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# The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?

Kevin C. Clark\*

## INTRODUCTION

When Chief Justice Warren Burger made his famous call to action in 1982, he put all legal professionals in America on notice that they had to find a better way to resolve disputes and relieve the courts from the overwhelming burden of cases.<sup>1</sup> From this speech, many trace the rapid rise, development and preference of alternative dispute resolution (ADR) programs in America. Of the various ADR processes available to the disputant seeking ADR, mediation has arguably become the “process choice of today” because “it is a very dynamic, user-friendly process” with a high success rate.<sup>2</sup> Despite its recent successes, however, mediation is not a modern creation. It has been used for centuries in places all around the world.<sup>3</sup> One of these places is China.

This article introduces the reader to the philosophical underpinnings of the Chinese legal system as it relates to mediation and the general workings of the Chinese mediation model. It is the author’s thesis that as western nations enthusiastically urge China to adopt western style adjudicative systems and the rule of law<sup>4</sup> in order to facilitate Chinese participation in the global

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1. See Chief Justice Warren E. Burger, *Isn't There a Better Way?: Annual Report on the State of the Judiciary*, Remarks at the Mid-Year Meeting of the American Bar Association (Jan. 24, 1982), in 68 A.B.A.J. 274 (1982).

2. Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 312-13 (1996).

3. Cao Pei, *The Origins of Mediation in Traditional China*, 54 DISP. RESOL. J. 32 (1999) Mediation has been used in China for 4,000 years. Pei recites a story of an ancient Chinese King who, in order to settle disputes, lived and worked amongst his people. Only by witnessing their lives could the King understand their problems and help them solve their disputes. *Id.*; see generally Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245 (1991) Professor Clarke’s article provides a very good general overview of Chinese Mediation systems, though there have been some changes to the Chinese legal system since publication. Nonetheless, his examination of Chinese legal institutions with western legal terms is very helpful.

4. “Rule of law” is best explained by the following excerpt:

Legal rules, standards or principles must be capable of guiding people in the conduct of

economy, those same nations are missing the opportunity to learn about one of the world's most successful mediation systems.<sup>5</sup> Essentially, as the West tells China, "You can learn from the way we operate," the West misses that it can learn from the way China operates. The end result of this study is a wide-ranging list of lessons that American mediators can learn from China.

## I. THE PHILOSOPHICAL UNDERPINNINGS OF CHINESE LEGAL THOUGHT: MEDIATION ROOTS IN LEGALISM, CONFUCIANISM, AND MAOISM.

Modern Chinese legal thought derives its roots from three separate sources: Legalism, Confucianism, and Maoism. Only through an examination of these sources, can one truly understand the Chinese legal system.

### A. Legalism

Legalist thought traces its roots to ancient China, and was the governing philosophy during the Qin Dynasty (221-07 B.C.).<sup>6</sup> Its principal proponents

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their affairs; the law should, for the most part, actually guide people; the law should be stable; the law should be the supreme legal authority; the courts should be able to do their work impartially and without direct interference from the political system.

STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 34 (1999); *relying on* Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 8, 9 (1996); LAWRENCE M. FRIEDMAN, *The Rule of Law, Modernization, and the Judiciary*, Lectures prepared for delivery in China.

"Blackstone defines law as a rule of action applied indiscriminately to all kinds of actions. According to John Rawls, rule of law is manifested in formal justice, or the regular and impartial administration of public rules." Margaret K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM. L. & POL'Y J. 581, 582-83 (1999) (quoting THE SOVEREIGNTY OF LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 27 (Garth Jones ed., 1973) and JOHN RAWLS, A THEORY OF JUSTICE 235 (1<sup>st</sup> ed. 5th. prtg. 1973)).

See generally Richard P. Appelbaum, *The Future of Law in a Global Economy*, 7, n. 2 SOC. & LEGAL STUDIES 171 (1998). Professor Appelbaum examines in depth the convergence of "global law" and the Asian legal systems, ultimately arguing that U.S. legal practices are incapable of dominating China and Asia because the United States and European global dominance may be on the decline due to emerging Asiatic power.

5. Lubman, *supra* note 4, at 34-35. Adherence to the rule of law is a prerequisite for participation in the World Trade Organization. According to a recent newspaper article, in the 1980s and the 1990s Chinese mediators successfully mediated "130 million civil disputes, prevented 2.86 million disputes from becoming acute, stopped more than 1.5 million suicides provoked by civil disputes, and halted 1.3 million civil quarrels from flaring into criminal cases." Shao Zongwei, *Mediators Face New Challenges*, CHINA DAILY, May 5, 1999, at <http://www.chinadaily.com.cn/cndydb/1999/05/d2-2just.e28.html>.

6. Robb M. LaKritz, Comment, *Taming a 5,000 Year Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 245 (1997).

were Lord Shang and Han Fei Tzu.<sup>7</sup> Their followers believed in heavy reliance upon penal law, using the “imposition of heavy punishments as the main instrument” of governing the people.<sup>8</sup> In order to carry out this goal, Legalist rulers instituted a sophisticated and intricate system of ministers and officials.<sup>9</sup> Despite this clear delegation of power and administration, subordinate officials were expected to act in accordance with the prerogatives of the ruler and in accordance with the law.<sup>10</sup>

The major tenet of the Legalist philosophy was the strict adherence to the laws separated from moral considerations.<sup>11</sup> Even small crimes and offenses were heavily punished in the Legalistic system.<sup>12</sup> To ensure that all members of society followed the law, the law was publicized, and people were held responsible for legal violations.<sup>13</sup> Legalists believed that if subjects were aware of the severe punishment that awaited their improper acts, those subjects would be deterred from acting improperly.<sup>14</sup> Most importantly, everyone under the law, except the ruler, was treated equally and received the same harsh punishments irrespective of social status.<sup>15</sup>

Legalism had some of the same characteristics as modern western law.<sup>16</sup> With its notions of reward and punishment, law under the Legalists produced social harmony by guaranteeing equality.<sup>17</sup> From the top of the social structure to the bottom, Legalism demanded societal submissiveness and in return produced good government for the people.<sup>18</sup> Unlike western law, however, Legalist structures also shared many features with totalitarianism.<sup>19</sup> A combination of the harshness of Legalist rule and the inability of officials to keep

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7. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 4 (1996).

8. *Id.*

9. *Id.* at 4-5.

10. *Id.*

11. *Id.*

12. MACCORMACK, *supra* note 7, at 4.

13. LaKritz, *supra* note 6, at 245.

14. MACCORMACK, *supra* note 7, at 4.

15. *Id.* at 5. This appears to have been the downfall of Legalism, for the ruler Lord Shang punished his heir apparent so severely, that when his heir apparent came to throne, Legalism was rejected. *Id.*

16. *See* LaKritz, *supra* note 6, at 245.

17. *Id.* Equality was basically guaranteed by applying the law equally and treating people equally.

18. *Id.*

19. *Id.*

track of all of the laws passed led to the downfall of Legalism as the governing law in China.<sup>20</sup>

In the end, China wholeheartedly rejected Legalist rule and embraced a non-legal system of governance, a choice that distinguishes Chinese legal development from Western legal development.<sup>21</sup> Two points about this rejection are particularly germane to this discussion: 1) the non-reliance upon legal institutions to solve problems and 2) the desire to seek local solutions, irrespective of unequal outcomes, instead of national solutions where equality was guaranteed. The counter response to Legalism was Confucianism.

## B. Confucianism

Confucian legal thought derives its name and roots from Confucius, a philosopher and social critic who lived in 6<sup>th</sup> century B.C. China.<sup>22</sup> Though Confucianism took a while to take hold in China proper, and went through certain changes as it developed, Confucian thought remains essentially the same today and was the official orthodox doctrine of the state from 206 B.C. until 1911.<sup>23</sup>

Confucian thought emphasized “teaching and moral guidance rather than penal law as instruments for the government of the people.”<sup>24</sup> According to

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20. See Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 384-85 (1987); see also MACCORMACK, *supra* note 7, at 6.

21. See Joseph W. Dellapenna, *The Lesson of the Triple Twisted Pine: Plum Blossoms on Mountain Peaks and the Future of the Rule of Law in Hong Kong*, 30 VAND. J. TRANSNAT'L L. 637, 645 (1997).

22. MACCORMACK, *supra* note 7, at 6. There were three principal proponents of Confucianism: Confucius, Mencius, and Hsun Tzu. *Id.* After Confucius' writings were translated and disseminated to the West, some scholars compared his influence and stature to Socrates, Jesus, Muhammad, Jefferson, and Gandhi. T.R. REID, CONFUCIUS LIVES NEXT DOOR: WHAT LIVING IN THE EAST TEACHES US ABOUT LIVING IN THE WEST, 91 (2000).

23. MACCORMACK, *supra* note 7, at 7. Most Chinese today consider themselves Han, as a result of the Han Dynasty 202 B.C. to 220 A.D., thus Han China and its Confucian rulers are considered the origination of modern China. See CHINA'S IMPERIAL PAST: AN INTRODUCTION OF CHINESE HISTORY AND CULTURE 122-23 (1975).

24. MACCORMACK, *supra* note 7, at 6-7. MacCormack notes Hsun Tzu was more apt to accept a greater role for law in comparison to Confucius and Mencius. See *id.* “The strong points of [Asian] civilization lie in diligence, emphasis on education, and a philosophy of life that stresses self-improvement and self-reliance.” REID, *supra* note 23, at 17. Confucius' goal in life is described as:

wanting to take his world back to the days when China was a stable, civil, unified, and virtuous community, where men and states did the right thing because they realized that proper conduct would produce the best results for the society as a whole, and thus, for the individual members of society as well.

*Id.* at 101.

this line of thought, "only through teaching could a proper sense of virtuous conduct be inculcated in the people."<sup>25</sup> Penal law, though a necessary component of society, should "be used to supplement and reinforce the lessons to be obtained from the teachings and guidance furnished by the ruler and his officials."<sup>26</sup> Therefore, moral laws and moral teaching were more important than penal laws and punishments.<sup>27</sup> It was more important to act the right way, then to be punished for acting the wrong way.

A primary element of Confucian moral teachings was the importance of relationships.<sup>28</sup> More favorable than asserting personal rights was yielding or compromising to preserve social harmony and personal relationships.<sup>29</sup> The most important of these preferred relationships was the family.<sup>30</sup> In these family relationships, a child was subordinate to a parent, a younger child subordinate to an older child, and a wife subordinate to her husband.<sup>31</sup> Concepts such as filial piety and respect for your elders defined the hierarchy of society.<sup>32</sup>

Another important component of Confucian moral teachings was the extreme disapproval of legal actions.<sup>33</sup> An ancient Chinese proverb aptly sums up the view of lawsuits: "It is better to die of starvation than to become a

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25. MACCORMACK, *supra* note 7, at 7.

26. *Id.*

27. *Id.*

28. *Id.*

29. See Utter, *supra* note 20, at 384-85. The Chinese art of yielding is known as *jang*. *Id.* According to Confucius, one should yield in order to avoid friction. *Id.*

30. Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN PAC. L & POL'Y J.* 13, 20-23 (2000). In China, the "family, not the individual constituted the unit of the social and political community." *Id.* "Once two people marry in Asian societies, they are family. And family is such a powerful concept that Asian couples are much more likely to stay married than couples in the Western Democracies." REID, *supra*, note 22, at 10.

31. MACCORMACK, *supra* note 7, at 10. "If marriage is deemed to involve fundamental responsibilities, parenthood is considered even more important. In East Asian countries, virtually every child is raised in a family with two parents; grandparents, aunts and uncles, and other relatives are frequently living in the same home." REID, *supra* note 22, at 12.

32. MACCORMACK, *supra* note 7, at 10. It is also important to note the "Three Bonds" of society, which were the "moral and political thought" basis of all classes of people in China. *Id.* at 8. These three bonds were between the ruler and his subjects, the father and his son, and the older brother and his younger brother. *Id.* at 7-8. These bonds represented the most important relationships of society, and were thus preserved and protected. *Id.*

33. See Shin-yi Peng, *supra* note 30, at 25. Litigation was seen as a disgraceful and humiliating undertaking. *Id.*

thief; it is better to be vexed to death than to bring a lawsuit.”<sup>34</sup> When someone engaged in litigation, it would often lead to “years of embittered relations between disputants and their respective families, with disputes frequently expanding to involve clans, villages or guilds.”<sup>35</sup> In order to avoid disrespecting one’s family and disrupting the social harmony, the people of China had to find a better way of solving disputes. The method that became preferred was mediation.<sup>36</sup>

Mediation under the Confucian-based system of government was quite localized and relied heavily upon family units.<sup>37</sup> If a dispute arose, family units or clan units would attempt to reconcile the parties through peer pressure and an assertive reminder of the traditional Confucian values.<sup>38</sup> Although a disputant could resort to the courts to settle a dispute, the undertaking of litigation itself “constituted a public admission of some personal failing and required the revelation of some private problems to unknown third parties” such as a local magistrate or magistrative assistant.<sup>39</sup> Thus, in order to avoid friction and confrontation, and in order to save relationships, parties generally agreed to a mediated outcome. While these outcomes could be wholly inconsistent with each other and were often reached arbitrarily, they preserved relationships and ostensibly eliminated pressure on the government to provide legal institutions.<sup>40</sup> The typical result of a resolved dispute involved the party determined to be in the wrong making a gracious overture to the person or group wronged.<sup>41</sup> Such overtures might have included a feast for the commu-

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34. Utter, *supra* note 20, at 383.

35. *Id.* at 386.

36. See Shin-yi Peng, *supra* note 30, at 25. “Village elders, neighborhood organizations, or local peacemakers” traditionally mediated disputes. *Id.* It is important to note at the outset that Chinese mediation is distinctly different than typical western styles of mediation. Utter, *supra* note 21, at 385-87. Traditional Chinese mediation techniques often included peer pressure to ensure participant’s compliance. *Id.*

37. See Cao Pei, *supra* note 3, at 34-35.

38. See Utter, *supra* note 20, at 386. “Since at least the third century B.C., the Chinese used the pao-chia mutual security system, under which localities were divided into small and smaller groups, whose members were responsible for each other’s conduct and tax payment.” *Id.* These groups also performed dispute resolution. A secondary effect of mediation, which will figure prominently later in the paper, was that mediation was used to further disseminate and remind the people of their Confucian roots and values. *Id.* at 387. Not only did Confucianism encourage the resolution of disputes, it further reminded the disputants and their families that disputes were disfavored. See *id.*

39. *Id.* at 385.

40. *Id.* at 386-87.

41. *Id.* at 386. This is not to say that the mediator adjudged one party or the other, but rather through self-criticism and yielding, one or both parties could correct the conduct that caused the problem. *Id.*; see also Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and The People’s Republic of China*, 10 TEMP. INT’L & COMP. L. J.

nity, or some other event whereby the social fabric of the community was restored to its pre-dispute state.<sup>42</sup>

A typical Confucian type mediation is seen in the following example:

A peasant sued his aunt for beating him after he had not lent her any money. After checking the plaintiff's very slight wound, Zifan [the mediator] exhorted him: 'As you are so poor and your aunt still needs to borrow from you, she must be poorer than you. If both of you were involved in the lawsuit, you would have to pay a lot of money, to wait a long time in the town, and miss your farming season. Why is it necessary to destroy both of your lives just for a short burst of anger? Then he gave the plaintiff some of his own daily money for his wound and advised him to go home. Dissolving into tears, the peasant withdrew his lawsuit and left.<sup>43</sup>

When China entered the twentieth century, extra-judicial mediation had become the preferred form of dispute resolution in China.<sup>44</sup> Confucian tenets were mostly responsible for this, but other legal currents also played a role.<sup>45</sup>

### C. *Maoism*

Maoist legal thought derives its name from Mao Zedong, the Marxist/Leninist leader who united China in 1949 after a half-century of internal conflict and strife. Though Maoist legal thought is essentially Communist in origin, Mao was flexible in its application to China.<sup>46</sup> Thus, despite the fact that communism was a new system of governance for China, it essentially brought back many elements seen in previous systems of governance.<sup>47</sup>

The major element of Maoist legal thought was adherence to the mass line.<sup>48</sup> It was critically important for the Maoists to enlist the participation of

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313, 315 (1996).

42. See Utter, *supra* note 20, at 386.

43. Pei, *supra* note 3, at 33.

44. See Utter, *supra* note 20, at 386.

45. *Id.*; see generally LaKritz, *supra* note 6.

46. See LUBMAN, *supra* note 4, at 41-42. Chinese communism could not rely on the strict interpretations of the proletariat and the bourgeois, because the Chinese social structure at the time contained much more of the former and few of the latter. Rather, Chinese Communist class categorization took into account economic status and degree of affiliation with the former Nationalist government. *Id.*

47. See Perkovich, *supra* note 41, at 318. Maoism has elements of Confucianism and Legalism.

48. See LUBMAN, *supra* note 3, at 42-43. "The Maoist approach to administration relied on the celebrated 'mass line,' a term denoting various techniques-propaganda, discussion, persuasion, and exhortation-that the Party used to measure and shape popular support for Party policies. . . ."



the masses in the execution of governmental policies.<sup>49</sup> The most important method utilized in this approach was the use of persuasion in non-bureaucratic functions.<sup>50</sup> Persons within the upper echelon of the Communist party and persons who supported the Party led this implementation and inculcation of Maoist thought.<sup>51</sup> Through mass demonstrations that appealed to the people's emotions, rather than their reasoned thought, and by punishing those who did not participate, the Party was able to establish control over social thought.<sup>52</sup>

With the establishment of social control came reform in all areas, including the legal sphere. A legal system was established that resembled that of the Union of Soviet Socialist Republics.<sup>53</sup> As a result of these reforms, mediation became required in the resolution of civil disputes and some criminal cases.<sup>54</sup> Since Maoism was government by the people, mediation became an "instrument for protecting the democratic interests of the great masses of people."<sup>55</sup> Maoist mediation, however, was not mediation as we currently know it.<sup>56</sup> Rather, Maoist mediation was grounded in the principles, policies and goals of the Chinese Communist Party.<sup>57</sup> Party activists prominently carried out mediations, and they equally strove to solve disputes and to gain the support of the masses.<sup>58</sup> Mediators were supposed to "bring people around to a correct attitude by developing disputants' positive factors."<sup>59</sup>

An excellent example of a typical Maoist mediation is seen in the excerpted example of Aunty Wu, a Model Mediation Committee Member:

If mediation isn't successful once, then it is carried out a second, and a third time, with the aim of continuing right up until the question is decided. Once, while Aunty Wu was walking along the street, she heard a child being beaten and scolded in a house. She went immediately to the neighboring houses of the masses, inquired, and learned that it was Li Guangyi's wife, Li Ping, scolding and beating the child of Li's former wife. She also learned that Li Ping often mistreated the child this way. After she understood, she went to

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*Id.* at 42.

49. *Id.*

50. *Id.*

51. *Id.* at 43.

52. See LUBMAN, *supra* note 4, at 42-43.

53. Perkovich, *supra* note 41, at 317-18. The newly implemented Maoist legal system combined elements of Leninism, Bolshevism, and fa (legalism) punishments. *Id.* at n.56.

54. LUBMAN, *supra* note 4, at 43.

55. *Id.*

56. *Id.* at 44. Maoist mediation techniques often included intense peer pressure. *Id.*

57. *Id.*

58. LUBMAN, *supra* note 4, at 44. Maoist mediators were encouraged to participate in mediations, and also further encourage the masses to participate in mediation. *Id.* Thus, mediation was as much about adhering to the party line as it was about solving disputes. See *id.*

59. *Id.*

Li's house to carry out education and urge them to stop. At the time, Li Ping mouthed full assent, but afterward she still didn't reform. With the help of the masses, Aunt Wu went repeatedly to the house to educate and advise, and carry out criticism of the woman's treatment of the child. Finally, they caused Li Ping to repent and thoroughly correct her error, and now she treats the child well. Everyone says Aunt Wu is certainly good at handling these matters, but she says 'If I didn't depend on everyone, nothing could be solved.'<sup>60</sup>

Mediation was officially codified into the Maoist legal institution with the first Five-Year Plan.<sup>61</sup> In 1954, under this plan, regulations on a nationwide network of people's mediation committees were announced.<sup>62</sup> These newly codified regulations directed mediation committees to "make timely settlement of civil disputes, strengthen education of the people on patriotism and observance of the law, and create unity among the people in order to benefit the people's efforts for production and national construction."<sup>63</sup> Mediation committees consisted of anywhere between three and eleven members and were established in several areas in cities and in the townships of the countryside.<sup>64</sup> From 1954 to 1966, mediation committees worked in all areas of the country toward their legislative goals and provided the organizational means to settle disputes.<sup>65</sup> In 1966, however, a radical shift occurred. That year, the Cultural Revolution took hold in China. Mediation committees, along with several other organizations of the state, ceased to operate during this period of chaos and crisis.<sup>66</sup>

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60. *Id.* at 40.

61. *Id.* at 48. After Mao came to power and cemented his rule, he began to promulgate Five-Year Plans to completely change Chinese society. For a good explanation of Maoist rule, see generally HARRISON E. SALISBURY, *THE NEW EMPERORS. CHINA IN THE ERA OF MAO AND DENG* (1992).

62. LUBMAN, *supra* note 4, at 49. Though these regulations came out of the First Five-Year Plan, they were announced nearly a year after the Plan had gone into affect. *Id.* at 48-49.

63. *Id.* at 49(quoting the 2<sup>nd</sup> All China Judiciary Conference).

64. *Id.*

65. *Id.* It is important to note that as the mediation committees were settling disputes and promoting harmony amongst the masses, this calming effect undoubtedly contributed to the solidification of Maoist Rule. By keeping the public happy and relatively dispute free, Mao and his state apparatus were making inroads to total societal control.

66. LUBMAN, *supra* note 4, at 218. Mediation committees disappeared or were suspended during the great period of social unrest that rocked China from 1966-1976. Known as the Cultural Revolution, this period marked Mao's last attempt to revolutionize society. He accomplished this by indirectly motivating gangs of youths, who then targeted members in society who were not exhibiting correct Maoist attitudes. The whole period is one of the darkest times in modern Chinese history, and finally came to a close with the death of Mao and the indictment and trial

The traditional elements of Chinese mediation, discussed earlier, continued to exist under the Maoist mediation committees.<sup>67</sup> Parties were encouraged to yield and compromise, and the harmony of the family was stressed as a foundation of daily life.<sup>68</sup> Thus, mediators continued to emphasize some of the traditional values that have guided and governed China since the time of Confucius.<sup>69</sup> This is not to say that Maoist mediation and traditional Chinese mediation under Confucian values were identical, but they did have several similarities; such as the lack of protection for individual rights, education of the public through mediation, and the combination of the judicial and administrative arms of government thus making mediation the preferred choice for dispute resolution.<sup>70</sup> The Maoist system, however, differed by incorporating mediators into the government apparatus and by promoting Maoist ideology over Confucian values.<sup>71</sup> Ultimately, though, Maoism incorporated many of the traditional elements of Chinese dispute resolution, elements that traced back to a time that Maoists vehemently opposed.<sup>72</sup>

#### D. *Legalism, Confucianism and Maoism Summed Up*

The sum of these forces and their effect on Chinese legal thought is conclusive. Historically, China has disavowed the lawsuit and legal remedies, and has instead emphasized mediation and moral edicts. Though mediation has

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of the Gang of Four. An excellent discussion of the Cultural Revolution is found in HARRISON E. SALISBURY, *THE NEW EMPERORS: CHINA IN THE ERA OF MAO AND DENG* (1992). The resumption of mediation committees occurred in the modern era, and will be discussed in the next section.

67. *Id.* at 64.

68. *Id.*

69. See Lubman, *supra* note 4, at 64.

70. See *id.* at 64-66. In both traditional China and Maoist China, one organization or one official and his office often carried out the judicial and the administrative functions. See *id.* An appropriate analogy to western legal systems would be a combination of the local courts and the city council or mayor.

71. See *id.* at 67-69. Maoist mediators deviated from the Confucian tradition of yielding, for this conflicted with the struggle and revolution elements of Maoist thought. *Id.* Instead, the Maoists "sought to repress any personal values and allegiances inconsistent with the individuals' obligations to society." *Id.* at 69.

72. LUBMAN, *supra* note 4, at 69. Despite Maoist efforts to change Chinese society, the most traditional elements of Chinese society remain strong to this day. See Henry Chu, *In China, 7 Brides for 14 Brothers*, L.A. TIMES, Feb. 14, 2001, at A1. For example, in 1979 the Chinese government implemented rules designed to control population growth. *Id.* These rules mandated that married couples were not allowed to have more than one child. *Id.* Despite this, traditional values, such as the desire to get married and have a family, remain exceedingly strong even though there are less mates available. *Id.* Thus, the Chinese government's attempt at limiting the traditional Chinese family have proved largely unsuccessful, despite severe restrictions and harsh punishments. See *id.*

been used to convey differing messages throughout history, the fact remains that mediation has been used consistently. It has been a staple of Chinese society for the last two thousand years. The next section will focus on how mediation is used today.

## II. THE GENERAL WORKINGS OF CHINESE MEDIATION SYSTEMS

During the last twenty years, China has undergone tremendous changes in all areas of society. With the ascension of Deng Xiaoping to Communist Party Secretary and President in the late 1970s, China began a series of economic reforms that have transformed the lives of hundreds of millions of Chinese.<sup>73</sup> Naturally, these reforms have affected mediation in China. Before discussing societal reformation and mediation, some general facts about Chinese mediation are necessary.

According to the Chinese government Chinese mediators have mediated approximately 130 million civil cases over the past two decades.<sup>74</sup> This number of cases is over 5 times the number handled by the courts during the same period.<sup>75</sup> Such a disparity is possible because there are nearly 10 million mediators in China, while there are only approximately 110,000 lawyers.<sup>76</sup>

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73. This paper is not a forum for discussion of the economic reforms that have changed China over the last twenty years, but a general understanding is necessary. These reforms have created special economic zones on the eastern coast, which in turn have transformed these areas into economic paradises. Areas in western China, where the infrastructure is insufficient to support growth and development have been left behind. This has created a floating work force of approximately 100 million workers, who have gone to the cities seeking work. These workers often sleep in train stations at night, and do not have the permanent connection to the cities such as the pre-reform workers. *See generally* DOROTHY J. SALINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET* (1999). For an excellent discussion on modern American perceptions of China, *see* THOMAS LASZLO DOROGI, *TAINTED PERCEPTIONS: LIBERAL-DEMOCRACY AND AMERICAN POPULAR IMAGES OF CHINA* (2001).

74. Shao Zongwei, *Mediators Face New Challenge*, CHINA DAILY, May 5, 1999, at <http://www.chinadaily.com.cn/cn dydb/1999/05/d2-2just.e28.html>.

75. *Id.* There is some statistical evidence indicating that the preference for mediation over litigation is decreasing. However mediators still handle more cases than the courts. *See* LUBMAN, *supra* note 4, at 224.

76. *Id.*; *see also* Shao Zongwei, *Lawyers, Notaries Urged to Help Reform*, CHINA DAILY, May 29, 1999, at <http://www.chinadaily.com.cn/cndydb/1999/05/d2-2nota.e28.html>. The number of lawyers has just recently crossed the 100,000 mark. *Id.*; *see also* Catharin Dalpino, *China Eases Gingerly into an Era of Cautious Openness*, pg. 2 at <http://www.cnn.com/SPECIALS/1999/china.50/red.giant/human.rights.dalpino/hum>. Even now, 110,000 lawyers for a population of 1.2 billion is insufficient.

While mediators are not required to have a legal background, mediators are encouraged by the government to better equip themselves with legal knowledge.<sup>77</sup>

Mediators are governed under the Mediation Regulations of 1989.<sup>78</sup> These rules are important because they are not necessarily Maoist in ideology, nor are they strictly Confucian based.<sup>79</sup> Rather they combine elements of both ideologies, producing a list of wide ranging guidelines for mediators to follow.<sup>80</sup> Under the rules, mediators should educate the public during mediations, but not necessarily about Maoist ideology.<sup>81</sup> Mediators should apply the “laws, regulations, rules, and policies” of the government, but where there are no clear laws, mediators should appeal to “social morality.”<sup>82</sup> Mediations should be formal processes, with recorded outcomes, and mediators must adhere to a code of ethics.<sup>83</sup> Finally, mediators no longer have the power to deal with minor criminal cases, and administrators with the Ministry of Justice closely supervise their civil case duties.<sup>84</sup> Thus, mediations are still conducted by mediators, but government officials facilitate mediations and oversee the mediation process.

The way that mediations are carried out has also changed. Under the “Methods for Handling Disputes among Citizens,” promulgated by the Chinese Ministry of Justice in 1990, disputes “over personal or property rights or other disputes arising in the course of daily life” are delegated to mediation committees by the ministry’s administrators.<sup>85</sup> The mediation committees, a relic of the Maoist era, are now staffed by persons chosen by members of a neighborhood, and in most instances are elders “who enjoy the respect of the community and are trusted to be fair.”<sup>86</sup> Mediations are no longer required,

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77. See Zongwei, *supra* note 76.

78. See LUBMAN, *supra* note 4, at 220.

79. See *id.* at 220-22.

80. *Id.*

81. *Id.* at 220.

82. *Id.* at 221.

83. See *id.* at 221-22. The code of ethics provides that mediators should “avoid acting out of personal considerations or committing fraud, suppressing disputes, retaliating against or insulting the parties, disclosing their private matters, or accepting bribes or gifts.” LUBMAN, *supra* note 4, at 222.

84. See *id.* at 221-22. Mediators are now supervised by judicial assistants, persons who have limited legal training and are assigned to the people’s mediation committees. See *id.* at 222.

85. *Id.* at 223.

86. Perkovich, *supra* note 41, at 324. This is significant, because in the Maoist Era, Mediation Committees were organized with Communist Party intentions in mind. See LUBMAN, *supra* note 3, at 49. In order to be a member of a mediation committee, for all practical purposes, you needed to be a member of the Communist Party. See *id.* Under the 1990 regulations, the government’s presence, thus the Communist Party’s Presence, is the judicial assistant, but the mediator

but they are the preferred method of dispute resolution.<sup>87</sup> Additionally, there are procedures in place for a party to go to court if mediation fails, or for courts to compel parts of a mediation agreement, or for one of the parties to attempt to repudiate an agreement.<sup>88</sup>

Mediator's traditional areas were "disputes concerning marriage, family, and supporting elder members of a family."<sup>89</sup> However, as Chinese society has changed and become bifurcated into urban areas and rural areas, the role of the mediator has changed from these traditional areas. Thus, in order to examine the general workings of Chinese mediation systems, it is important to do so in geographic terms.

### A. Rural Mediation Systems

The economic changes over the last twenty years have largely left the rural areas of China behind. Because of this, mediation in these areas focuses on different issues and is conducted in a different manner.<sup>90</sup> The desire to preserve social relationships is much stronger in rural areas as compared to the cities.<sup>91</sup>

In the villages and townships, village heads and Community Party secre-

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does not have to be a member of the Communist Party. While this does not establish that the mediation committees have gone democratic, it does show the Communist Party's grip is lessening.

87. LUBMAN, *supra* note 4, at 223.

88. *Id.* If the parties cannot come to agreement, the parties can go to the local government and seek a solution for their dispute. *Id.* The parties have 15 days after an agreement is signed to go to court and repudiate an agreement, and after 15 days, if one of the parties is not performing their end of the agreement, the other party can go to court and compel adherence to the terms of the agreement. *Id.*

89. Zongwei, *supra* note 74.

90. It is the author's argument that the economic reforms have changed society in the cities, while leaving societies in the rural areas behind. In turn, the relationships that defined how people acted in certain areas has changed. For instance, in the cities where the population is generally transitory, the importance of personal relationships is not emphasized because they are not established. In rural areas, on the other hand, the preservation of relationships is important because of the stagnated development.

91. See LUBMAN, *supra* note 4, at 235. "Chinese social networks, especially in the countryside, are based on acquaintances (*shuren*) from one's residence or workplace." *Id.* "In such contexts, people do not want to use the law to handle ordinary disputes and injure relationships." *Id.* Rather, they would preferably "renounce some rights, if it serves emotion and reason, in order to improve social relations around them." *Id.*

taries maintain powerful influence over dispute resolution.<sup>92</sup> Additionally, clan oriented structures have reemerged in the post-1978 period.<sup>93</sup> The clans were prevalent during the Confucian era, and despite Maoist reforms to do away with them, they have reemerged in the post-Maoist era.<sup>94</sup> In some areas of the country, disputes are initially mediated by clan leaders and are only mediated in the people's committees if clan mediation fails to succeed.<sup>95</sup> Traditional Confucian values are used in clan mediation, thus there is pressure to yield and compromise from the mediator as well as other members of the clan.<sup>96</sup>

An example of a typical rural mediation is seen in the following. A couple was having marital problems, and the wife claimed the husband was abusing her.<sup>97</sup> Since the situation between the disputants was potentially explosive, the husband and wife were separated and the mediator moved between individual caucuses with each party.<sup>98</sup> Additionally, the mediator engaged the support of family members to bring an end to the dispute.<sup>99</sup> After many sessions, the dispute was resolved when the husband expressed regret for his actions and the mediator suggested that the couple go to Beijing for a vacation.<sup>100</sup>

Rural areas have different structures for carrying out mediations because of the different nature of the rural areas. However, as will be explained later, there is some congruency on how a mediation is performed, irrespective of who is carrying it out.

### *B. Urban Mediation Systems*

Economic reforms have largely benefited and changed the urban areas of China. Accordingly, while some mechanisms remain unchanged in the cities, such as the organizational structure, urban dispute resolution systems have changed with the times.

Dispute resolution in the cities is still the main activity of the neighbor-

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92. LUBMAN, *supra* note 4, at 229.

93. *See id.*

94. *See id.* Clans were the primary social unit during the Confucian era. *Id.*

95. *Id.*

96. *Id.*

97. Perkovich, *supra* note 41, at 325-26. Professor Perkovich collected this example on a trip he took to China as part of a delegation of dispute resolution professionals. *Id.*

98. *Id.*

99. *Id.* Much like the traditional forms of mediation discussed in the earlier sections of this paper, the mediator here used one's devotion and respect for one's family as an important consideration in the settling of a dispute.

100. *Id.*

hood committees.<sup>101</sup> These committees remain the “essential basic-level units” of control in the urban apparatus.<sup>102</sup> At one time in the not too recent past, nothing that happened went unnoticed by the committees, and often times disputes could be settled quickly because committee members knew everyone’s business.<sup>103</sup> This is not the case today.

The economic opportunities available primarily in the cities have brought an influx of new residents, thus diluting the power of the neighborhood committees.<sup>104</sup> Further, because of changing economic opportunities and changing societal values, the committees available for dispute resolution have changed.<sup>105</sup> Under the committee system, mediators are paid a small stipend, which has not changed in value over the past forty years.<sup>106</sup> Compared with the well paying jobs that one could take in the cities, mediation offers lower end wages.<sup>107</sup> While one could take a job in addition to being a mediator, this would hinder his availability to either job because of time constraints. Additionally, some studies suggest that it is no longer a meaningful ideal to serve fellow citizens by being available to mediate disputes.<sup>108</sup> The economy remains the number one force of change in the urban areas.<sup>109</sup> Thus, dispute

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101. LUBMAN, *supra* note 4, at 228.

102. *Id.*

103. *See id.* at 228-29. “Changes in the physical configuration of large Chinese cities” have lessened “the neighborhood committees’ ability to play a role in the affairs of urban residents simply by making it more difficult for committee members to pry and spy.” LUBMAN, *supra* note 4, at 229. This is dramatically different then it was approximately ten years ago, when the neighborhood committees were so powerful and pervasive in people’s lives that one observer described them as part therapist, part utility company, part patrol unit, and “always trying to prod, scold, nudge and push the Government’s policies down to the masses.” *Id.* at 228.

104. *Id.*

105. *See id.* Urban Chinese society has changed dramatically in the last twenty years. *See* Catharin Dalapino, *China Eases Gingerly Into An Era of Cautious Openness*, CNN.COM (1999), at <http://www.cnn.com/SPECIALS/1999/china.50/red.gian/human.rights.dalpino.htm>. “For example, urban neighborhood committees, which once were the essential unit of the ‘thought police,’ are undergoing conversion to community service agencies. *Id.*”

106. LUBMAN, *supra* note 4, at 228. Most of the persons on mediation committees are elders, retired workers, or homemakers. *See id.*

107. *Id.*

108. *Id.* Lubman quotes at study done in Guangzhou by Charlotte Ikels titled RETURN OF THE GOD OF WEALTH. “Former volunteers”, who principally handled mediations, “now work elsewhere for pay or help with the work of their employed or enterprising family members; the volunteers who remain are overworked, and it is not clear who will be their successors.” LUBMAN, *supra* note 4, at 228.

109. LUBMAN, *supra* note 4, at 228. So powerful, that in 1997, a street committee was ab-



resolution at the most basic levels in the cities is different today than it was forty years ago.

Despite these several changes and developments, mediations are still being conducted in the urban setting. Excellent examples of some of the situations an urban mediator may face are as follows: A dispute erupted between two families, and a fight was to take place.<sup>110</sup> The neighborhood committee learned of the fight and “acting on its own initiative, intervened and investigated the facts, determining which party initiated the dispute.”<sup>111</sup> “The mediators then impressed upon the party that instigated the dispute that if he did not pay monetary damages, as requested by the other disputants, there was the likelihood of continued conflict and then he would bear even more responsibility than he did at that point.”<sup>112</sup> In another example, a dispute arose after “a son objected when his widowed mother found a boyfriend after the son married and moved away.”<sup>113</sup> In helping the parties reach a mediated agreement to end the dispute, “the committee reminded the son that now that he had married he was happy, but that his mother was alone.”<sup>114</sup> “In turn, the committee also urged the mother to wait six months before marrying her boyfriend so that her son would calm down.”<sup>115</sup>

### C. Common Approaches in Chinese Mediations

Irrespective of the different persons or organizations that are carrying out mediations across China, there are some general similarities in Chinese mediation systems. Studies suggest that Chinese mediations have similar procedures, such as initial statements given by the disputants to the mediator, a restatement of the facts by the mediator, and the use of caucuses by the mediator.<sup>116</sup> Other methods such as encouraging the disputants to look at their “Best Alternative to a Negotiated Agreement”<sup>117</sup> and the flipside are also

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sorbed into the Coca-Cola distribution network. *Id.*

110. Perkovich, *supra* note 41, at 326-27. The following example is taken from Professor Perkovich's observations during a trip he made to China.

111. *Id.*

112. *Id.* This is similar to a mediator coming down hard on two parties at the end of a mediation, giving them that extra nudge toward an agreement when such an agreement is in sight.

113. *Id.*

114. *Id.*

115. *Id.*

116. Perkovich, *supra* note 41, at 327. The same type steps are utilized in mediation in the United States. *Id.*

117. (BATNA)

used.<sup>118</sup> Finally, settlements regularly encourage the disputants to engage in self-criticism concerning their behavior before and during the dispute.<sup>119</sup>

Apart from procedural similarities, some studies have classified Chinese mediations into three different categories, distinguishable by their outcome.<sup>120</sup> These categories are: (1) mediations based on emotion and reason, (2) mediations based on law, and (3) mediations based on feelings and law.<sup>121</sup> In terms of the first category, mediators using the emotion and reason method are not concerned with the rights of the parties, and instead focus on the "relationships involved and the desirability of reconciliation."<sup>122</sup> This approach is very similar to the typical Confucian mediation approach, for both rely on the importance of relationships.

The second approach is one based on law, and is guided by formal legal rules.<sup>123</sup> This approach is clearly preferred by governmental policy, but its implementation is limited by the lack of legal training on the part of the majority of mediators.<sup>124</sup> Additionally, law-based mediations fail to protect the "face" of the disputants, and are not preferred by the disputants.<sup>125</sup>

The final category is mediations based on emotion, reason, and law. The Chinese Supreme Court has expressly disapproved of this approach because it suppresses the disputants without clarifying their legal rights or without "dealing with the feelings of the parties."<sup>126</sup> Coincidentally, this approach is relatively similar to the Confucian mediation approach, for it favors compromise and yielding above all else.<sup>127</sup>

The approach used depends ultimately upon the mediator, and the type of mediator depends upon where in the country the disputants reside. With a country of 1.2 billion people, divergence is to be expected. Nevertheless, one universal theme throughout the country is that mediation is preferred and liti-

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118. Perkovich, *supra* note 41, at 327.

119. *See id.* at 328.

120. LUBMAN, *supra* note 4, at 230.

121. *Id.*

122. *Id.* at 231.

123. *Id.* Disputes that might fall into this category include "ownership disputes over land," or other disputes involving "individual rights." LUBMAN, *supra* note 4, at 231.

124. *Id.* at 231-32. This approach to mediation works best in property disputes or contract disputes.

125. LUBMAN, *supra* note 4, at 231. Saving face was a major advantage of Confucian mediations.

126. *Id.* at 232.

127. *See id.*

gation is still discouraged.<sup>128</sup> Although attitudes are changing, and there is a growing willingness to pursue a remedy in the courts, traditional attitudes remain.<sup>129</sup> One can be assured that mediation will continue to be the preferred method of dispute resolution for many years to come.<sup>130</sup>

### III. WHAT LESSONS CAN AMERICAN MEDIATORS LEARN?

In this final section, the prevailing question concerns what American mediators can learn from their Chinese counterparts. Essentially, by studying Chinese mediation systems, can an American mediator apply any lessons learned from a culture that has employed mediation for thousands of years? One would cry out an enthusiastic “yes.”

#### 1. Morality in Mediation

The biggest lesson that can be learned from the Chinese model is that there is a place for morality in mediation. Confucian mediations were based upon morality and offered mediators an opportunity to reinstall moral values in disputants. By appealing to morality, Confucian mediators were able to get the disputants to agree to an end to a dispute.

In America, “morality” often has a pejorative meaning with a large segment of the population.<sup>131</sup> Perhaps readers of this article are exclaiming that they have no interest in forcing their values upon another individual, particularly one involved in a dispute. The author would agree with this assertion, and add that mediators should not force moral values on to disputes, but rather should appeal to disputants to recognize moral values. Much like the method of asking party A to understand party B’s arguments and grievances, an appeal to morality causes each side to see the right and the wrong in their actions. Questions presented in caucuses such as “Can you see what’s wrong with X position?” or “do you think that’s right?”, where the question is honestly presented and the outcome honestly sought, may yield an epiphany for some disputants. This moral lesson is important not only for settling current disputes, but could have an effect on future behavior.

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128. *See id.* at 235.

129. *See id.* at 231-41.

130. *See id.* at 237. “Research by scholars at the Institute of Law of the Chinese Academy of Social Sciences indicates that villagers are slowly becoming more willing to bypass local leaders and to seek redress directly in the courts, just like their counterparts in the cities, who are increasingly willing to bypass the local residents committees.” *Id.* The importance of this quote is the attitudes are changing “slowly.” In a country of 1.2 billion people, such change could take a long time.

131. Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 295 (1996).

A possible example of where the exploration of morality would be pertinent and helpful is during a divorce mediation. For example, if both the husband and wife were unfaithful to each other, an appeal to explore one's morality would help the couple go "below the line," and possibly explore the issues that led to their predicament. Furthermore, an exploration of their immoral behavior may lead to an understanding, which in turn may prevent future immoral behavior.

Mediators should not make moral judgments about their disputants, and invariably if they do, they should not vocalize these judgments nor allow these moral judgments to affect their ability to mediate the dispute.<sup>132</sup> Moral counseling in the mediation context is a thought provoking exercise, and the Chinese have proven that its use facilitates agreement.<sup>133</sup>

## 2. The Power of a Mediator

The second lesson presented is a caveat to the first. The mediator has a tremendous amount of power, and that power should not be used lightly. In China, mediation was historically used as an element of social control.<sup>134</sup> In Maoist China, mediation was used to suppress the masses and instill communist ideology in disputants.

American mediators should realize, and never forget, the inherent power that they possess in mediation. The commonly defined role of mediator, the facilitative negotiator, describes the mediator's importance and power in the dispute resolution process. Parties seeking an end to often bitter disputes are looking towards their mediator for guidance, support, and recognition. This is not a job for the half-hearted, and should not be undertaken lightly. Those who are in it purely for selfish reasons have no place at the mediation table. Being a mediator is not merely a job, but is also a belief in the power of reconciliation.

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132. It is extremely important that the mediator retain the appearance of neutrality. *Id.* at 294. Failing to maintain this appearance can seriously harm the mediation, for one or both of the parties will lose faith in the mediator. *See id.*

133. For a wealth of information on morality in the legal profession, its implementation and proper use, *see generally* THOMAS L. SHAFER AND ROBERT F COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (West 1994).

134. Mediation is still used as an element of social control in modern day China. *See* LUBMAN, *supra*, note 3, at 233. "Dispute suppression remains a key goal of mediation policy, but because of concern to prevent crime and disorder rather than to promote political aims." *Id.*

### 3. Materialism, Personal Advancement, and Lack of Community are Counterproductive to a Successful Mediation

Just as the mediator must remember their place in a mediation, a disputant must also be aware of counter-productive attitudes. Traditionally, one of the positive forces promoting settlement in mediation in China was the sense of community one felt, a value that governed over all other values. Where the sense of community decreases, so too will the desire to go to mediation. Currently in China's major cities, mediation is becoming less and less prevalent. There is a direct correlation between this and the economic growth and personal advancement being experienced by the citizenry. Thus, as Chinese disputants become more interested and focused on their self-interests, they are more likely to avoid mediation.

American mediators should be cognizant of these self-interest centered values, and when they appear in a mediation, the mediator should not be afraid to call a caucus and point out counterproductive attitudes. While Americans are generally more individualistic than their Chinese counterparts, this does not mean that all Americans lack a sense of community.<sup>135</sup> There is a direct link between a lack of community and a lack of settlement, for if there is no appeal to save the relationship, both to the person and to the community, the desire to do save the relationship and end the dispute is lessened, and the potential for settlement ultimately decreases. American mediators should appeal to disputants' sense of community as a means of encouraging dispute resolution.

### 4. The Mediators Qualifications

Anyone can be a mediator, and anyone can set a charge for their services, but a truly successful mediator is one educated in the field. Chinese mediators are not required to have any legal background, nor are they required to have any formal training.<sup>136</sup> Consequently, they are not paid very well. Though this situation is changing, and the Chinese government is increasingly offering more training to their mediators, there are a significant number of mediators in China who are uneducated.

American mediators can take an important lesson away from the Chinese situation: the power of knowledge. There is no substitute for becoming edu-

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135. See Geert Hofstede, *Motivation, Leadership, and Organization: Do American Theories Apply Abroad?* (1977)(pamphlet on file with the author.)

136. The typical training provided to a Chinese mediator might consist of three to five days of initial training, followed up by one day of training each month. Perkovich, *supra*, note 41, at 326. The subjects being taught include substantive law and negotiating skills. *Id.*

cated in the mediation process, for just being a past participant is not enough to qualify one later as a mediator. To know how the process works is only half the battle. American mediators should seek to educate themselves on why the process works.<sup>137</sup> Only a combination of the two can adequately prepare one for the duties associated with mediating a dispute.

## 5. The Inherent Limitations of Mediation

Mediation is neither applicable nor practicable for all types of disputes. In China, mediation has traditionally been used to resolve family disputes and neighbor disputes. In the cities, where different types of disputes have arisen, mediation has proven ill-suited to deal with economic disputes. In 1995, the Chinese government created an arbitration program to deal with economic and contractual disputes.<sup>138</sup>

In America, mediation is used to solve all types of disputes. From divorces to contractual violations, there are few civil disputes that cannot go to mediation. This general willingness to mediate, if the parties so desire, misses the lesson being taught by the Chinese - some disputes need to go to arbitration or litigation.<sup>139</sup> In order to be more effective as mediators, parties and

137. An excellent example of a competent mediator certification plan is seen in Florida. FLA. STAT. ch. 10.100 seq. Though Florida does not require certification, their rules and regulations encourage mediators to become educated and trained in their field. *Id.*; For an excellent article on mediator certification programs in the United States, as well as an examination of various mediation styles, see generally Dana Shaw, Comment, *Mediator Certification: An Analysis of the Aspects of Mediator Certification and An Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327 (1998). Though the author's thesis ultimately comes out against mediator, she nonetheless frames the issues rather well. *Id.*; but see Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 997 (1992); John Ferick, et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95 (1995).

138. LUBMAN, *supra* note 4, at 242. Cf. David B. Dreyfus, Note and Comment, *Confucianism and Compact Discs: Alternative Dispute Resolution and its Role in the Protection of United States Intellectual Property Rights in China*, 13 OHIO J. ON DISP. RESOL. 947 (1998). Mr. Dreyfus argues, in part, that China created adjudicatory systems in recent years in order to handle 'western' type property disputes, such as patent, trademarks, copyrights, inventions, and contracts cases. *Id.* at 966-69. Thus, China has recognized that mediation is inappropriate for some types of disputes. *Id.*

139. While the Federal Arbitration Act, 9 U.S.C. §§ 1-15, has been law in the United States for seventy five years, it is still not as heavily used as mediation and is often disfavored by plaintiff's attorneys and those seeking an emotional award. See Calkins, *supra*, note 131, at 284. This general disfavoring of arbitration, even by those in the ADR field, happens despite courts' general favorability towards arbitration. An example of this is seen in *Mastrobuono v.*

their advocates need to be aware of all of their dispute resolution alternatives. Some disputes require a finding of fact, not a finding of common ground. Unfortunately, the recognition of what dispute resolution procedure to undertake is not the choice of the mediator, but rather the choice of the parties. However, mediators can play a role in this selection process by informing potential parties of the mediation process, its goals and outcomes, and its limitations. In order to utilize the mediation process properly, mediators must inform some potential clients that mediation is inappropriate to settle their dispute.

## 6. The Importance of Conciliation

There is a turning point in every settled dispute when the parties realize that their actions have contributed to the dispute. This does not mean that there was a right and a wrong; rather this means that both sides realize that they were right and they were wrong. In Chinese mediation, an important element of mediation is self-criticism.<sup>140</sup> During this stage, each disputant asks himself or herself “What did I do to cause this?” Here, one is reminded of the old adage: It takes two to tango.

American mediators can take a valuable lesson away from the importance of conciliation. It is critical for the mediator to make disputants aware of their contribution to the dispute. Often times, a disputant’s awareness of her own contribution to the dispute leads to a solution for the dispute. Further, an important step in repairing the damage done to the disputants’ relationship is a gesture of conciliation. Far from mandating a conciliatory gesture, encouraging such a gesture, either jointly or singularly, can vastly improve the chances of mediating a settlement. Often times, such gestures tell the other party that their message or quarrel is being heard and understood. One of the main reasons parties are in mediation in the first place is that they are unable to “hear” what the other party is saying. Acts of conciliation open these channels.

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*Sherason Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995) (noting a strong federal policy in favor of arbitration); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (strongly advocating the arbitration of statutory anti-discrimination claims).

For an excellent explanation of Chinese arbitration systems and the governing law of such systems, see generally Wang Sheng Chang, *Resolving Disputes Through Conciliation and Arbitration in the Mainland China*, 2 Ann. 2000 ATLA CLE 1643 (2000).

140. See Wang Sheng Chang, *supra* note 139. “In mainland China people do not distinguish between the terms ‘conciliation’ and ‘mediation,’ both of which are regarded as having the same meanings. It is a technique that promotes the disputing parties to reach [a] settlement agreement with the help of a conciliator or mediator.” *Id.*

## CONCLUSION

China has been mediating disputes for thousands of years, and several trends have gone into the development of their legal system. These trends have contributed to mediation being the dispute resolution process of choice in the most populous nation in the world. Understanding how the Chinese mediation system has progressed throughout Chinese history will benefit the American mediation system and American mediators. Applying some of the Chinese techniques and practices, which have been honed over the centuries, presents American mediators with an excellent opportunity to profit from the millions of mediations conducted over the years in the world's most populous nation. In one's opinion, as we seek to relieve our court systems and mediate disputes, learning some lessons from China will undoubtedly help us achieve our goals.



