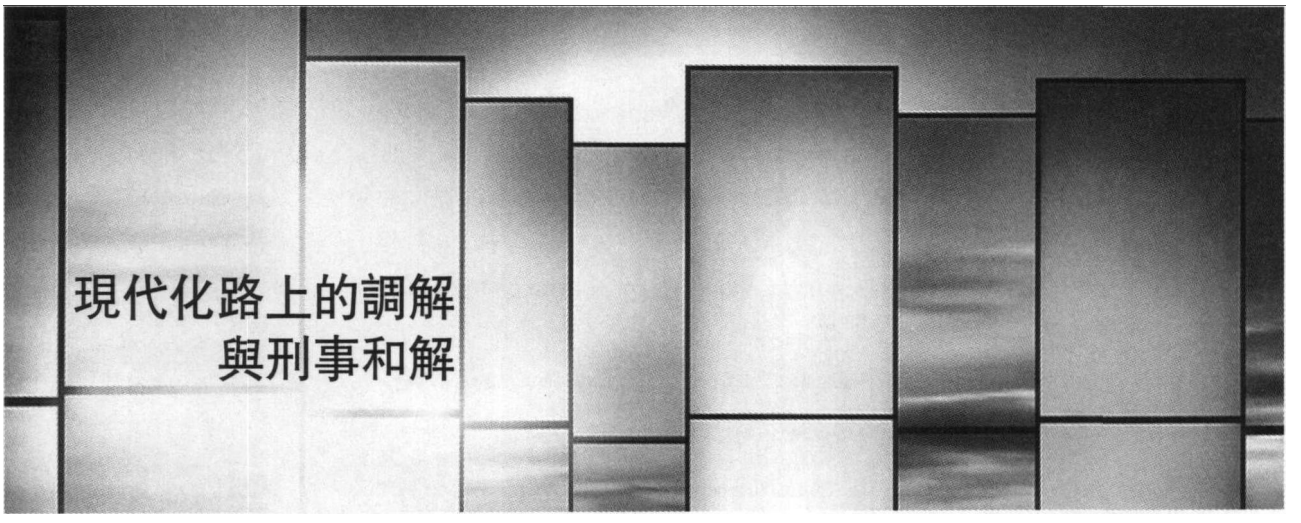


調解與中國法律的現代性

[美]黄宗智
尤陳俊

尤陳俊：就傳統中國法律的歷史實踐而言，調解在糾紛解決機制中處于極其重要的地位；也因爲如此，調解成爲中國法律實踐中的一個永恒話題，時至今日，仍備受關注。您從20世紀90年代初轉入中國法律史研究開始，陸續出版了《清代的法律、社會與文化：民法的表達與實踐》、《法典、習俗與司法實踐：清代與民國的比較》和《過去和現在：中國民事法律實踐的探索》。此三卷本的法律史著作，以清代、民國和中華人民共和國爲時間順序，對近現代中國（民事）法律的歷史實踐進行了卓有新意的探索，而無論在哪一本專著中，關于調解的内容都占了相當大的比例，尤其是最近出版的新著《過去和現在：中國民事法律實踐的探索》。您如此安排是基于什麽考慮?

黄宗智：調解確實是一個十分重要的話題，但對其過去和現在有許多錯誤的理解，在有關的討論中，虚構多于實際。最初撰寫《清代的法律、社會與文化：民法的表達與實踐》一書之時，我的一個重要目的便是要去挑戰學界先前關于調解的一種成見。長久以來，人們通常將清代衙門想象成以調停爲處理民間糾紛之主要手段的機構，其中縣官更像是調停人而非法官，特别是對于民事糾紛，縣官是像調停子女争吵的仁愛父母那樣行事——日本學者滋賀秀三將這稱爲“教諭式調停”（didactic conciliation）。之所以有這種成見，我認爲主要是受儒家以及清代官方表達的影響所致。此外，1949年以來，中國法庭大規模地實行法官調解，把過去民間的調解納入到官方法律（和黨政行政機關）系統之下，又宣傳説法庭調解乃是中國久有的優良制度，致使我們把清代的法庭（公堂）也想象成革命以來的法庭那樣。

我立足于清代訴訟檔案的研究則表明，在實踐之中，清代的縣官確實樂意按照官方統治思想的要求采用法庭之外的社區、宗族調解，但一旦訴訟案件無法在法庭之外和解而進入正式的公堂審理，他們總是毫不猶豫地按照《大清律例》來審斷，用今天的話來説，他們以法官而非調停者的身份來行事。這種歷史事實，其實與後來將法庭調解

當作中國久有的優良制度的宣傳大相徑庭。我試圖去澄清這種誤解。

清代這樣的一種法制，如果不結合民間的調解來考慮，是無法得到理解的。傳統中國與現代西方在司法制度上最顯著的區別，也許就在于前者對民間調解制度的極大依賴。因此，要真正理解近現代中國的民事法律實踐，尤其是民事司法制度，就必須將法庭調解和民間（社區）調解作爲一個整體來相互觀照，從兩者在不同歷史時期所處的位置與其間的關系入手，如此才能深刻理解近現代中國法律實踐中的變與不變。

社區調解的前生與今世

尤陳俊：如您所説，要想真正理解中國的調解制度，對公堂（法庭）調解和民間（社區）調解的深入考察缺一不可，衹有將兩者放置在不同歷史時期進行相互觀照，才能洞見中國調解制度的深層問題。我注意到，從《清代的法律、社會與文化：民法的表達與實踐》到《過去和現在：中國民事法律實踐的探索》，在您這兩本前後相隔13年的著作中，一項非常重要的工作就是勾畫一幅社區調解制度從清代至當下的歷史演變圖景。您能否就此簡要概述一下？還有，你是如何看待社區調解制度在中國未來的處境？

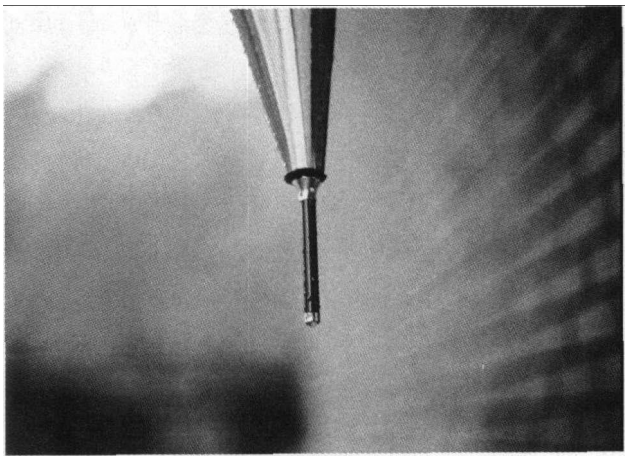
黄宗智：在治理的問題上，清代國家的一個基本概念和方法是讓家族和社區自己通過調解來解決他們之間的糾紛，國家要在社區自己不能解決的時候方才介入。因此在一個個相對緊密内聚的社區中形成一整套自我解決糾紛的機制：由社區具有威望的人士出面，在聽取、考慮到糾紛當事人雙方的觀點之後，分别以及聯同探尋雙方都能接受的妥協方案，其間也考慮到國家法律以及民間的所謂“道理”，但主要目的是照顧到人情的妥協。然後，在雙方自願的基礎之上，達成調解，可以用“賠禮道歉”、口頭承諾或書面協議、共同聚餐等方式來賦予調解方案一種儀式化了的確認。

多少有些驚訝的是，在近百年來一再否定中國傳統法律的大環境下，這套調解制度居然基本維持了下來，雖然也有一定的演變。比如説，在1920—1940年代的中國農村中，村莊的糾紛主要圍繞和清代基本一樣的主要範疇而呈現，即土地、債務、繼承—贍養以及婚姻。糾紛一旦出現，主要由村莊内生的有威望的人士調解解決，其主要原則和方法是基于人情考慮的妥協，輔之以法律和道理。

這個“傳統調解”的基本原則和方法，在1949年之後呈現比較顯著的變化。到了集體化時期，村莊生活和人際關系都起了根本性的變化，糾紛内容也相應改變。伴隨私有産權的基本終止，土地、債務、繼承、分家等糾紛也基本絶迹；新興的一些矛盾主要來自新的制度安排，諸如關于工分議定、工作分配、自留地地界，以及夫妻糾紛，等等。與解放前的情況相比，集體化時期最主要的變化之一是調解人員的“幹部化”，即從過去的社區自生的高威望人士，一變而爲革命政黨的“幹部”。當然，他們的身份也同時是村莊社區的成員之一。這個時期村莊的糾紛，多由生産隊隊長、黨支部委員（包括婦女主任）、村治保主任、大隊隊長、大隊支部書記等村莊幹部處理。在調解人員的高度“幹部化”大趨向之下，調解原則和方法也起了一定的變化。總體來説，當時涉及政策（或政治）的“調解”更像“調處”。在高度全能化治理的高度威權性大環境下，當涉及國家政策和法律時，調解方法和原則也更加强制化。但是，村莊社區的緊密性比過去則唯有過之而無不及，其糾紛也依舊由村莊自己來解決。

到了改革初期，和解放前的社區調解相比，糾紛内容又有改變，婆媳糾紛大規模上升，贍養、鄰裏糾紛也有增加。這一時期的調解原則和方法基本上仍然使用了情、理、法“三結合”的原則和方法，所不同之處在于舊調解是以“人情”，亦即妥協爲主，法律和道理爲輔的；而當代的調解則是以國法—政策爲主，人情和道理爲輔的。同時，因爲調解人員主要是國家認可和委任的幹部，在村莊中比傳統自生的調解人士具有更大的威權，雖然在村民當中的威望并不一定更高，但是，顯然更可能傾向强制性調解。

這一切在改革後期都受到比較强烈的衝擊。1990年代以來，農村勞動力大規模流動，既離土也離鄉，導致了農村糾紛内容和調解機制的一系列變化。農村社區已經大多不是過去的那種緊密内聚的“熟人社會”，而更多的已經轉化爲“半熟人社會”。同時，村級政府功能收縮。伴之而來的一方面是非正式民間調解機制的重現，尤其是在分家和親戚間的糾紛中；另一方面則是半正式幹部調解的延續。同時，國家法庭功能擴大，正式法規進一步滲透鄉村，在民衆生活中起了更大的



作用，社區調解機制所起作用也顯著收縮。但是，進入21世紀，社區調解仍然顯示出頑强的生命力，而國家治理也顯示了對原有治理原則——盡可能讓社區自身處理其内部糾紛——的堅持。

現今法學界的一種主要意見認爲，伴隨中國的"現代化"、市場化、城市化和富裕化，中國農村衹可能越來越走向完全相似于西方先進國家的"法治"道路。這種觀點的部分根據是近年來民間調解糾紛案例的減少，以及民事訴訟案件的大規模增加。其深層來源則是中國法律傳統的特殊歷史處境，即其百年來被國家領導者和立法者一再與現實隔絶，被認定爲與當前現實無關的傳統。伴之而來的是當前法學領域的建立在西、中方法律的非此即彼二元對立之上的現代主義意識形態。據此，中國衹可能越來越像西方先進國家。當然，也有强調中國過去的調解制度的優越性的意見，但多認爲這是局限于鄉村"熟人社會"的一個制度，伴隨從"熟人社會"到"半熟人社會"和最終到"陌生人社會"的轉向，基于緊密内聚社區倫理的調解將會被西方現代式的、城市式的法律制度和文化所完全取代。舊調解制度最終將會像中國傳統法律那樣完全被淘汰。

上述看法雖然有所不同，但同樣不符實際。首先，所謂近年來民間調解糾紛案例減少的印象，基本是從《中國統計年鑒》和《中國法律年鑒》上的統計數字中得來，而這樣的思路忽視了一個基本事實：這些數字衹是有記録的調解的數字，也就是説衹是半正式的幹部調解制度的數字，没有考慮到今天重新出現的没有記録的社區和家族非正式調解。官方調解數字其實嚴重誇大了調解功能的收縮。2002年一個比較系統的對6個縣的30個村莊、2970人的問卷調查就發現，在農村人民心目中，舊調解制度仍然比新法院制度成效要高。它長期以來一直是個低成本、高效率的制度。其次，認爲調解衹可能消失的意見，也忽視了國家領導人維持和發展民間調解的堅强决心。我們應該注意2002年的兩個關鍵文件——《最高人民法院關于審理涉及人民調解協議的民事案件的若幹規定》（自2002年11月1日起施行）和司法部《人民調解工作若幹規定》（2002年11月1日起施行）。在國家司法部門的推動之下，調解機制所起的作用已經再度回升。2006年，半正式的幹部調解制度共處理了462.8萬起有記録的糾紛，約相當于法院處理的438.2萬起民事案件的數目。此外，省、市級政府顯然都在積極推動民間調解。最近幾年全國各地地方政府紛紛頒布了根據上述中央級的幾個文件，經過不同程度的細化的調解條例和規定。同時，在基層民間調解的重現之上，更有適應新社會情況的高層次和更大空間跨度的調解委員的興起，比如説上海市已經相當普遍地在街道調解委員會下設置了新型的"工作室"，成效不錯。

由此看來，時至今日，雖然處在全盤西化意識形態的大潮流下，但社區的半正式和非正式調解制度在司法實踐中仍然是中國法律制度的一個關鍵部分，是其最具特色的一個部分，也是中國社會和中國法律制度區别于西方國家的主要不同特點之一。以美國爲例，其法律制度中的"非訴訟糾紛解决"運動（Alternative Dispute Resolution，簡稱ADR），至今雖然已經具有近半個世紀的歷史，但其對調解制度的依賴遠遠低于中國。遇到糾紛，美國普通民衆仍然基本不會考慮調解，不會把調解視作一個可能借以解决糾紛的選擇。遇到嚴重侵犯自身利益的糾紛，人們一般都會把告上法庭視作唯一的可能選擇。所謂"仲裁"（arbitration）則多衹是一種廉價的法庭，靠使用退休的法官和簡單的替代性場所來節省費用，但其運作精神基本是和法庭一致的，最終衹可能明確分出勝負。附帶説一句，國内對美國的非訴訟糾紛解决制度誤解頗多。而中國的大部分民衆的意識，至今仍然基本上傾向于先考慮調解，期盼某種和解，真正迫不得已才會告上法庭。這是當今中美法律文化仍然存在的基本不同，也是中國廣義的傳統法律制度的基本延續的最好證明。至于未來，中國的法律制度是不是真的會變得跟美國一樣，調解

機制完全消失，每 10 萬人的訴訟案率比今天的要再上升 29 倍？我相信不會，我們也應該希望不會。

中國法庭調解：現當代時期的發明

尤陳俊：十多年前，您與日本學者滋賀秀三教授有過一場著名的學術争論，您前面也已經稍微提及其中的争點。滋賀秀三教授認爲清代的法庭（公堂）并不進行裁決，而僅從事“教諭式調停”——其觀念的根基就是支配着中國法的“情、理、法”三合原則。而您則通過對來自三個縣的 628 個清代案例的分析證明，清代衙門并没有從事滋賀教授所説的“教諭式調停”，絶大多數案件都是由衙門根據法律裁決結案。按照您的看法，法庭調解因此很大程度上是現當代中國司法制度的創新，而不是清代的遺産。能就此稍作延伸解釋麽？

黄宗智：好的。我們可以先來看民國時期的法庭調解。在民國時期，社會自身的調解運作得比較有效，在那裏，它繼續發揮着和在清代非常相似的作用。一般説來，國民黨政府對鄉村社會已經發育成型的制度很少作出改變。但我們知道，在法律制度方面，當時的嘗試幾乎是全盤西化的。1929—1930 年的民法典仿照了 1900 年的《德國民法典》，而根據馬克斯・韋伯（Max Weber）的尺度，後者是所有西方法律模式中最形式主義化的典範之一。爲了減輕法庭的負擔，國民黨政府曾經試圖實施法庭調解制度。1930 年 1 月 27 日《民事調解法》正式頒布，要求所有的初審法院增設“民事調解處”，所有的民事案件都要經過這裏過濾。但實際上，法庭調解的機構設置和程序規定，都祇允許法庭在時間和精力上作最低限度的投入。因此，民國時期的法庭調解所起的作用很有限，尤其是與其後毛澤東時代的調解制度相比。在社區和宗族調解繼續運行于民間社會的同時，國民黨基本上采用了德國模式的庭審制度。我分析過當時的調解處處理的一些案例，它們都表明法庭調解的實際影響很小。不過這并不奇怪。國民黨的立法者們事實上是以德國法的形式主義模式爲標榜的，法庭調解的嘗試是比較馬虎草率的。

如果深入考察清代、民國和 1949 年後的中國調解，我們便可以發現，盡管當代中國的調解和傳統調解具有一定的聯系，但兩者的制度框架很不一樣。清代的衙門幾乎從不調解，毛澤東時代的法庭則大量調解；清代的調解幾乎全部是在非官方的民間權威主持下完成的，毛澤東時代的法律制度則用黨政幹部取代了民間權威，并且賦予法庭調解非常廣泛的功能；在清代和民國時期，如果民間調解不成功，當事人可以決定是否上公堂（法庭），而當代的法庭調解一旦失敗，除非原告撤訴，法庭幾乎總是會緊接着由同一個法官進行裁斷或判決，而且這些過程都屬于同一個法庭程序。

但是中華人民共和國的官方表達常常將歷史上的和當代的調解相提并論。出于現代民族主義意識和時代的迫切需要，調解被宣稱是中國所獨有的，是偉大的中國法律傳統的核心，使中國法律傳統不僅區别于而且不言而喻地在很多方面優越于現代西方的法律傳統。的確，清代和民國時期與當代中國存在着相似之處，即調解在整體的民事司法制度中始終扮演着極爲重要的角色。然而這個相似之處不應該掩蓋的事實是，法庭調解幾乎完全是現當代時期的發明。而事實上，當代中國調解的特徵首先體現在法庭調解上，它包含了法庭的各種權力，也模糊了調解和判決的界綫。

尤陳俊：法庭調解既然不是清代的遺産，而是現當代時期的發明，那麽作爲一種新的機制，它又是在何種歷史條件下産生和成形的？或者説，我們應該如何去理解法庭調解的起源？您可否就此具體解釋一下？

黄宗智：毛澤東時代廣泛采用的法庭調解制度，其實主要源自離婚法的實踐。中國共産黨在中央蘇區時期便在婚姻自由和男女平等的大原則下，采納了非常激進的離婚法：即夫妻雙方任何一方要求離婚便允許離婚。但是，這個離婚法律幾乎立刻就遭遇到農村人民的强烈反對，因爲它不符合當時農村生活的實際。婚姻乃是一輩子一次性的大花費，不允許草率結婚、離婚。而農村人民的積極擁護，又是當時共産黨存亡的關鍵。爲此，中國共産黨便一直試圖在原先的激進允諾和農村實際之間尋找一條中間道路，結果主要采用了單一條辦法，即一起一起地來處理有糾紛的離婚要求，規定必定要先調解，先由當地的行政機構進行調解，然後再由法庭調解，調解不成才允許離婚。其目的是要盡可能減輕黨和農村人民間的矛盾。

如此，法庭調解一旦建立和制度化，便很自然地被普遍用于其他民事領域。在毛澤東時代，離婚案件占法庭所有民事案件的絶大比例，幾乎等于全民事法

律領域。

在離婚案件中，當時常常依賴比較强制性的手段來試圖把夫妻雙方“調解和好”。由法官深入當地，通過訪問幹部和親鄰深入調查，然後通過意識形態、“政府”（法官和當地政權組織）和親鄰的壓力，包括物質利益刺激，擬出一個和好方案，盡一切可能促使當事雙方“自願”接受。直到1980年代，方才興起對强制性調解的反思。之後逐步放弃，今天已經基本不再使用强制性的調解。雖然如此，由之而來的法庭調解制度，尤其是非强制性的調解，仍然被相當廣泛使用。2006年，調解結案所占比例，仍然占據調解和判決案件總數的45%。

中西觀照論調解

尤陳俊：我記得一位西方學者曾講過這麽一番話，其大意是，長時間以來，中國的調解大概是唯一在西方被廣泛研究的中國法律制度的特徵。您在新著中也提到，柯恩（Jerome Cohen）、陸思禮（Stanley Lubman）、彭文浩（Michael Palmer）、郭丹清（Donald Clarke）等衆多學者都曾就此做過專門的研究。當英語世界的西方學者對中國調解進行研究時，通常都是以“mediation”來加以稱呼。但問題是，中國語境中的“調解”與西方意義上的“mediation”是否指的是同一内容？如果無法精確對應，那麽如何對兩個詞語在不同文化語境下的實際含義進行區分？這實際上涉及關于中西法律實踐的求同與辨异。您在前面也已經談到這一問題，能否再就此專門談一下麽？

黄宗智：的確，中國的“調解”與西方“mediation”有其相似之處，但或許更重要的還是在于兩者之間的差异。比方説就毛澤東時代而言，如果衹看當時的意識形態，我們會認爲中國民事法庭從事的幾乎全部是調解活動。然而這樣的視角遮蔽了法庭實踐的真實情況，同時也嚴重擴大了所使用的術語的内涵。“調解”這個詞的中文含義，在毛澤東時代以前與英文的“mediation”實際上没有大的差别，都是通過第三方的斡旋或幹預達成争議方均願意接受的解决分歧的方案，且主要是指民間調解。不過，到了毛澤東時代，隨着黨一政控制的擴張，民間調解在急劇收縮的同時，法庭調解和行政調解變得非常普遍；“調解”最終涵蓋了“調處”的意思。而在此之前，解放區的一些地區曾經將“調解”和“調處”區分得很清楚，後者主要由行政機構實施；經調處作出的決定，有可能是違背當事人意願而强加的。毛澤東時代的調解最後實際上包含了判决和强制性質的做法，盡管在表達和形式上仍然使用了原來的“調解”一詞。

當代中國的法庭主要在不涉及過錯、雙方均有過錯以及雙方有同等的權利或義務——例如，夫妻雙方都同意離婚，法庭衹需協助他們達成具體的離婚協議具有同樣繼承權利或贍養義務的兄弟間的糾紛；不涉及對錯或雙方都有過錯的賠償案件等——這類案件中所實施的調解，最接近于西方“mediation”一詞本來的核心含義，即通過第三方的居間工作達成自願的妥協。法庭衹要從事實調查中得出結論認定無法簡單地將過錯歸給某一方，就僅需考慮如何設計出雙方均能接受的解决方案。這一類型調解的結果，較之其他類型的法庭調解更有可能爲當事人自願接受。不過，即使在這類案件中，法庭在最初對案件的事實情節進行定性時所體現出來的判决性質的作用和權威，也不應該被忽略。

在中國，“法庭調解”這個名稱本身就已經説明了問題。美國的庭外解决不僅發生于法庭之外的地方，也外在于法官的正式職能。但在中國，調解是法官的正式職能的一部分，因此法官進行幹預時擁有更大的權威和更多的權力。此外，這兩種模式下，調解的動力來源也非常不同：在美國，當事人一般是在計算訴訟將會花費多少時間和金錢之後，再决定是否選擇庭外解决的方式；在中國，至少在那些個人之間的糾紛（區别于近年來日益增加的公司法人之間的合同糾紛）中，上述成本的考慮并不是一個重要因素。案件經歷法庭調解，更多的是因爲法庭主動發起而不是因爲當事人的選擇，而其中的首要因素在于法官們對于民事司法性質的理解。最後，中國的法官們在調解中可以毫無障礙地運用自己的正式職權，對案件的事實情況做出判斷，而美國的法官們在庭外解决中，則衹能非正式地在法庭正式程序之外表達自己的意見。

美國（以及大多數其他西方國家）的“mediation”，或曰“非訴訟糾紛解决模式”（Alternative Dispute Resolution，即ADR，或譯爲“替代性糾紛解决機制”），很大程度上是由民間機構而不是由法官來主導的，它

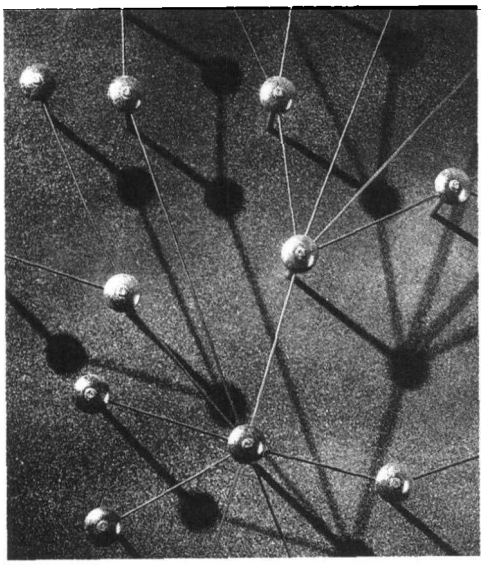
存在于司法體制之外，并不具備司法的性質。這種糾紛解決模式與當代中國的調解有着顯著的差异，後者主要以法庭而不是民間機構爲主導者。這個差异進而造成了程序上的差别：當調解在法庭之外且完全獨立于法庭的地方舉行時，其紀録一般都會保密，各方都理解這些記録不能用于隨後可能發生的法庭訴訟（部分原因是爲了鼓勵争議各方更加坦誠地合作）。然而當調解同時也是一種法庭行動時，調解人和承審法官這兩種身份就合二爲一了，調解和庭審兩個階段的事實發現也無從分開。因而在中國的模式中，法庭調解一旦失敗，隨後幾乎總是由同一個/組法官來進行裁斷或判决，這個特點使法官的意見格外有分量，也給糾紛當事人造成了更大的壓力。目前美國和歐洲的司法外調解顯然不是這種情况。

上述的不同調解模式各有其自身的優缺點。不過有一點似乎是没有争議的，即西方新近興起的“調和式仲裁”（the use of conciliation in arbitration）——作爲純訴訟模式的一種很可行的替代選擇——比較類似中國的法庭調解。它近年來在一些國家和地區逐漸呈現爲一種趨勢。甚至在美國和歐洲，也逐漸可以看到“仲裁和調解的結合”的討論和試用，并稱之爲“調裁（Med-Arb）”。

調解與現代性

尤陳俊：曾有中國學者如此認爲：“對調解制度的理解實際上并不是理解一種普遍性的糾紛解决機制，而是理解現代性問題在中國展開過程中面臨的種種特殊的問題。”請問您是如何理解當代中國的調解制度與現代性之間的問題？

黄宗智：美國法制自20世紀70年代以來，本着法律現實主義的精神，針對訴訟極端頻繁的弊病，興起了所謂“非訴訟糾紛解决模式”運動，試圖跨出現存法庭制度的範圍，尋找其他實用的解决糾紛辦法。環顧今日世界，帶有部分强制性的中國法庭調解制度已以“附帶調解的仲裁”形式——英語稱作 arbitration with conciliation，簡稱 med-arb，“調裁”——在西方出現，并且明顯是一個具有一定擴增潜力的替代性糾紛解决模式。20世紀90年代以來，世界各國中已有不少國家和地區試用這樣的調解方法，其中包括澳大



利亞、加拿大、克羅地亞、匈牙利、印度、日本、韓國，以及香港地區。近年來，med-arb 調裁制度在美國也得到了一定程度的使用。此制度在世界上應會有相當的發展空間。它不可能取代訴訟中的審判，但也許能起一定的削減審判的作用。我們起碼可以這樣説：在中國革命過程中所形成的法庭調解制度是具有中國特色的，也是具有現代性的，它既非完全是中國傳統的産物，也不完全是現代的産物，而是同時具有傳統與現代性的、中國與西方法律制度成分的産物。

我要特别提醒大家注意的是，中國國内對西方的非訴訟糾紛解决模式誤解頗多，把西方的“庭外協定”和仲裁制度想象爲相似于中國調解的制度。但它們其實既不同于中國的社區調解，也不同于中國的法庭調解。有學者甚至把西方的調解想象爲成效高于中國的制度，認爲中國必須向之看齊。事實是，中國的調解制度，包括其延續至今的非正式民間調解傳統和毛澤東時代創建的半正式社區幹部調解以及正式法庭調解傳統（排除其過分强制性的運用），乃是個比較獨特而又成效相對較高的制度。它們受到民衆比較廣泛的認可，遠遠超越西方的調解制度。爲此，人們遇到糾紛，首先考慮的是依賴調解來解决——過去如此，今天仍然如此。西方則不然，時至今日，人們遇到糾紛，考慮的基本上仍然祇是訴訟。這是中國和西方過去與現在的法律文化上的一個基本差别。（黄宗智系加利福尼亞大學洛杉磯校區歷史系“榮休”教授，中國人民大學長江學者講座教授；尤陳俊系北京大學法學院博士生，《北大法律評論》現任主編）

The Mediation and Criminal Reconciliation on the Road of Modernization

Mediation and Modernity in Chinese Law

By Philip C. C. Huang* and You Chenjun**
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Mediation – A perpetual topic in legal practice in China

You Chenjun: As far as the historical practice of traditional Chinese law is concerned, mediation has been taking an extremely important position in the mechanism for disputes settlement. Just because of this reason, mediation has been a perpetual topic in legal practice in China. Up to the present, it is still a topic arousing widespread interests. Since shifting onto the research of the Chinese legal history in the early 1990s, you have successively published the masterpieces of The Law, Society and Culture of the Qing Dynasty: Civil Law Expression and Practice, Codes, Customs and Judicial Practice: Comparison between the Qing Dynasty and the Republic of China, and The Past and the Present: Exploration into the Practice of Civil Law in China. These three-volume works on legal history, with a time sequence from the Qing Dynasty (1644-1911) to the Republic of China (1912-1949) and the People's Republic of China (since 1949), make explorations into the historical practice of (civil) law in modern China with much novelty. Any of the three works, particularly the book of The Past and the Present: Exploration into the Practice of Civil Law in China, has a considerable amount of contents on mediation. Then, on the basis of what consideration, have you made such an arrangement?

Philip C. C. Huang: Mediation is indeed a very important topic, but there have been many misunderstandings about its past and present. Moreover, in the relevant discussions about it, what is fictitious has outdone what is realistic. In the initial stage of writing the book The Law, Society and Culture of the Qing Dynasty: Civil Law Expression and Practice, one of my most important goals was to challenge a kind of prejudice held by the legal community about mediation that existed previously. For long, people always imagine yamen (local government offices) in the Qing Dynasty as the government organs that adopted mediation as the leading means for settling civil disputes. In yamen, county magistrates were more like mediators rather than judges. In particular, in handling civil disputes, court magistrates would always play a role like kindhearted parents mediating quarrels among children in a same family, which was called "didactic conciliation" by Japanese scholar Shiga Shuzo (1921-2008). I think the existence of such a prejudice is mainly a result of influence of expressions by the Confucianists and feudal governments of the Qing Dynasty. Besides, since 1949, Chinese courts have generally adopted the approach of mediation by judges on a large scale, virtually bringing nongovernmental mediation in the past under the coverage of the government's legal system (including roles of Communist Party organs and administrative authorities). The government always says in propaganda that mediation by courts is an excellent system that has existed in China for long. Consequently, we even imagine courts (tribunals) in the Qing Dynasty as courts established since the Chinese revolution.

Results of my dedication to the research of dossiers of legal proceedings in the Qing Dynasty indicate that in legal practice, county magistrates were indeed willing to adopt the approach of extracurial community or clan mediation in accordance with the ruling ideology of the government. But once a case could not be solved through extracurial reconciliation or mediation and was instead referred to the tribunal for a trial, they would gave a ruling without hesitation in accordance with the Codes and Precedents of the Qing Dynasty. In today's words, county magistrates were actually performing their official duties in the capacity of judges rather than mediators. In reality, this historical fact is largely different from the propaganda to describe court mediation as an excellent system that has existed in China for long. I have always been trying to clarify such a misunderstanding.

If we do not consider it in connection with the role of nongovernmental mediation, we will not be able to understand such a legal system of the Qing Dynasty. The most obvious difference between the traditional Chinese legal system and the modern Western legal system perhaps lies in the large dependence of the former on the system of nongovernmental mediation. Therefore, if we wish to really understand the practice of civil law in modern China, particularly the system of civil justice in the country, we must observe and compare the system of court (tribunal) mediation and the system of nongovernmental (community) mediation as an integral whole, and start with research of the positions of the two systems in their different historical periods of time and also the relationship between them. Only by doing so, can we understand in an in-depth way what have been changeable and what have been unchangeable in the legal practice in modern China.

The status quo ante and the status quo of community mediation in China

You Chenjun: Just like what you have said, if we wish to really

understand the systems of mediation in China, it will be indispensable to study in an in-depth way both the system of court (tribunal) mediation and the system of nongovernmental (community) mediation, and only by observing and comparing the roles of the two systems in their different historical periods of time, can we spot in-depth problems existing in the systems of mediation in China. I have noticed that in the long period of 13 years from the writing of The Law, Society and Culture of the Qing Dynasty: Civil Law Expression and Practice to the writing of The Past and the Present: Exploration into the Practice of Civil Law in China, a very important job you did was to draw a table of historical evolution of the system of community mediation in China from the Qing Dynasty and the present time. So, could you make a brief and general explanation of this subject? And, how do you view the future prospects for development of the system of community mediation in China?

Philip C. C. Huang: For governance of the country, a basic national idea and approach adopted by the Qing Dynasty was to have clans or communities solve disputes in them through mediation, and the State would intervene only when clans or communities themselves were unable to solve their disputes. Therefore, the various communities under tight internal rule all developed their own mechanisms for disputes settlement: Whenever a dispute erupted, prestigious persons of the community would preside over a ceremony to solve it. After hearing and considering the points of view of both the two parties concerned, they would separately or jointly work out a scheme for compromise acceptable by both sides. In this process, national laws and the so-called "folk principles" would also be taken into account. But what mattered would mainly be a compromise meant to accommodate human feelings or relationships. Afterwards, on the basis of voluntariness of both sides, an agreement on mediation would be reached. Then, the agreement on mediation would be ceremonially affirmed with the offering an "apology", the making of oral commitment or the signing of a written agreement, or by holding a banquet attended by all, etc.

What is somewhat surprising is that under the general situation of repeatedly denying the traditional Chinese law over the past nearly 100 years, this system of mediation has basically survived in an unexpected way, though it has undergone certain evolution. For example, in rural areas across China from the 1920s to the 1940s, disputes appearing in villages were still mainly over land, debts, inheritance, family support and marriage, in basically the same categories as those appearing in the Qing Dynasty. Once a dispute occurred, prestigious persons in the village would intervene to mediate to find a solution, with the major principle or approach adoptable intended to reach a compromise on the basis of accommodation of human feelings or relationships, and with the application of laws and legal principles playing a support role.

This basic principle or approach of "traditional mediation" has shown obvious changes since 1949. In the era of collectivization, village life and interpersonal relationships in China both underwent fundamental changes, together with corresponding changes of contents of disputes. Along with basic termination of private ownership of property in China in the era of a centrally planned economy, disputes over land, debts, inheritance, division of family property, etc basically ceased out. In this era, some new forms of contradictions or disputes mainly stemmed from systemic arrangement, including the determination of workpoints (a unit indicating the quantity and quality of work performed, and the amount of payment earned in rural People's Communes), assignment of jobs, demarcation of boundaries of private plots, spousal disputes, etc. In comparison with the situation before liberation in 1949, one of the most important changes in the era of collectivization was the qualification of mediators as "cadres" (civil servants). Mediators were all "cadres" with the revolutionary Communist Party instead of prestigious persons chosen from within communities. Of course, as far as their identity is concerned, mediators were meanwhile members of their respective village communities. In this era, village disputes were mostly mediated and settled by leaders of rural Production Teams, members of village Communist Party branches (including directors in charge of women's affairs), village public security directors, chiefs of Production Brigades, Production Brigade Communist Party branch secretaries and other village-level cadres. Under the general situation of massive qualification of mediators as "cadres", the principles and approaches for mediation underwent changes accordingly. Generally speaking, the policy-related (or political) "mediation" in those years was more like "coordination". Under the general situation of a high degree of authority of highly omnipotent governance, the principles and approaches for mediation, when involving policies or laws of the State, will become more compulsory. However, in this era, village communities were more tightly ruled internally than ever before, and disputes were still settled by villages themselves normally.

In the initial period after the adoption of the policy of reform and opening up in 1978, there were further changes of contents of disputes, in comparison with those subject to community mediation before liberation, with massive increase in the number of disputes between the mother-in-law and the daughter-in-law, and also with increase in the number of disputes over family support and neighborhood relations. In this era, the principles and approaches for mediation were still those based on the combination of human relationships, principles and law "in trinity". What was different was that mediation in previous periods of time was mainly based on "human feelings" or "human relationships", namely, was intended for compromise, with law and principles playing a support role, while mediation at the present time is mainly based on application of the law and policies of the State, with consideration of human feelings or relationships and principles becoming secondary. Meanwhile, as mediators today are mainly cadres recognized and appointed by the State, they are more authoritative than traditional mediators chosen from within communities. Although mediators today are not more prestigious among villagers than their predecessors, it is obvious that they are more likely to make compulsory mediation.

All such systemic arrangements were under relatively powerful impacts in an ensuing period of time following the adoption of the policy of reform and opening up. Since the 1990s, surplus rural labor has been on a massive flow into

urban areas nationwide, leaving both their native places and farmland, which has given rise to a series of changes of contents of disputes in rural areas and also the mechanism for their settlement. Today, rural communities across China are mostly no longer the type of "face-to-face communities" under tight internal rule. Rather, they have been converted more into "rurban communities". Meanwhile, the functions of village-level governments have shrunk. What emerge in company are the rise of the role of the unofficial, nongovernmental mediation mechanism, particularly in disputes over the division of family property and disputes among relatives, and also extension of operation of the system of semi-official mediation by community cadres. In this era, the functions of courts of the State have been significantly enlarged while the laws and regulations of the State have further infiltrated into rural areas, playing greater roles in public life. The role of the mechanism community mediation has obviously shrunk. But, since the beginning of the 21st century, community mediation in China has still shown strong vigor and vitality while governance by the State has shown adherence to existing governing principles – to enable communities to handle their own disputes as much as possible.

Presently, a leading opinion held by circles of jurists considers that along with advancement of modernization, general adoption of the market principle, development of urbanization and enrichment of the population in China, rural areas across the country can only get closer and closer to the path of realizing the "rule of law" totally similar to that in place in advanced Western countries. Part of the ground for such a point of view is reduction in the number of cases of disputes referred to the system of nongovernmental mediation for settlement over recent years, and large-scale increase in the number of cases of civil proceedings. An in-depth cause for this phenomenon is the particular historical position of the Chinese legal tradition, namely a tradition that has been repeatedly separated from the realities by both leaders and legislators of the State over the past century, and that has been considered to be irrelevant to the present realities. What has appeared in company has been the development in the field of jurisprudence of a modernist ideology established on the basis of either Western or Chinese law that are in a relationship of binary opposition. On the basis of this, China can only be more and more like an advanced Western country. Of course, there are also opinions emphasizing advantages of the systems of mediation applied in China in the past. But a majority of opinions consider it to be a system limited to "face-to-face communities" in rural areas only. Along with the transition from the pattern of "face-to-face communities" to the pattern of "rurban communities" and eventually to the pattern of "communities of strangers", mediation based on the ethics of communities under tight internal rule will totally give way to Western modern and urban legal systems and cultures, while old systems of mediation will eventually be phased out like traditional Chinese laws.

Although the aforesaid opinions are different from one another, they are all unrealistic. Firstly, the so-called impression of reduction in the number of cases of civil disputes referred to nongovernmental mediation for settlement is a result of presumption from statistics from China Statistical Almanac and China Legal Almanac. Such a way of thinking is in disregard of a basic fact: The data are merely officially recorded data on mediation. Namely, they are only data on semi-official mediation performed by community cadres, with taking into consideration the large quantities of nongovernmental community or clan mediation which has reemerged over recent years, but which has never been officially recorded. In reality, official data on mediation are in serious exaggeration of the shrinkage of functions of mediation. A relatively systematic questionnaire survey on 2,970 people in 30 villages in six Chinese counties conducted in 2002 found out that in the eyes of rural residents, the old system of mediation was more effective than the new system of court mediation, and has for long been a mediation system with lower costs and higher efficiency. Secondly, the opinion that mediation could eventually be phased out is also in disregard of the great determination of Chinese leaders to maintain and develop nongovernmental mediation. We should take notice of two key official documents on nongovernmental mediation issued in 2002 – The Provisions of the Supreme People's Court for the Adjudication of Civil Cases Involving Agreements on People's Mediation (effective as of November 1, 2002) and the Provisions of the Ministry of Justice for the Work of People's Mediation (effective as of November 1, 2002. Promoted by administrative authorities of justice, the role of mechanisms for mediation has been once again on the rise. In 2006, the system of semi-official mediation by community cadres settled 4.628 million disputes that were officially recorded, which was basically equal to the 4.382 million civil cases tried by courts across China in the year. Besides, all provincial-level and city-level governments in China are apparently promoting nongovernmental mediation. Over the past few years, local governments across China, in line with the aforesaid national-level official documents, have one after another promulgated local government rules or provisions for mediation that are specific to different extents. Meanwhile, on the basis of reemergence of grassroots-level nongovernmental mediation, there is, more significantly, the rise of mediation committees at higher levels that better meet the new social realities and that cover a wider range of areas. For example, in east China's Shanghai City, new types of "mediation work rooms" have been rather universally established in mediation committees in all sub-districts, achieving good results. In view of this, though under the magatrend of development of a totally Westernized ideology, the system of semi-official or unofficial community mediation is still a key part of China's legal system in judicial practice, and is a most characteristic part of it. It is also one of the major characteristics of China's social system and legal system different those of social systems and legal systems of Western countries. Take the United States for example: The Alternative Dispute Resolution (ADR) movement in the legal system of the United States is almost half a century old, but it is far less dependent on the system of mediation than its counterpart in China. Whenever a dispute erupts, ordinary people in the United States would basically not take mediation into consideration. Namely, they do not consider mediation to be a choice for possible settlement of their disputes. Whenever there occurs a dispute in serious violation of their personal interests, people in the United States

will normally take the institution of a lawsuit with a court as the sole possible choice for its settlement. The so-called "arbitration tribunals" at most can be a kind of cheap courts, which are meant to save costs through the use of retired judges and simple substitutional sites. However, the spirit of operation of arbitration tribunals is basically the same as that of courts. They have eventually to determine who is the winner and who is the loser. What I would like to additionally say here is that there is much misunderstanding in China about the ADR as a system for disputes settlement. In comparison, a majority of people in China still basically tend to first of all consider mediation to be a priority choice for disputes settlement, and they generally expect a kind of reconciliation in the process of disputes settlement. They will file a lawsuit with the court only when they have to. This is a basic difference existing between the Chinese and American legal cultures today. It is also a best evidence of basic extension of China's traditional legal system in the broad sense. As for the future, there are the questions of whether China's legal system will really become the same as that of the United States, whether mechanisms for mediation in China will be completely phased out, and whether the average rate of legal action for every 100,000 people in China will go up by 29 times? I believe these will never happen. We should also hope that these will never happen.

Mediation by Chinese courts: An invention in the modern and contemporary ages

You Chenjun: More than ten years ago, you had a well-known academic debate with Japanese scholar Shiga Shuzo, and you briefly mentioned a point of debate above. Professor Shiga Shuzo thought that Chinese courts (tribunals) in the Qing Dynasty were conducting "didactic conciliation" rather than ruling. The foundation of his conception is the principle of combination of human relationships, principles and law "in trinity" dominating the Chinese law. In comparison, the results of your analysis of 628 cases from three counties in the Qing Dynasty indicate that yamen in the Qing Dynasty were not conducting what Professor Shiga Shuzo called "didactic conciliation". Rather than, a majority of cases in the Qing Dynasty were tried and wrapped up by yamen in accordance with law. According to your point of view, mediation by courts is therefore to a great extent an invention on the part of the contemporary judicial system of China, rather than a legacy of the Qing Dynasty. So, could you briefly make an extended explanation of this?

Philip C. C. Huang: OK. We can first of all review mediation by courts in the era of the Republic of China. In the era of the Republic of China, mediation by society itself was functioning relatively effectually. In the Republic of China, it continued to play a role very similar to that of the Qing Dynasty. Generally speaking, the government of Kuomintang (The Nationalist Party) seldom made changes to the already developed and established systems in rural communities. But as far as we know, in the development of the legal system, the trials made in those years were almost all leading to a total Westernization. In the period of 1929-1930, the Civil Code of the Republic of China was in imitation of the German Civil Code. According to the criterion of Max Weber, the latter is one of the most formalist examples of all Western legal system models. In efforts to lessen the burden on courts, the Kuomintang government once tried to apply a system of mediation by courts. On January 27, 1930, the Kuomintang government officially promulgated the Law on Civil Mediation, requiring all courts of first instance to additionally establish under them a "civil mediation office", and demanding that all civil cases must be reviewed by this office first. But in reality, both the institutional establishment and procedural rules for mediation by courts could only permit courts to make a minimum input on mediation in terms of both time and energy. Therefore, mediation by courts in the era of the Republic of China could only play a very limited role, particularly in comparison with the ensuing system of mediation in the era of Mao Zedong (1893-1976, late Chinese Communist Party leader). At a time when community or clan mediation continued to function among people and in society, the Kuomintang government basically adopted a court trial system established after the German model. I analyzed some of the cases that were settled through mediation in those years, which all indicate that the actual influence of mediation by courts was very minor. However, this is nothing strange. Legislators with the Kuomintang government actually took the formalist model of German law as the example to follow in legislation, and their trials on the establishment of a system of mediation by courts was conducted in a relatively sloppy and perfunctory way.

If we study in an in-depth way the systems of mediation in China in the Qing Dynasty, the era of the Republic of China and since 1949, we will find out that though the system of mediation in contemporary China has some links with the traditional system of mediation, the systemic framework of the two are greatly different from each other. Yamen in the Qing Dynasty almost never conducted mediation while courts in the era of Mao Zedong applied a great deal of mediation. Mediation in the Qing Dynasty was fulfilled almost totally under the auspices of unofficial or nongovernmental authority while Communist Party or government cadres took the place of nongovernmental authority in the legal system in the era of Mao Zedong, in which courts were granted very extensive functions of mediation. In the Qing Dynasty or the era of the Republic of China, where nongovernmental mediation failed, the parties concerned could decide on whether to file a lawsuit with the court (tribunal). Presently, once mediation by courts fails, unless the plaintiff withdraws the accusation, the court will almost always designate a judge to give a ruling or judgment, and these processes all belong to a same court procedure.

However, official expression by the People's Republic of China often mentions in the same breath the system of mediation in history and the system of mediation in the contemporary age. Out of imperative need of the modern nationalist ideology and the contemporary age, mediation is often declared to be something unique from China, and to be a core of the great Chinese legal traditions, which enables China's legal traditions to not only differentiate itself from modern Western legal traditions, but also unequivocally declare itself to be more advantageous than modern Western legal traditions in many respects. Indeed, there does exist similarity between the Qing Dynasty, the era of the Republic of China and the contemporary China in terms of mediation.

Namely, the system of mediation in the overall system of civil justice has always been playing an extremely important role. Yet, a fact in connection with this similarity that should not be covered up is that mediation by courts is almost totally an invention of the modern and contemporary ages. But in reality, the characteristics of mediation in contemporary China are first of all embodied through mediation by courts, which includes various powers of courts, and which also makes the difference between mediation and judgment ambiguous.

You Chenjun: Since mediation by courts is not a legacy of the Qing Dynasty, and is rather an invention of the modern and contemporary ages, then, under what historical conditions has the system of mediation – as a new type of mechanism – developed and formed? Or, in other words, how should we construe the origin of the system of mediation by courts? So, could you make a specific explanation of this?

Philip C. C. Huang: The system of mediation was extensively applied in the era of Mao Zedong, which in reality mainly stemmed from practical application of the law on divorce. In the Central Chinese Soviet Areas (established during the Second Revolutionary Civil War period (1929-1937), the Chinese Communist Party, under the general principle of freedom of marriage and equality between men and women, adopted a very radical law on divorce: Where either the husband or the wife requested a divorce, the request would be approved immediately. However, this law on divorce drew strong objection from rural residents immediately after its promulgation, because it was not in conformity with the realities in rural life in China at that time: As matrimony meant an occasion of one-off major spending, one should not be allowed to get married or break a marriage hastily. Meanwhile, active support by the rural population was essential to the survival of the Communist Party during that period. Therefore, the Chinese Communist Party tried to seek a middle course between the original radical permission and the realities of rural life. As a result, it mainly adopted a case-by-case approach. Namely, applications for divorce involving disputes would be handled in a case-by-case way. The party provided that all cases of divorce must be preceded by mediation – firstly by the local administrative authorities and secondly by a court. Only when mediation failed, could divorce be permitted. The adoption of such a system was intended to minimize contradiction between the Communist Party and the rural population as much as possible.

On the basis of this, once mediation by courts was established and systematized, it was naturally extended to other fields of civil law for universal application. In the era of Mao Zedong, cases of divorce accounted for an absolute majority of all civil cases handled by courts, and almost involved all fields of civil law.

In handling cases of divorce at that time, there was often heavy reliance on the relatively compulsory means of trying to persuade the couple in question to "reconcile with each other by mediation". Specifically, court judges would go into the midst of the local people, and conduct in-depth investigation by visiting cadres, relatives and neighbors. Then, a plan for reconciliation would be formulated with the application of ideological pressure and also pressure exerted by the "government" (judges and organizations of the local political power), relatives and neighbors, as well as stimulation of materials interests, which was intended to urge the two parties concerned to "voluntarily" accept the plan as much as possible. It was in the 1980s that there was a rise of reflection on the means of compulsory mediation. Afterwards, the means of compulsory mediation was gradually renounced. Today, the means of compulsory mediation is basically no longer applied. Yet, an ensuing system of mediation by courts, particularly non-compulsory mediation, developed on the basis of the means of compulsory mediation. Mediation by courts has still been rather extensively applied in China. In 2006, the cases settled through mediation still accounted for 45 percent of all cases solved through mediation and/or court judgment.

Comparative study of mediation in Chinese and Western concepts

You Chenjun: I remember that a Western scholar once made a statement generally meaning that for long, mediation in China has probably been a sole characteristic of China's legal system extensively studied in the West. In your new works, you also mentioned that Jerome Cohen, Stanley Lubman, Michael Palmer, Donald Clarke and many other famous scholars have conducted exclusive research of this subject. In conducting research of China's system of mediation, English-speaking Western scholars will always use the word "mediation" to call it. But it is a question whether "mediation" in the Chinese context means the same as "mediation" in a Western sense? If the two do not exactly match each other, then how can we distinguish the meaning of the word "mediation" in Chinese from that of the word "mediation" in a Western language in the context of different cultures? This question actually involves the study of what is common and what is different in legal practice in China and the West. Although you have talked about this subject earlier, could you once again particularly talk about it here now?

Philip C. C. Huang: Indeed, there is similarity between the Chinese term "mediation" and the Western term "mediation". But what is more essential is probably the difference between them. For example, as far as the era of Mao Zedong is concerned, if we only see the ideology at that time, we will think what civil courts in China were doing then were almost all activities of mediation. Such a perspective, however, not only covers up the real situation of legal practice by courts in those years, but is also in serious amplification of the meaning of the term used. Before the era of Mao Zedong, there was actually no major difference between the Chinese term "mediation" and the English term "mediation" in terms of meaning. Both meant the reaching of agreements on disputes settlement acceptable by both the two parties through mediation or intervention by a third party, and, moreover, it mainly referred to nongovernmental mediation. However, in the era of Mao Zedong, along with expansion of control by the Communist Party and the government, court mediation and administrative mediation become quite common, at a time when the role of nongovernmental mediation was shrinking rapidly. As a result, the Chinese term "mediation" included the meaning of "coordination for a settlement". Before such an evolution, there was a clear distinction between "mediation" and "coordination

for a settlement" in some parts of Liberated Areas, with the latter mainly performed by administrative authorities. Decisions adopted on the basis "coordination for a settlement" might probably be against the will of the parties concerned and might be imposed on them. In reality, mediation in the era of Mao Zedong eventually included judgment and the adoption of compulsory means, though the original term "mediation" was still in use in terms of both expression and form.

The mediation by courts in contemporary China that is the closest in meaning to the origin core sense of the Western term "mediation" is mainly the type of mediation in cases which do not involve the fault of either party, in which both parties have faults, or in which both parties have the same rights or obligations, for example, the category of cases in which both agree to divorce, and what the court needs to do is just assist them in reaching a specific agreement on divorce; cases which only involve disputes between brothers with the same rights of inheritance or with the same obligation of family support; or cases of compensation which do not involve the fault of either or in which both have faults. Namely, it means the type of compromise voluntarily reached through mediation by a third party. As long as the court determines through the conclusion of its investigation of facts that it is unable to simply attribute the fault to either party, it will need to consider how to design a solution acceptable by both parties. The outcome of this form of mediation will be more likely to be voluntarily accepted by the parties concerned than other forms of court mediation. Yet, even in such cases, the judgmental role and authority embodied by courts in preliminarily determining the nature of factual circumstances of cases should not be neglected either.

In China, the term "court mediation" just speaks for itself. In the United States, extracurial settlement not only takes place at sites other than courts, but is also excluded from the range of formal functions of judges. But in China, mediation is right a part of the formal functions of judges. Therefore, Chinese judges will have greater authority and more power in intervention. Besides, the sources of motive forces for mediation under these two models are also quite different: In the United States, the parties concerned will normally decide on whether to choose the means of extracurial settlement only after computing the amount of time and the size of costs to be spent on legal proceedings. In China, at least in disputes among individuals (different from contractual disputes among corporate legal persons that have kept increasing over recent years), the aforesaid consideration of costs is not an important factor. The referral of cases for court mediation is more often a result of active initiation by courts rather than the choice of the parties concerned. A primary factor for such initiation lies in the comprehension by judges of the nature of civil justice. Finally, in performing mediation, Chinese judges are free to exercise their formal functions to make a judgment of the facts and circumstances of the cases concerned. In comparison, in extracurial settlement, what American judges can do is just to unofficially express their personal opinions out of the formal court proceedings.

"Mediation" in the United States and a majority of other Western countries (which is also known as Alternative Dispute Resolution or ADR) is to a great extent dominated by nongovernmental organizations rather than judges. It can exist out of the judicial system, and is of no judicial nature. There is an obvious difference between such a disputes settlement model and the system of mediation in contemporary China, with the latter being dominated mainly by courts rather than nongovernmental organizations. This difference in turn gives rise to a procedural difference: When mediation is conducted in an extracurial way and at a site totally independent from the court, the records on it will normally be kept secret, and all the parties concerned will understand that such records cannot be used in ensuing legal proceedings in court (with part of the reason being to encourage the parties concerned in dispute to cooperate with each other in a franker manner). However, when mediation is at the same time part of the court action, the mediator and the judge presiding over the trial of the case concerned will have a dual status, and factual discovery in the two phases of mediation and court trial will become inseparable. So, under the Chinese model, once court mediation fails, it will always be the case that the same judge or the same group of judges will make a judgment or ruling in the case. This characteristic enables the opinion of judges to become extraordinarily weighty, which will create greater pressure on the parties concerned in dispute. Obviously, such is not the case of extrajudicial mediation in the United States and Europe.

The aforesaid different models of mediation each have their own advantages and disadvantages. Yet, it seems that there is at least one undisputed consensus: The use of conciliation in arbitration emerging in the West over recent years – as a highly feasible alternative for the pure model of legal proceedings – is relatively similar to the system of mediation by courts in China. Over recent years, the use of conciliation in arbitration has gradually become a trend in some countries and regions. Even in the United States and Europe, discussions about and trial use of conciliation in arbitration can be gradually seen. In the United States and Europe, the use of conciliation in arbitration is called "med-arb".

Mediation and modernity

You Chenjun: A Chinese scholar once expressed the opinion: "Comprehension of the system of mediation actually does not mean comprehension of a general disputes settlement mechanism. Rather, it means comprehension of the various particular problems faced by modernity in the course of its development in China." So, how do you comprehend the relationship between the system of mediation and modernity in contemporary China?

Philip C. C. Huang: Since the 1970s, the United States, in keeping with the spirit of legal realism, and in light of the existence of drawbacks of extremely frequent legal proceedings, launched the so-called Alternative Dispute Resolution movement, trying to go beyond the existing scope of court system and find other practical disputes settlement means. Taking a look at the present-day world, we can see that China's system of partially compulsory court mediation has appeared in the West in the form of "arbitration with conciliation" (med-arb), and is obviously emerging as an alternative disputes settlement model with certain potential for future extension. Since the 1990s, many countries and regions

around the world, including Australia, Canada, Croatia, Hungary, India, Japan and South Korea as well as the Hong Kong region of China, have applied such a means of mediation on a trial basis. Over recent years, the med-arb system has been applied in the United States to some extent. This system will have considerable prospects for future development in the world. Although it is impossible for the med-arb system to take the place of adjudication in legal proceedings, it could probably play a role in reducing adjudication. We can at least draw a conclusion that the system of court mediation formed in course of Chinese revolution is a system with both Chinese characteristics and modernity. It is neither totally a traditional Chinese product nor totally a product of modernity. Rather, it is a product with both traditionalism and modernity, and with elements of both Chinese and Western legal systems.

What I would like to remind everyone here is that there is much misunderstanding in China about the Alternative Dispute Resolution model of the West, and that the arbitration system and the system of "extracurial agreement" in the West is imagined as something similar to the system of mediation in China. In reality, they are different from both the system of community mediation and the system of court mediation in China. There are even scholars who imagine the system of mediation in the West as something more effective than the system of mediation in China, believing that China must follow the Western standards in this regard. As a matter of fact, the system of mediation in China, including the tradition of unofficial, nongovernmental mediation that has continued to be applicable so far, semi-official mediation by community cadres created in the era of Mao Zedong, and the tradition of formal court mediation (with the exclusion of its excessively compulsory application), is a relatively unique and relatively highly effective system. Relatively extensively recognized the public, the system of mediation in China far outdoes the system of mediation in the West. Therefore, whenever people in China are involved in a dispute, what they firstly consider is to rely on mediation for a settlement, which was and is still the case today. On the contrary, up to the present, whenever people in the West are involved in a dispute, what they first consider is basically to take a legal action. This difference is actually a basic difference between the Chinese and Western legal cultures both in the past and at the present.

Translated by Liao Zhenyun

Mediation – A Cultural Change

By Elsie Leung
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The Civil Justice Reform came into effect on the 2nd April 2009, i.e. about a fortnight ago, and is described as "the most important change in the practice of civil litigation during the working life of almost every practitioner (in Hong Kong) . One of the underlying objectives of the Civil Justice Reform is to facilitate settlement of disputes , and to this end, judges are given case management tools at their disposal including, inter alia, identifying and narrowing issues, encouraging the parties to use an alternative dispute resolution procedure and facilitating the use of such procedure . The Judiciary has issued a Practice Direction No. 31 on Mediation, but has postponed its commencement until I January 2010 to enable practitioners more time to become acquainted with the mediation process.

Development of Mediation in Hong Kong

In mid 1975, when the Hong Kong Federation of Women Lawyers (then known as FIDA, H.K.) advocated the establishment of the Family Court, we had in mind not only a specialty court dealing exclusively with family matters, but the emphasis was also on the supporting services like mediation and counseling service and collation & analysis of statistics, etc. to be attached to the Court. To date, this has not yet been completely achieved. In those days, almost the only mode of alternative dispute resolution was arbitration, and mediation, counseling and adjudication etc. in their professional sense were hardly heard of. In the beginning, mediation was used in the settlement of construction and family disputes, as by nature, these disputes are more suitable for mediation.

In 1988, the Hong Kong Catholic Marriage Advisory Council started the Marriage Mediation Counseling Project and released its Evaluation Research Report in October 1991. This was followed by a proposal by the Hong Kong Council of Social Service for the setting up of a Court Conciliation Co-ordinator at the Family Court. For several years after its establishment, there was only a separate list for matrimonial matters in the Divorce Jurisdiction of the District Court. Its venue was in different court rooms and presided by different judges from time to time. It was only in 1998 that specialist judges were assigned to sit in the Family Court and a section of the District Court is now dedicated to the Family Court.

The desirability of settling family disputes by mediation was urged upon by the Hong Kong Law Reform Committee and the Judiciary on divers occasions. The Judiciary considered in 1996 that it was premature to set up a court-attached mediation scheme because a reasonable pool of professionally qualified mediators was not yet available in Hong Kong.

In the first two decades after mediation was introduced into Hong Kong, most of the professional mediators were social workers or