

The position of mediation in contemporary Chinese civil justice

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APPENDIX VII:

English Summary

The aim of this work is to explore key procedural issues of mediation in China's civil justice system and provide concrete recommendations for reform. While there are a number of articles and books on the subject, a focused and comprehensive procedural study in the English language is lacking. The intention of the dissertation is therefore to fill a gap in the international literature. The fundamental question that needs to be answered is whether mediation will remain a policy tool for courts in China. This question is particularly relevant given the history of courts using mediation to further the agenda of the ruling elite during Wang Shengjun's tenure as president of the Supreme People's Court (SPC) (March 2008 – March 2013). This question is important not only as a procedural topic, but also from a socio-legal standpoint. From a procedural perspective, mediation occupies a unique position in any civil justice system in that it (if appropriately deployed) provides an alternative to litigation while preserving the parties' right of access to court. The procedural nature and function of mediation changes if policy is allowed to dictate the mediation process, especially when such policy contravenes the law. This is exactly what happened in China under Wang Shengjun's presidency. Mediation, in particular the unique procedure of judicial conciliation, became a policy tool to further the ruling objective of 'maintaining social harmony', at times even at the expense of procedural justice. This work tracks the influence of Wang's policies in shaping China's mediation regime and the extent to which Wang's legacy affected the construction of a modern civil justice system in China in the wake of current judicial reforms. From a socio-legal perspective, a broader issue needs to be considered: is the ruling elite in China still using courts as a medium to secure its dominance, rather than respecting the judicial process as a uniquely important domain in its constitutional matrix that is best left to do its business alone without external interference. This question is particularly relevant to an international audience that seeks to understand what China is doing in its new wave of judicial reform that allegedly aims to construct 'the rule by law'. The proceduralist perspective in this work is supplemented by an empirical enquiry covering 24 different courts in China. The research gives attention not only to the theoretical or 'black-letter law' aspects of procedure, but also addresses pragmatic issues that the Chinese courts are facing in the context of civil mediation. The ultimate objective is to provide concrete solutions to existing problems that can bring tangible and meaningful change to the practice of civil litigation in China.

Mediation plays a critical role in the development of any civil justice system. When used well as a true alternative to litigation, mediation could alleviate the zero-sum effect of litigation and introduce flexibility in the disputes resolution process. However, the positive effects of mediation could only manifest if the process is protected in ways that allow parties to truly be able to choose what is best in their interests and explore options free from interference from anyone else. The Chinese legal and political culture, coupled with a systemic distortion of the function of mediation during Wang Shengjun's period, made it very difficult to develop an authentic mediation system that places party autonomy and other core principles (such as confidentiality) at the heart of the process. Judges generally view mediation as a

convenient way to manage the court dockets. Judicial conciliation is still preferred by many judges given the inherent advantage of a conciliated settlement from a career perspective (i.e. a settlement cannot be appealed and a high settlement rate is favourable to the evaluation of the judge). According to the empirical findings, the goal of '*Anjie shiliao*' (i.e. to resolve disputes in such a way that 'the case is closed and the dispute is [truly] resolved') is still considered important in Chinese civil justice, which means that it would be difficult to separate mediation (in whatever form) from the prevailing policies of the state that place great premium on any measures that could help maintain social order. An overhaul of the mediation system in China, therefore, requires an institutional separation of the judiciary from the rest of the state machinery in the realm of civil procedure in a way that the judiciary is given the simple task of delivering justice unadulterated by interventionist state policies and populist trends. Only by doing that could there be 'normalization' of mediation, i.e. mediation simply playing an ADR function and nothing more.

The dissertation is divided into nine chapters. Chapter 1, the introductory chapter, laid the foundation of the dissertation. It outlines the research question, the methodology and key concepts in contemporary Chinese civil justice. Given the main target audience of the dissertation is European, the chapter identifies and explains the fundamental conceptual differences between contemporary Chinese mediation and mediation processes in Europe.

Chapter 2 explores the legal history of China in relation to civil disputes resolution, from the imperial periods to the early days of the People's Republic of China. The discussion on contemporary Chinese mediation is placed into the appropriate context when one understands that conciliatory processes in China today still operate to a certain extent under the shadow of China's historical legal culture.

Chapter 3 reviews the practice of people's mediation in China, the policy of 'Grand Mediation' and the nexus between out-of-court mediation and court proceedings. The policy that pushed for the settling of disputes out-of-court gives rise to concerns that courts are not docketing cases as they should be. It is not infrequent that parties experience delay when the court is considering whether or not the case should be docketed for reasons outside the scope of the relevant procedural law.

Chapter 4 seeks to explore the impact of overusing judicial conciliation on access to justice during Wang's period. As much as the leaders of the SPC today are aware of the need to strengthen the courts role in declaring legal norms and enforcing private proprietary rights, lower courts are likely to continue to use judicial conciliation for institutional or strategic purposes.

Chapter 5 presents an empirical study on the practice of judicial conciliation. The gap between law and practice, particularly in the context of civil litigation, is especially wide in China. It is therefore important to capture the actual dynamics of the law in a systematic way. Empirical work on Chinese courts written for an international audience emerged not so long ago. Ethnographic research helped reveal what really happens in Chinese courtrooms. A number of these studies helped dispel certain generalizations or misconceptions arising from official representation of the judicial process. The value of qualitative empirical work is obvious: the judiciary tends to be

highly secretive when it comes to sharing what really happens in the courtrooms and qualitative empirical research helps pierce the mystical veil of Chinese courts.

Chapter 6 discusses the three mediation options for resolving commercial disputes in China from the perspective of foreign enterprises. These mediation options are court mediation, mediation conducted in the course of arbitration proceedings (commonly known as ‘med-arb’), and private mediation through professional third-party mediation institutions (also known as institutional commercial mediation).

Chapter 7 discusses the fundamental tenets of contemporary Chinese civil justice. Contrary to the modern emphasis on procedural justice, the Chinese judiciary focuses on substantive justice while deliberately downplaying the importance of procedural formalism. A key guiding principle in Chinese civil adjudication is that it is the duty of the judge to find the ‘material truth’ in every case. The fact-finding process is still in practice dominated by judges despite efforts in civil procedural rule-making to entrust parties with greater fact-finding responsibilities.

Chapter 8, the last substantive chapter, surveys the principles underlying the concept of ‘trial management’ by examining in detail the operation of the ‘case quality evaluation’ system. ‘Trial management’ is a mass case-processing system designed predominantly to alleviate social discontent in line with the political goal of maintaining public order and social stability. With this backdrop in mind, it is not difficult to understand the judiciary’s tolerance of abusive practices in mediation so long as such practices produce positive ‘social effect’.

The conclusion of the dissertation, in Chapter 9, highlights how China sees itself as ‘exceptional’ in the administration of civil justice and the areas of tension in the management of the country’s civil disputes resolution processes.

One cannot change the culture of litigation overnight. Old habits of abusing the judge’s position in judicial conciliation are part and parcel of the entrenched predominance of the bench in civil litigation, something that judges are unlikely to be willing to part with as a matter of self-interest. Despite efforts of the SPC to eradicate abusive mediatory practices, pragmatism dictates that the majority of Chinese judges are likely to passively resist any top-down direction that takes away their discretion to use mediation as their tactical tool to manage caseloads and meet institutional goals.

The development of China’s civil justice system during Wang’s period was not a historical coincidence. Its populist trajectory, social engineering objective and policy-driven nature are rooted in the country’s legal history. No matter how much the current SPC leadership wanted to change the outlook of the judicial process, the ‘innateness’ of the concept of *Anjie shiliao* in the DNA of Chinese judges suggest that reforming China’s civil justice system takes much more than simply changing its rules of procedure and management structure. Ultimately, the fundamental question is whether the Chinese ruling elites are willing to take the courageous step of granting the necessary autonomy to the courts so that the administration of justice is truly separated from the administration. Courts function best when they are left alone. This is why judges occupy a unique position in a polity, a position that allows them to enforce the legal rules and norms without the usual political and bureaucratic dynamics of a regular state organ.