal cooperation between them. Moreover, mediation is still viewed by the business community with considerable scepticism, and many have chosen to adhere to expensive and time-consuming litigation. Studying the experiences of Western countries, it is recommended that China could adopt a non-interventionist, hands-off approach to ensure that the experts are the ones taking the reins. Such an approach would accelerate the professionalisation of mediation, making it a more desirable form of dispute resolution. Furthermore, the Chinese Government could better educate its people about the advantages of mediation to increase public awareness. Importantly, China must continue to strive towards the modernisation of mediation through the adoption of technology. Only by improving upon experience and learning through mistakes can Chinese mediation become more mainstream.