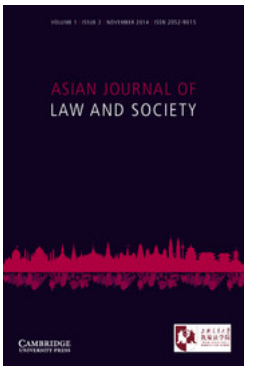

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Two Sides of Court Mediation in Today's Southwest Grassroots China: An Empirical Study in T Court, Yunnan Province

XIONG Hao*

Abstract
Court mediation is now playing a crucial role in the Chinese legal system. Based on two case studies in Yunnan Province, this paper examines how court mediation works in Southwest China. It finds that court mediation can expand the capacity of the court concerning case acceptance, and is capable of fixing multicentre disputes and complicated social problems. However, the paper also points out that when encountering some ill-suited cases, justice may be undermined and the judge's role may be confused. Therefore, it is necessary to pass some law to exclude the ill-suited cases from the mediation track when promoting court mediation in Southwest China.

Keywords: court mediation, Southwest China, empirical study, local legal ecology, regionalism

1. INTRODUCTION

In recent years, across different countries, the entrenched cultures of dispute resolution via litigation are subject to more or less continuous re-examination and renovation, especially in the Alternative Dispute Resolution (ADR) movement.[1] Historically speaking, the modern idea of ADR was developed in the US.[2] Yet today ADR has become popular not only in America but also at the international level. There is now a worldwide interest in ADR. Jurisdictions as varied as the US, Australia, the UK, and Japan have all promoted the use of ADR.[3] In mainland China (PRC), which is one of the most important forms of ADR in the existing Chinese legal framework, court mediation (*fayuan tiaojie*, *法院调解*, also called

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1. Roberts & Palmer (2005), p. 45.
2. King et al. (2009), p. 88.
3. Wong (2006), p. 100.

judicial mediation, *sifa tiaojie*, *司法调解*)[4] is endorsed by the Supreme People's Court (SPC). A series of mediation promotion policies have been issued since 2008, which were usually summarized as "Big Mediation" (*datiaojie*, *大调解*, also translated as "Grand Mediation"). As a result, the rate of court mediation has grown dramatically. In the *Working Report of the Supreme People's Court* in the Representative Conference of the National People's Congress 2011, the then President of the SPC, Wang Shengjun confirmed that the mediation rate in the first trial stage of civil and commercial disputes was 65.29% in 2010, which was 3.31% higher than that in 2009.[5] In 2011 and 2012, the percentages increased to 67.3 % and 68.15%, respectively.[6] The majority of disputes handled by China's court system are civil and commercial disputes. In other words, most of China's disputes are now fixed through the court mediation track by the Chinese court system.

In fact, the ADR movement has always been a very controversial issue.[7] Speaking of the current "Big Mediation" wave in China, legal scholarship has formed a consensus that this policy is mainly driven by political and social considerations,[8] but scholars still hold different views towards it. Some scholars believe that because Chinese legal reforms ignore the interests of ordinary people, and authorities expect that the satisfaction of the public with the judicial system can be improved, the current policy makes sense and is a positive change.[9] However, others argue that the "Big Mediation" policy is an "apparent return to the past, to

4. There are many models for mediation practice, thus the definitions of mediation are numerous. According to the strength of the mediator's interference, mediation can be classified into facilitative mediation and evaluative mediation. In the former model, the mediator plays a relatively passive role, only assisting communication, clarifying issues, and asking the disputants questions when it is necessary. In the latter model, however, the mediator will actively and directly participate in the dispute resolution process by designing a plan and giving very realistic suggestions regarding the outcome (see Menkel-Meadow et al. (2005), pp. 302–6). However, it is hard to draw a clear boundary between these two models in practice, and they may be adopted by the mediator according to concrete contexts.

In the *US Uniform Mediation Act* (2001), the mediation seemingly means a facilitative model. The Act provides that "mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." In Chinese law, however, mediation is more like an evaluative one. *The People's Mediation Law* (2010) defined mediation as a process in which "a people's mediation commission persuades the parties concerned in a dispute to reach a mediation agreement on the basis of equal negotiation and free will and thus solve the dispute between themselves." Although mediation can be defined in different ways, narrowly or broadly, the essential characteristic is a non-coercive and voluntary form of conflict management with the assistance of a neutral third party. Most scholars seem to agree that the definition of mediation should include the following elements: (i) assistance or some form of interaction by (ii) a third party who (iii) does not have the authority to impose the outcome (see Wall et al. (2001), p. 375).

According to Professor Nadja Alexander, there are four basic judicial dispute resolution models: (i) judicial settlement; (ii) judicial mediation; (iii) judicial moderation; and (iv) a facilitative judge (see Alexander (2009), p. 130). In the context of China, court mediation is a kind of judicial dispute resolution mechanism, in which all the models mentioned above are engaged to some degree. In other words, court mediation in the context of China is different from ordinary mediation in the Western context.

At present, the relative statute does not provide a clear official definition on court mediation. In general, court mediation in this paper is defined as a form of court-connected ADR in which judicial staff and another invited facilitator play the role of mediator to assist the disputing parties to achieve a mutually acceptable resolution in a written form. It is an evaluative mediation in which judges play a very influential and even a leading role. The principles of court mediation are voluntariness and lawfulness provided by art. 9 of the *Civil Procedural Law of the RPC* (amended 2012). Unlike the ordinary mediation agreement which is similar to a contract between equal parties, the court mediation agreement (*minshi tiaojieshu*, *民事调解书*) is legally binding like an enforceable judgment. In this paper, the meaning of court mediation (*fayuan tiaojie*, *法院调解*) is equal to judicial mediation (*sifatiaojie*, *司法调解*).

5. Wang Shengjun (2011a).

6. Wang Shengjun (2012).

7. Abel (1982), pp. 270–1, 297–8; Fiss (1984), p. 1083; McThenia & Shaffer (1985), p. 1664; Twining (1993), p. 381.

8. See Waye & Xiong (2011); Minzner (2011).

9. Liebman (2011), pp. 183–4; Su (2010), p. 6.

the use of law as an instrument of 'proletarian dictatorship' implemented through the 'mass line' in the guise of 'democratisation.'"[10] In a sense, it is said that the golden years of China's legal reform have passed,[11] and this policy may undermine the long-term development of Chinese legal institutions and even destabilize China.[12] However, the relevant research mainly focuses on mediation in Chinese characteristics,[13] or targets theoretical and ideological issues. They are a type of "broad narrative," without providing empirical studies to explain the application of court-connected ADR in practice. It is seemingly forgotten that mediation is not just a concept or a policy: "mediation to a great extent is what a mediator does."[14] For this reason, little is known about how judges implement court mediation in practice, and it is thus difficult to assess the feasibility of court mediation and the validity of the current "Big Mediation" policy in a given context.

Moreover, because of the size and variation of geography and population: "China is a very complex land where multiple realities are operating beneath a facade of a unitary nation-state … Variation across the province and even within the province is enormous."[15] In the judicial system, it is also confirmed by some research that the regional differences of judicial practice within China are also very significant.[16] Given the size and regional differences within China, the feasibility of court mediation may be different from one place to another, which is hard to generalize at the national level. Although some recent research made a contribution to this area by using empirical methodology to understand the internal contradictions between court mediation and adjudication, the research only covered a highly developed city of the Pearl River Delta.[17] Therefore, existing scholarship still lacks empirical research on court-connected ADR in terms of its operational processes and feasibilities, especially in Southwest China. Due to the lack of empirical evidence, it is hard for the scholarship to comprehensively understand how court mediation works in practice, and it is also hard to provide constructive and realistic suggestions for the legislation.

With a view to China's cross-regional heterogeneity and complexity and the lack of empirical data concerning court mediation in Southwest China, it is necessary to empirically examine court mediation practice there. Through fieldwork within the T District Court,[18] Yunnan Province, this paper aims to fill this research gap. This research presents a vivid picture, in regards to how a judge utilized his micro skills and living wisdom to protect his own interests within the process of handling complicated cases and in connecting with government officials. From the case-studies, the paper discloses that the judicial ecology of the grassroots court is structured by its social situation, and the preference of mediation in solving disputes will not fundamentally change the judicial ecology in a given context.

10. Cohen (2011).
11. Zhang (2010), p. 255.
12. Minzner, *supra* note 8, p. 959.
13. Clarke (1991), pp. 245–96; Peerenboom (2002), p. 288.
14. Wall & Lynn (1993), p. 186.
15. Saich (2011), p. 9.
16. See Woo & Wang (2005).
17. Ng & He (2014), p. 4.
18. The court in which the author carried out his fieldwork is the one commended by the Supreme People's Court of the People's Republic of China because of its excellent performance in court mediation. There are a very limited number of courts and individuals who have earned this distinction. These award winners are regionally influential and thus represent typical cases as they have been guaranteed by the SPC. The fieldwork examined deeply the "typical" experiences which have happened in these courts.

The paper argues that court-connected ADR is able to play an active role in today's China. It can expand the capacity of the court and it is suitable for many complex cases occurring within Southwest China. However, because court mediation works according to a political agenda, it may also undermine justice and cause dysfunction within the court system when pursuing political goals, such as achieving social harmony and defusing social conflict. The "Big Mediation" policy, in this regard, is driven by pragmatism, rather than being an institutional innovation, as claimed by the Supreme People's Court.

My fieldwork was conducted in T District Court, Yunnan Province. T District is a very developed area in terms of economics and politics, and is a cultural centre of the city in the study. T district is not very far away from Kunming, the capital city of Yunnan Province. The district is approximately 1,000 square kilometres in area, with a total population of more than 490,000, of which 60% make their living in agriculture. The per capita disposable income of this district is very high, based on being within Yunnan Province, reaching around 17,000 RMB and 7,000 RMB within urban and rural areas, respectively. T District Court is also a rich court. The reason is that the court is not only located in a rich urban area, where the facilities and work conditions are relatively more advanced, but also human resources are rich. Five judges have Master of Law degrees, and 79 judges and legal staff members are university graduates (there are 105 staff members in total). The degree of professionalism is relatively high.[19] T District Court (hereafter TDC) is the busiest court in the city. Every year, there are around 2,500 cases handled in this court. The court has four despatch tribunals (*paichu fating*, *派出法庭*), the biggest of which is the one located in a northern town.[20]

In the following sections, the social circumstances of the area where the fieldwork was conducted will first be explained. The powerful *guanxi* mechanism, which is the social context reinforced by the court staff will be analyzed by using a "thick description."[21] Second, the paper will describe two very interesting and typical cases, with the objective of this description being to show how judges at the Southwest grassroots courts implement court mediation in solving disputes. Third, based on case-studies and fieldwork in T District, the merits and drawbacks of court mediation will be further discussed.

2. CONTEXT: HAVING LUNCH TOGETHER

2.1 More than Eating

It is important to first explain the location of the People's Tribunal in the north town. The tribunal is located at the core region of the town, on a business street around ten kilometres

19. In order to keep the investigated place anonymous, the relevant footnotes showing the information about this court are omitted.

20. The People's Tribunal is a dispatch judicial institution of the grassroots court (*jicheng fayuan*, *基层法院*, "basic court" is another corresponding translation). According to the *Organic Law of People's Republic of China* (amended 2006), art. 20 provides that: "A basic people's court may set up a number of people's tribunals according to local conditions, population, and cases. A people's tribunal shall be a component part of the basic people's court, and its judgments and orders shall be judgments and orders of the basic people's court" (Lawinfochina.com (2011)).

21. "'Thick description' is the intensive, small-scale, dense description of social life from observation, through which broader cultural interpretations and generalizations can be made. The term was introduced in the philosophical writings of Gilbert Ryle, and developed by Clifford Geertz in anthropology, especially in his celebrated study of the Balinese cockfight" ("Thick Description," in Scott & Marshall (2009), Oxfordreference.com (2013)). See also Geertz (1973), pp. 3–32. When studying dispute resolution issues in China, "thick description" as a method has been successfully used in previous research, for example Lubman (1997).

from the city centre. It is also located on the boundary of the urban and the rural area of the city. Most interestingly, it is just opposite the street of the town government (*zhen*, 镇): two minutes' walk in normal conditions.[22]

When the author did his fieldwork there, he had lunch in the town government's canteen. This canteen is not open to the public, yet the judges and other legal staff members can have lunch there every day with the government officials. The most obvious reason why judges have lunch in the government canteen is that the price is very cheap and it is in close proximity to their office and convenient to use. From the perspective of government, they are happy to provide this convenient service. As a not very old but popular Chinese saying states: "it is just more pairs of chopsticks."[23] Judges and officials are like friends at the meal tables, chatting, making jokes, and sharing and exchanging news and gossip. They get to know each other more closely and even discuss some formal issues when eating.

Any person who is familiar with Chinese culture and Chinese society will certainly know that food plays an important role in Chinese life.[24] As one of the most famous and influential Chinese cultural scholars, Professor Yi Zhongtian, has observed:

> Chinese people love eating out … Once there is any significant social activity, dinner is the irreplaceable program. When friends come, we need to "welcome"; when they leave, a "farewell dinner" will be followed. You can treat friends with a dinner when you have personal "business"; if no business, "gathering" is also common. In an ordinary person's family, whether festivals, wedding and funeral ceremonies, a birthday of the senior, new child's birth, Chinese treat others. Who would refuse the invitation? When going abroad, if a person gets a promotion or bonus, or moves to a new house, it is not uncommon that friends and relatives will naturally require you to treat them. If a person asks for assistance with such things as an installation of a new telephone, cleaning up the sewer, installing a new air conditioner, obtaining a license, buying a ticket, applying for a job, sending a child to kindergarten, purchasing materials, submitting a report to Customs, it is very usual to treat people in showing thoughtfulness. *Even if the issue is really hard, drinking can make the goals easier to achieve.* Chinese culture is a sort of food culture, which has permeated in every corner of Chinese daily life … Within Chinese culture, all the principles of human life are the same as the rationales of food and eating. Whether or not the focus on the eating is well understood and whether you are good at eating or not are the big issues concerning national welfare and the people's livelihood.[25]

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22. The town government (*zhen zhengfu*, 镇政府) is a fourth-level Chinese local administrative division under the county government (*xian*, 县) but above the village (*cun*, 村). Town government is the same as township government (*xiang*, 乡) regarding the administrative hierarchy. However, a township is usually smaller in population, less developed, and more remote from a city compared to a town. For a general discussion about Chinese local administrative hierarchy, see Zhong (2003); Tung (1968), pp. 287–8.

23. The original text is "只不过多双筷子吃饭而已." It means that "it is no really no trouble for me to give you the benefit of my hospitality" (in English culture: "it is easy to set another place"). When the author did his fieldwork in this town, he had lunch with judges and government officials almost every day. The judge introduced the author to the officials and the chief executive of the town government as if he were a friend. This brought the author some benefits: first, he could carry out the research more smoothly because of the establishment of a personal network with the local authorities. Or, to quote from David M. Fetterman's term, he could receive assistance from the "local facilitator." Second, the lunches that the author daily received were free, because the chief executive of the town government thought that the author was a privileged guest and his research might make some contribution to the town's development. This courteous and convenient eating arrangement was not simply experienced by the author alone in the T Court. In every court the author did fieldwork in, having dinners or lunches with the judges was quite normal. This eating arrangement was of great benefit for the author concerning his involvement in both the field and becoming more knowledgeable about the community. It is worth noting that the author alone was not singled out in being treated in this manner. This is a quite common personal interaction model practised at the grassroots level in China, regardless of whether the author was there or not. It is difficult to simply say whether it is good or not, because it is the life style that is practised.

24. See Simoons (1991).

25. *Ibid.*, pp. 1, 18–19 (emphasis added).

Hence, having dinner together in China is not only an activity for eating but also a significant person-to-person interactive style of the Chinese people.[26] Indeed, Chinese people love to eat out. On many daily occasions, eating out is a method of building networks and also enhances personal identities. Eating out strengthens friendships, changes a stranger into an acquaintance, and often even into becoming brothers and sisters. In Chinese society, it is true that:

> Simple knowledge of the structural contexts, behavioral expectations and symbolic associations associated with food events can provide access to social boundaries that would otherwise be less easily breached and make it possible to more easily achieve one's goals. Rather than constituting positively functioned adaptive responses, table manners and knowledge of them are better seen as an inventory of symbolic responses that may be manipulated, finessed and encoded to communicate messages about oneself. For Chinese, as for most everyone else, you are how you eat.[27]

2.2 Lunch, Guanxi,[28] *and Judicial Independence*

Having lunch together every day enhances the connection between the government and court through enhancing the connection between judges and officials. The impartiality and independence of the court, in this regard, may be undermined not by the Party's interference but by greeting, chatting, and smiles at table. Ironically, none of this is intended to compromise judicial independence.

It is interesting to note that, when analyzing judicial independence, many Western scholars argue that:

> the essence of judicial independence … is the preservation of a separate institution *of government* that can adjudicate cases or controversies with impartiality. This principle is embodied in the doctrine of *separation of powers*, which elevates the judiciary to the status of a coequal branch.[29]

According to Joel G. Verner, judicial independence is briefly defined as "[the ability] to decide cases on the basis of established law and the 'merits of the case' without substantial interference from other *political or governmental agents*."[30] In many scholars' minds, it is clear that judicial independence chiefly concerns external political interference with the court,[31] controlling power at the constitutional level,[32] and the rule of law.[33] For them, the essence of judicial independence is found in a series of institutional settings which protect the judges and court system from interference from *political and*

26. In the existing scholarship, anthropologists have done extensive studies concerning food habits and eating activities. These studies are an interesting and important angle which assists in understanding social interaction and culture. See Cooper (1986), p. 179.

27. *Ibid.*, p. 184.

28. *Guanxi* is a Chinese term "关系," which is usually translated as "interpersonal relationship" or "personal ties." It is one of the key concepts in Chinese society, indicating how people's lives are structured and how they interact with each other. For a detailed discussion about this concept, see Kipnis (2002); Lin & Si (2010), pp. 561–81.

29. Kaufman (1980), p. 688 (emphasis added).

30. Verner (1984), p. 463 (emphasis added).

31. For example, "the key in accounting for an independent judiciary is to explain why elected officials (*politicians and political parties*) will not want to, or will not be able to, undermine judicial autonomy" (emphasis added). See Vanberg (2008), p. 103.

32. See Friedman (2004).

33. Dahrendorf (1977), p. 1.

institutional power.[34] In this sense, "judicial independence … is a feature of the *institutional setting* within which judging takes place";[35] and it actually comprises a check and balance mechanism similar to what exists in US and many Western countries' constitutional law.

Influenced by these thoughts, existing scholarship mainly investigates *independence at the structural level*[36] between the People's Court and other significant organs of the state. In this vein, it implies that the Chinese Communist Party (CCP) and government are the only two, or the most frequently and the most problematic, elements, which exert interference on the courts' operation. For example, when analyzing China's judicial independence issue, Dr Liu Nanping said:

> without an independent judiciary, *Chinese constitutional rights* cannot be protected and the stability of the social order cannot be assured … to make the independence of the judiciary meaningful, the Constitution should clearly exclude the interference of *political party supremacy* … [and] the law must have power over *the Party* so that the promise of an independent judiciary can possibly become a reality.[37]

However, structural independence is just one aspect of judicial independence. As John Ferejohn pointed out:

> Independence seems to have at least two meanings. One meaning commonly invoked when considering the circumstances of the individual judge, is that a person is independent if he is able to take actions without fear of interference by another … Another meaning is perhaps less common in discussions surrounding judges, but applies naturally to courts and to the judicial system as a whole. We might think of a person or an institution as being dependent on another if the person or entity is unable to do its job without relying on some other institution or group. In this context, the federal judiciary is institutionally dependent on Congress and the president, for jurisdiction, rules, and execution of judicial orders.[38]

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34. According to Irving R. Kaufman, this understanding, which pays more attention to the institutional and structural independence of a court, is derived from the special historical evolution of the idea of judicial independence in the British as well as American context. See Kaufman, *supra* note 29. Similarly, Professor Albert Chen also said (2004, p. 151):

> The modern Western idea of judicial independence is an integral component of the political and legal thought associated with the ideology of liberalism, as well as a product of power struggles in specific historical circumstances, and the degree to which it is a firmly established experience from which the forces of habit, custom, and tradition develop in support of it.

35. Ferejohn (1999), p. 353 (emphasis added).

36. Findlay (1999), p. 284 (emphasis added).

37. Liu (1997), p. 212 (emphasis added). Another typical example of this kind of analytical approach can be found in "2009 Human Rights Report: China," which also highlights only external interference from other institutions and the CCP to the judicial system (State.gov (2010)):

> The law states that the courts shall exercise judicial power independently, without interference from administrative organs, social organizations, and individuals. However, in practice the judiciary was not independent. It received policy guidance from *both the government and the CCP*, whose leaders used a variety of means to direct courts on verdicts and sentences, particularly in politically sensitive cases. At both the central and local levels, *the government and CCP* frequently interfered in the judicial system and dictated court decisions. Trial judges decided individual cases under the direction of the adjudication committee in each court. In addition, the CCP's law and politics committee, which includes representatives of the police, security services, procuratorate, and courts, had the authority to review and influence court operations at all levels of the judiciary. People's congresses also had authority to alter court decisions, but this happened rarely. (emphasis added)

38. Ferejohn, *supra* note 35 at p. 355. A few Western scholars notice the role *guanxi* played regarding using it for personal or institutional advantage. See, for example, Potter (2002), p. 188.

The fundamental and ordinary meaning of judicial independence, although not a classical liberalism narrative, should include that the judge should be a "neutral third." In other words:

> judges have no interest in the issues of the case and no bias toward either of the parties, all citizens—rich, poor, strong, and weak—are put on an equal footing before the law and are able to protect their rights and security against encroachment by others.[39]

This is not to deny the fact of CCP and government interference with China's court system. However, it should be stated that the PRC courts handle over eight million first instance cases per year; only a small fraction of them are political or politically sensitive in nature, which may attract attention from the CCP or government;[40] also, "The mountains are high and the Emperor is far away." The *guanxi*, as another important and probably much more frequent element which may undermine judicial independence, especially at the grassroots court level, is often underestimated in the Western analytical framework when talking about China's judicial issues. *Guanxi*, as an interdependence mechanism existing at the personal level, may exert significant influence on a judge in a subtle and delicate way. Under the situation where the interpersonal relationship works, judges will not "*resist external pressures* when passing judgment,"[41] or "*fear* … interference by another."[42] Rather, they are happy and willing to lose a certain degree of impartiality and independence, because this is the basic rule of the interaction between friends and acquaintances. This mutual exchange can bring direct benefits to the judges themselves by expanding and enhancing their personal ties to many other useful connection points in daily life, such as educational institutions, hospitals, banks, police stations, and so forth. Again, this does not aim to deny or justify CCP and government interference in the court, yet that means there is a very apparent tension between judicial independence and the interpersonal interaction lifestyle into which local judges are absorbed.

Some may argue that the detached tribunal should be equipped with a separate canteen in order to maintain its independence. However, the real problem is that there are only three staff members in the detached tribunal most of the time: two judges and one court clerk. If they leave for case investigation or undertake some other mission, they will not come back for lunch. So, the proposed arrangement for a separate and independent canteen in the tribunal is not only uneconomical but also irrational. More importantly, this proposal is seemingly naive because it simplifies China's reality by presuming that if independence in the canteen is achieved, the independence of court can be correspondingly achieved.

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39. Larkins (1996), p. 608.

40. Fu Yulin and Randall Peerenboom continued that "the risk, nature, source and impact of interference are different. Failing to draw these distinctions is likely to lead to misleading generalizations." See Fu & Peerenboom (2010), p. 96.

Although Professor Fu and Professor Peerenboom's classification of disputes according to the sources of interference clarified the judicial independence issues in China to some degree, it should be noted that this classification used multiple standards to category disputes, political influence, and personal/social influence. In this context, it is very hard to use this framework in analyzing cases where both political and social influence exist. That is to say, for example, if a political leader influenced a particular case in the court but the leader also had personal connections with the court personnel (this is not uncommon in grassroots society), how do we classify this kind of interference and evaluate which element is more influential in judicial independence? Therefore, Fu and Peerenboom's analytical framework is based on the premise that a political leader is actually detached from the local society. This may make sense in the context of big modern cities, but its explanatory power may be very limited when applied to undeveloped grassroots society and rural contexts in which political power and personal power generated from *guanxi* are highly overlapping and snarled.

41. Cownie et al. (2003), p. 190 (emphasis added).

42. Ferejohn, *supra* note 35, p. 355 (emphasis added).

In fact, having lunch together is a symbol which illustrates the vivid and realistic situation in which China's local court is embedded.[43] China, to a certain extent, is still a big community with close interdependent relationships.[44] "Having lunch together" actually manifests the interaction model of people and the *guanxi* (关系) culture which used to and still shapes people's minds. *Guanxi* in Southwest China leads the people towards an "acquaintance society" (*shuren shehui*, 熟人社会). In an acquaintance society, *guanxi* provides "access across social boundaries." In this case, the divisions between "yours" and "mine," between "court's" and "government's" are not as clear as those in modern Western society.[45] Therefore, where the judges have lunch is not that important. What is really important is the natural daily interaction model between people, and between government and court. *Guanxi* that is established through eating out may surpass legal rules. It is still one of the fundamental characteristics of the grassroots interaction between the court and government in Southwest China. In fact, it is not surprising that *guanxi* is the most obvious and profound characteristic of Chinese traditional society. What is surprising is that these characteristics are still governing and dominating China's grassroots society in a modern city in Southwest China after 30 years of social transformation, legal reform, and an open-door policy. If a person, including a judge, living in a grassroots society cannot be independent from personal relationships, how can the court be?

3. CASE ONE: A SUCCESSION DISPUTE IN A MUSLIM COMMUNITY AND THE IMPLEMENTATION OF COURT MEDIATION IN SOLVING HARD CASES[46]

3.1 Basic Facts and the Dispute Resolution Process

A and B are sister and brother; they are both Muslims living in the town. Forty years ago, A got married to a man living in a neighbouring community and then moved out from the

43. "Local," in this sense, does not necessarily mean rural or poor areas of China but the grassroots society. For example, the author was told by a Shanghai procurator that the Court and Procuratorate of a very rich district actually share the same canteen as well. The district is the financial centre of Shanghai city, and one of the richest districts of Shanghai. In other words, to share a canteen between judicial and administrative institutions in grassroots China may not be uncommon. Interestingly, the author was told this information while having dinner with his friend.

44. The importance of *guanxi* is also very obvious in modern Chinese societies—this argument has been confirmed by much relevant research. For example, Chu & Ju (1993); Hamilton (1998), pp. 181–99.

45. Fei Xiaotong has even analyzed this in his classic book *From the Soil* (Fei (1992), pp. 61–2, 69, emphasis added):

> Western societies are somewhat like the way we (Chinese) collect rice straw to use to cook our food … the separate straws, the separate bundles, and finally the separate stacks all fit together to make up the whole haystack … Why are nouns for such basic social units so ambiguous in Chinese? In my opinion, the ambiguity indicates the difference between our social structure and that of the West. Our pattern is not like distinct bundles of straws. *Rather, it is like the circles that appear on the surface of a lake when a rock is thrown into it. Everyone stands at the center of the circles produced by his or her own … Now we can see the boundary between the public and private spheres is relative—we may even say ambiguous.*

46. When doing his fieldwork, the author usually spent several months staying in one court to observe various dispute resolution processes. The author tried his very best to establish personal connections and access different judges in the investigated courts, but it was really challenging. It is not only because the Chinese court system is always hard to access, but also because "investigating ongoing mediations is difficult, time-consuming, and expensive … few disputants and mediators are even willing to allow researchers to 'sit in' on their mediations" (Wall & Dunne (2012), p. 229). In this case, the author could only choose the information-rich cases from the ones observed. Before reporting the cases, the author consulted the local judges to ensure that the cases presented here are not abnormal and unique. For more methodology discussion about the sample selection in the qualitative research, see Xiong (2014).

parents' house. After all the brothers and sisters moved out gradually, B, the youngest child of the family, continued living with the parents and undertook the main obligation of supporting his aged parents until they passed away around 20 and 10 years ago, respectively. When the parents were alive, other brothers and sisters also undertook some of the obligations of supporting the parents while not continuing to live within the parents' house. In 2009, B wanted to demolish the old house to build a new one instead. A, the sister, came to interfere and claimed that she also had rights of succession of the house.[47] According to A, common ownership of the house existed in this case.[48] However, B, the younger brother, claimed that the "married-out women" could not enjoy the right in succession, according to the custom,[49] and other brothers had waived the rights of heritage, hence he had 100% real property rights over the house. The People's Mediation Committee had tried to cope with the dispute, but failed. Then, A sued B at the T District Court.[50]

3.2 Dispute Resolution Process and Preliminary Analysis

Obviously, there is a tension between state law and customary law in this case. Regarding this kind of conflict, there has been much literature in legal scholarship at the conceptual level.[51] What should be of concern here is how the judges release the tension between the two "legal systems," the formal law and folk law, in practice. If the judge insisted on the principle of "equality between the genders," as provided by China's law of succession (in other words, if the court thought that the customary law was totally invalid), the plaintiff would not be completely satisfied with the outcome.[52] However, if the judge just followed the customary

47. According to the *Law of Succession of the People's Republic of China* (1985), art. 9 provides that "Males and females are equal in their right to inheritance," which is considered a principle of China's law of succession. Art. 3 provides that "Estate denotes the lawful property of a citizen owned by him personally at the time of his death, which consists of: (1) his income; (2) his houses, savings and articles of everyday use; (3) his forest trees, livestock and poultry; (4) his cultural objects, books and reference materials; (5) means of production lawfully owned by him; (6) his property rights pertaining to copyright and patent rights; and (7) his other lawful property." Art. 10 provides that "the estate of the decedent shall be inherited in the following order: First in order: Spouse, children, parents. Second in order: Brothers and sisters, paternal grandparents, maternal grand-parents. When succession opens, the successor(s) first in order shall inherit to the exclusion of the successor(s) second in order. The successor(s) second in order shall inherit in default of any successor first in order."

48. According to the *Real Right Law of the People's Republic of China* (2007), art. 93 provides that "A realty or chattel may be commonly owned by two or more entities or individuals." Art. 95 provides that "A joint owner of a commonly owned realty or chattel shall enjoy the ownership of the realty or chattel on a common basis." Art. 97 provides that "As for the disposal or heavy repair of a commonly owned realty or chattel, the consent of the several co-owners occupying 2/3 of the shares or all joint owners shall be obtained, except it is stipulated otherwise by the co-owners."

49. In traditional Chinese society, the married-out women shall not enjoy the right of succession. The old saying is "Married daughter is just like the water splashed out" [*jiachuqu de nver pochuqu de shui*, *嫁出去的女儿泼出去的水*], which means the woman will be economically removed from the family member list, which is just like the splashed water that cannot recover to the former situation. This kind of dispute also happens in some other areas of China; see He (2007), p. 203.

50. The basic facts and process of this case are abstracted from the mediation agreement and the author's interview with the judges and judicial staff with the permission of both parties and the presiding judge.

51. See e.g. Yu (2008), pp. 106–45.

52. In Western jurisdictions, whether the parties are satisfied with the outcome of judicial litigation is not an important consideration of the presiding judge. However, in China, the judges have to consider the parties' feelings and feedback. That is because if the parties complain through appeal, the judges may lose their interests. The judge's concern about the parties' feelings is even becoming increasingly obvious because of the current political-legal ideology movement which aims to promote the idea "People's Judge Serves People" [*人民法官为人民*]; Court.gov.cn (2010).

Beyond this, there is an explicit requirement updated by the People's Supreme Court in the Notice (2010) which provides that "[all courts] should strive to achieve 'two rises'; that is the rise of rate regarding lawsuit settlement and rise of rate regarding withdraw and/or satisfaction with lawsuit, and to achieve 'two drops,' including the

law, regardless of the statute, this would be against the law. It is really a dilemma caused by legal pluralism.[53] The judge, in this case, needed to consider the situation very carefully and find a suitable solution to make an acceptable compromise to all the involved disputants through balancing modern legal skills, traditional custom, and local knowledge.[54]

Mediation, in this sense, could not only provide a compromise solution that both parties may accept, but can also avoid a conflict between state law and customary law. The polycentric nature of this dispute, technically speaking, made this case very suitable for mediation. It also offers judges weapons with which to push and facilitate the parties to achieve a compromise. On the plaintiff's side, the judge can say that the defendant has undertaken the main obligation of supporting the ageing parents, and the customary law also provides that the "married-out women" do not have the right of succession. On the defendant's side, the judge may persuade the defendant to give some compensation to the plaintiff according to the law of succession. Unfortunately, mediation failed because of the "stubborn" defendant (the brother in this case). Consequently, the judge was pushed to come back to the adjudicative track to produce a judgment and had to face the possible negative impact of the dissatisfaction of the parties in a future appeal. In the court mediation process, the judge had realized that this was a hard case. When writing the judgment, the judge sought help from the local authorities, who are the village leaders, township leaders, and people's mediators. Before writing his judgment, the judge went to the village where the succession dispute happened and consulted the local leaders. The judge asked how to distribute justice in such particular circumstances. Is there any precedent on similar issues before and how much compensation should be paid to the plaintiff (the sister in this case), if any? Interestingly, the court clerk was required by the judge to record all of the content of the communication. Then, the interviewed leaders would sign the record. When the judge made the final judgment, these interviews, in which local knowledge and suggestions were expressed from the perspective of local administrative leaders, were included within the case package. Although these documents and sources were not written directly in the judgment, they are not just suggestions but evidence. The judge included all these signed interview documents in the judgment, just in case the judge at the appellate court needed to read them when reviewing the case. It is clear that the judge borrowed the administrative power to justify his own judgment and tried to avoid risks from the appellant procedure by including more justifications in it.

In the above discussion, it is clear that the judge solved the case by using his wisdom. He produced a judgment according to comprehensive recourse, including law and local

(F'note continued)
drop of rate regarding petitions involving lawsuit and the rate of compulsory execution of the judgment ["*要努力实现调解结案率和息诉服判率的'两上升'，实现涉诉信访率和强制执行率的'两下降'*." Court.gov.cn (2010). In this case, if the judge can handle the dispute by using court mediation, he will not only be rewarded but also safe because both parties will agree with, or at least tolerate, the final outcome to a huge extent. However, if going through the appeals process in which the judgment from the grassroots court was overruled or remanded by the Intermediate People's Court; or finally the parties go to the petitions approach, the judge taking a mistaken position faces possible fines, loss of bonus, or even dismissal. The examples can be found in Su (2000), p. 106.

53. "Legal pluralism" is a term indicating the fact that any society or social group contains a plurality of legal orders or fragments of the legal system. Actually, human society "contains many strands pulling in different directions. These strands transcend any one legal system; they recur in quite foreign and different systems, creating the possibility of unexpected alliances between the native and the foreign, and conflicts between aspirations in the natives." See Tan (1997), p. 405. For a general discussion on "legal pluralism," see Snyder (1981), pp. 155–7.

54. Su, *supra* note 52, pp. 130–3.

knowledge collected from local authorities, in order to locate justice and avoid risks from the appellate procedure as far as possible. To be frank, this is a creative strategy. But the question concerns why the administrative leaders were willing to help him? And more importantly, why were they willing to sign the document with certain legal effect? The answer is that they are acquaintances. Using the judge's own words, "we will meet sooner or later" (*taitou bujian ditou jian*, *抬头不见低头见*). The daily interaction has ensured that "if you need help, I will give a hand to you." In fact, the local administrative leaders can refuse the request for an interview from the judge. First of all, "it is none of my business." The administrative leaders do not have any duty to facilitate dispute resolution in the judicial system. Second, it is easy for the administrative leaders to refuse it by saying some "broad narratives," "big words," or some bureaucratese like "rule of law" (*yifa zhiguo*, *依法治国*) or "to maintain the authority of the constitution and law" (*weihu xianfa yu falv de quanwei*, *维护宪法与法律的权威*). These words will be easily found in official documents, propaganda, and leaders' speeches as "strengthening the legal system, has become a key party policy."[55]

The local administrative leaders are helpful because they know the judge is also helpful when he/she is needed. It may not necessarily be a friendship, but it is a realistic symbiotic relationship established by the people's interaction model and the self-interested nature of human beings. So, this is the context where the local court mediation operates. Government and court co-operate with each other as a whole at grassroots level. They are not only connected by institutional settings like the CCP's Political-Legal Committee, Comprehensive Management Office (*zonghe zhili bangongshi*, *综合治理办公室*), and also interpersonal relationships. Therefore, the signed interview is not only one piece of evidence for this particular dispute, but also evidence proving the relationship between the government and the court.

4. CASE TWO: A HOUSING DEMOLITION AND RELOCATION DISPUTE, AND THE FUNCTION OF COURT MEDIATION IN SOLVING SENSITIVE CASES

4.1 Basic Facts and the Dispute Resolution Process

A and B signed a house lease contract. At that time, it is said that the house might be expropriated by the government. A, the lessor, agreed that if the rented land were expropriated by the government, the compensatory payment for this house from the government would be B's in order to ensure the certainty of the lease contract. In 2008, the government initiated a new road construction plan and planned to expropriate A's house which had been rented to B. A did his very best to negotiate with the government and finally A got higher compensation.[56] In this case, A refused to transfer the compensatory payment to B and

55. Liebman, *supra* note 9, p. 168.

56. According to the *City Housing Demolition and Relocation Management Regulation* established by State Council (No. 305, 2001), it provides an abstract principle governing compensation issues by saying: "The house demolition and removal may be conducted by means of monetary compensation, they may also be conducted by means of exchanging the property rights. (Article 23)." Regarding the compensation standard, the regulation provides that "the amount of monetary compensation will be defined according to location, use, area, and other reasons of the demolished house and the estimated value from the real property market. The concrete regulations will be established by the people's government of the province, autonomous region, and municipality directly under the central government. (Article 24)." At the province level, the Yunnan government's regulation concerning house demolition and relocation management

alleged that the contract was invalid. B was angry with A's breach of faith and refused to move out when the government came to demolish the house. Because A, the real property owner, and the town government had achieved an agreement on demolition and compensation issues, the government could not understand why a delay of the project should occur because A could not let B move out. So, the town government sued A in the T District Court and required the court to make an order to let them demolish the expropriated house legally. B, at the same time, sued A for breach of contract. Finally, these two cases were handled by court mediation. B received 1.2 million RMB compensation and the contract was abolished.[57]

4.2 The Dispute Resolution Process and Preliminary Analysis

In practice, it is not uncommon that the administrative power transfers the dispute to the judiciary. Speaking of this, Professor Randall Peerenboom has noted that:

> [the] political actors may cede power to the courts as a way of diffusing responsibility. Both democratic and authoritarian regimes may find it advantageous to funnel divisive issues to the court as a way of maintaining elite level consensus, deflecting popular discontent away from the regime, and allowing disgruntled citizens a forum to blow off steam, thus maintaining legitimacy for the ruling party.[58]

However, although they have an institutional connection, China's court does not like to help the government to fix the housing demolition and relocation disputes (hereinafter the HDRD). One judge of the court told the researcher that they do not like to accept HDRDs because these disputes may transfer the conflict between the parties to the court. Another judge said that: "we do not want to be besieged by the angry people and do not want to be the scapegoat for the government who may suffer from the protest, demonstration as well as turbulence." That means that if this kind of dispute cannot be handled properly and delicately, the parties may be angry with the court rather than with the government who is originally responsible for housing demolition and relocation. The residents may consider that the court is merely a partner of the government, producing some legal terminology and big words to cheat them. In this case, it is possible for the residents to use some very extreme methods in taking reprisals against the court, such as self-burning or murder.[59] This will not only threaten the progress of a court leader official's career but may also jeopardize the safety

(F'note continued)
issues repeated the central government voice. It does not provide detailed compensation standards and delivered the privilege of setting concrete compensation standards to the city and county government. See art. 10 and art. 22 of the *Yunnan City Housing Demolition and Relocation Management Regulation*.

In the particular city investigated, the Housing Demolition and Relocation Management Regulation was established in 2002. Until 2009, the regulation had not been amended by the government. In practice, it is impossible to compensate the relevant residents according to the standard set in 2002 due to the rapid social and economic development. However, the compensation standard should be equal and the same for all the relevant residents living in one region. In short, legally speaking, the amount of compensation is not negotiable; but negotiation is also common in practice, and the compensation may be higher or different due to bargaining and people's efforts.

57. The basic facts and process of this case are collected and abstracted from the mediation agreement and my interview of the judges and judicial staff with their permission.

58. Peerenboom (2009), p. 187.

59. These kinds of report can be easily found in the media. For example, "Penalty Announced of Self-Immolation Case in Yihuang County, Jiangxi," Echinacities.com (2010); "Chinese Man Sets Himself on Fire to Protest Eviction," Chinadigitaltimes.net (2010); "A Man Wanted to Explode Himself in Higher People's Court of Yunnan Province," News.163.com (2010); see also Liu (2005), pp. 1–3.

of all judges. The court, like any other organization, is governed by self-interested persons. Therefore, to accept the housing demolition and relocation litigation is not a wise choice for them. Besides, it should not be ignored that in the hierarchy, the district court is higher than the town government. The town government is actually at the township level (*xiangzhenji*, *乡镇级*) regarding the administrative hierarchy, whereas the district court is at the vice-county level (*fuxianji*, *副县级*). The court, in this case, will suffer little pressure if refusing the HDRD. Actually, they have the privilege to do so in practice justifiably. According to the written reply (*pifu, 批复*) of the SPC in 2005:

> the People's Court shall not hear the civil litigation case between the dismantler and the dismantlees, or between the dismantlees and tenants of houses because of not reaching an agreement regarding compensation and resettlement for dismantlement. The People's Court shall notify the parties that they may apply for arbitration to the relevant departments according to article 16 of the City Housing Demolition and Relocation Management Regulation.[60]

That is to say, the court had sufficient reason to refuse the HDRD openly and legally. However, the government wanted the court to share responsibility with them due to the special and sensitive features of the housing demolition and relocation dispute. Benefiting from the inter-institutional relationship established in daily interaction, the government thought of the possibility of moving the case to the court when they suffered a headache from HDRDs.[61] Consequently, the court was motivated by the government to use its legal authority to persuade or press all the relevant parties. The government and court worked hand in hand, as they were acquaintances who were facing the same CCP's policy of social harmony and were both under political pressure to maintain the stability of the society.

5. COURT MEDIATION IN THE SOUTHWEST CONTEXT: TWO SIDES OF THE SAME COIN

In this section, the bright and dark sides of court mediation in the Southwest urban context will be further discussed. The debate on ADR and court mediation existing in the legal scholarship will not be repeated. This section only highlights some aspects of court mediation based on the author's empirical study and the analysis of the two cases mentioned above.

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60. See "The Supreme People's Court's Reply about whether the People's Court Shall Accept and Hear the Civil Litigation between the Parties Who Cannot Reach an Agreement on Compensation and Resettlement." The original text goes as follows (Law.baidu.com (2010)):

> *《最高人民法院关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复》中规定：*
>
> *拆迁人与被拆迁人或者拆迁人、被拆迁人与房屋承租人达不成拆迁补偿安置协议，就补偿安置争议向人民法院提起民事诉讼的，人民法院不予受理，并告知当事人可以按照《城市房屋拆迁管理条例》第十六条的规定向有关部门申请裁决*

61. Some administrative leaders are even suspended from duty because of the inappropriate settlement of a housing demolition and relocation dispute. See Peng (2010), p. 26.

5.1 The Bright Side

5.1.1 Expand the Capacity and Range of Case Acceptance

As was pointed out in Section 4.2, the court, in general, can refuse to accept and hear housing demolition and relocation litigation according to the reply from the SPC. Not just in the judicial interpretation at the Supreme Court level, but also in local practice, some of China's courts explicitly refuse housing demolition and relocation litigation. For example, the People's High Court of Guangxi Province listed 13 categories of cases that courts shall not accept:

> These [cases] include real estate disputes resulting from government decisions or institutional reforms, claims brought by laid-off workers resulting from corporate restructuring, and lawsuits resulting from a party's failure to implement a government decision regarding ownership or usage rights in property. Most of the categories relate to government reforms of industry, agriculture, and land; some, such as a ban on some classes of securities lawsuits, mirror decisions by the Supreme People's Court.[62]

As is commonly admitted, judicial power in China is restricted. Sometimes a restriction is due to political considerations, regarding letting the court avoid interfering or reviewing the government's activities, and getting rid of any kind of political embarrassment caused by a "check and balance" situation which happened in practice. And the court usually follows the instructions, as the finance and human resources are controlled by the government.[63] However, rejection is also in the court's own interests because of the sensitivity and danger of coping with this kind of dispute.

But this time, the court accepted this HDRD. They made full use of a loophole in the law. According to the reply from the SPC, it provides that "the People's Court shall not *hear the civil litigation case* between the dismantler and the dismantlees, or between the dismantlees and tenants of houses because of not reaching an agreement regarding compensation and resettlement for dismantlement." That implies, from a particular perspective, that the court may accept the case and handle it by using an alternative approach instead of hearing the civil litigation. Here, court mediation can strive for a legal space in which the court can handle the dispute. In my fieldwork in another county court, the situation was quite similar. For example, the disputes caused by forest ownership reform usually cannot be accepted by the court according to the law and judicial interpretation.[64] In the local practice, for example, the People's High Court of Guizhou Province explicitly announced that the following dispute related to forest rights cannot be accepted by the court. The court should notify the parties to turn to the relevant administrative institution for resolution:

> (1) [the dispute caused by] the dissatisfaction with the compensation standard for the forest and forestland expropriated according to the law; (2) the dispute caused by the unclearness

62. Liebman (2007), p. 27.

63. Cohen (1997), p. 804; Clarke, *supra* note 13, pp. 260–3.

64. According to the *Administrative Reconsideration Law of the People's Republic of China* (1999), s. 2 of art. 30 provides that: "According to the decisions of the State Council or the people's governments of provinces, autonomous regions and municipalities directly under the Central Government to prospect and confirm or adjust administrative divisions into districts, or to requisition lands, an administrative reconsideration decision, which is made by the people's governments of provinces, autonomous regions and municipalities directly under the Central Government, to confirm ownership and right to use of natural resources, such as land, mineral resources, rivers, forests, mountains, grasslands, unreclaimed land, beaches, maritime waters, is a final ruling."

> of the ownership and the right of use; (3) assignee changes in the required forestland usage after the forestland has been legally transferred from the contractor who requested to punish the assignee.[65]

However, by using court mediation, this dispute regarding forest ownership issues can also be handled by the court through the court mediation track due to a very technical distinction between civil litigation and court mediation.

Strictly speaking, it is not a bad thing for the court to expand its range and capacity for case acceptance, although not through the litigation approach. This is because China, as some scholars have argued, is experiencing a high incidence of social conflict.[66] The types of dispute are multiplying, the subjects involved in the disputes are diversifying, and the demands of the disputants vary.[67] The Blue Paper on the *Rule of Law Development 2010* has reported that, due to the high unemployment rate, the polarization of the society, and the financial crisis, many social conflicts have appeared.[68] One of the most obvious manifestations is the large number of criminal cases and mass disturbances currently in China.[69] For this, Wang Shengjun, the then President of China's Supreme People's Court, also confirmed in his Working Report 2009 that, from 1978 to 2008, the case-load of the SPC increased around twenty-fold.[70]

As a result, more and more cases need solutions from the courts. However, due to the lagging political and legal reform,[71] "courts increasingly deal with difficult or sensitive cases by inaction: cases are refused or left unresolved."[72] Court mediation, however, did not play its maximal role in coping with disputants in the past decades. According to Randall Peerenboom and He Xin:

> the popularity of all types of mediation had been decreasing until recently, except for formal third-party commercial mediation. For instance, the percentage of civil and economic cases resolved through judicial mediation decreased from 69% to 76% in 1989 to 30.4% in 2001.[73]

It is true that "[ADR] procedures which are effective can be adopted as required, and to the extent that they need modification to make them more suitable to local conditions, they can be adjusted accordingly."[74] Based on the idea of dispute resolution design, ADR can

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65. See "The Directions on Hearing Civil Litigation regarding Forest Right," (Forestry.gov.cn (2010)). The original Chinese text goes as follows:

> *以下纠纷不属人民法院受理的民事案件，应告知当事人向有关行政机关申请处理：*
> *(1) 因林地被依法征收，对被征林地、林木补偿标准不服的；(2) 因林地所有权、*
> *使用权权属不清发生争议的；(3) 林地合法流转后，受让人私自改变林地用途，*
> *承包人请求对其进行处罚的。*

66. See Hu et al. (2007); Yu (2007).
67. Zhao (2008), pp. 59–66; Halegua (2005), p. 718.
68. See Li (2010).
69. Yang (2006), pp. 152–3.
70. Wang Shengjun (2011b).
71. Song (2007), p. 147.
72. Liebmam, *supra* note 62, p. 27.
73. Peerenboom & He (2009), p. 25.
74. Brown & Marriott (1993), p. 17.

continue creating structures to deal with repeated or systemic disputes, and can be applied to both the most mundane and the most horrific of conflicts.[75] Therefore, court mediation is really a rich mine which has not yet been exploited, especially considering its capacity to cope with dispute in the 1970s in China. Court mediation, in this case, provides a legal and official remedy for the disputants, who may get nothing from the litigation approach. Although this is not an institutional innovation and cannot solve all the problems fundamentally according to current circumstances of the court system, from a pragmatic perspective this quick response according to emergent circumstances of the court system can release social conflicts and cope with the dispute by using an alternative official approach. Meanwhile, the court can expand its power and capacity by advocating the needs of dispute resolution. After all, dispute resolution itself is also one of the most fundamental functions of courts and law.[76]

5.1.2 Be Good at Solving Complex Problems

It is argued that, for the small community which lacks social mobility and mainly consists of acquaintances, informal dispute resolution mechanisms like mediation can work well.[77] But for the city, which is a totally differentiated domain and is full of strangers, institutionalized and formal dispute resolution mechanisms like litigation will be the dominant means of solving disputes.[78] In this regard, people will naturally prefer a lawsuit in the modern urban context. However, the reality is always more complicated than this theoretical discourse. For example, in modern China, "many reports show that [Chinese disputants] still prefer a private settlement achieved through negotiation in civil, commercial disputes, or even when there are official laws to resolve their problem and there is no serious impediment for them to seek in recourse of law."[79] Disputants or the court in a modern urban context may still choose mediation, because they are realistic and rational about dispute resolution options and are willing to choose the most suitable approach to fix the relevant problem. The dichotomy regarding village and city, mediation and litigation, is too simple and ignores another possibility when a multicentre dispute exists.

In the succession dispute mentioned above, mediation is ideal. This is true because, as much research has supported, mediation is a better approach when handling family-related issues.[80] More importantly, the flexibility found in the mediation mechanism can assist the judge in balancing not only the interests of the relevant parties, but also conflict between state law and customary law, by avoiding disputes which may not be suitable for the adjudicative track.

75. Schneider (2009), p. 289.

76. Cownie et al., *supra* note 41, pp. 27–30; Farrar & Dugdale (1990), p. 6.

77. North (Winter 1991), pp. 99, 103.

78. *Ibid.,* p. 104.

79. Su (1998), p. 150.

80. See e.g. Vorys (2007), pp. 871–2. In many jurisdictions, family affairs are settled by a specialized legal institution like a family court, which is quite different from the orthodox judicial institution. For example, in Japan, due to the traditional culture and the special characteristics of family issues, family disputes will be handled by a family court. Within this family court, there are judges and experts regarding family issues, as well as social workers. They can help the parties to calm down and solve the problem peacefully. In this process, mediation is often preferred. The family court has been deemed a spectacular success as the first generation of Japanese judicial reform. Thanks should be given to Professor Stao Nobuyuki from Chuo University, Tokyo for letting me know about this. For more details about the Japanese family court system, see Oda (1992), pp. 73–5; Bryant (1995).

China is such a huge country with unexpected, unbalanced regional development and diversity, and is still in the social transitional era. For quite some time into the future, various folk customs, ethnic traditions, cultural disciplines, taboos, and the state law will need to co-exist and even contest against each other for dominative legitimacy governing social activities. This is especially true in Southwest China. State law and local custom "could diverge significantly, and sometimes one, sometimes the other would prevail."[81] That is to say, the complexity of the various disputes and social reality will challenge the simplistic and uniform dispute resolution approach. In reality, this situation requires a diverse and changeable dispute resolution mechanism.

As to this issue, Professor Lon L. Fuller has made a persuasive argument. By borrowing the concept of "polycentric" from Michael Polanyi, Fuller argued that there are some cases that are inherently unsuitable for adjudication because of the complicated web of inter-dependent relationships existing within particular kinds of dispute. Fuller made it clear that:

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions of a complicated pattern throughout the web as a whole. Doubling the original pull, will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.[82]

Although Fuller did not intend to analyze the legal pluralism problem, he inspired us to see that it is extremely difficult to produce a binding judgment because "[adjudications cannot] lend themselves well to the consideration of multifaceted disputes … the adversary proceeding oversimplifies many conflicts, and consequently many disputes are brought to court only as one stage in their ultimate resolution."[83] For Fuller, the traditional adjudicative judgment is not able to solve a "many centered" dispute.[84] This situation will encourage judges to try an unorthodox approach such as mediation, or will push the judges to "reformulate the problem so as to make it amenable for a solution through adjudicative procedures."[85]

It is definitely the case that the courts, according to Randall Peerenboom, are not the proper venue for resolving many of the socially, politically, and economically contentious disputes, especially in a country like China, which is so large, diverse, and complex.[86] Some scholars believe that mediation is mainly used to resolve disputes happening within a particular community or within a particular group, and in most cases these dispute resolutions are closely related to moral judgement.[87] Following Fuller's argument, it is clear that the feasibility of mediation can go beyond the community context and can provide resolutions to multicentre and complex disputes with a combination of informal and formal rules involved. In this case, court mediation is an ideally "amenable" approach for solving these kinds of complicated dispute for transactional Southwest China.

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81. Twining (2000), p. 226.
82. Fuller (1978), p. 395.
83. Jacob (1984), p. 12.
84. Fuller, *supra* note 82, p. 401.
85. *Ibid*.
86. Peerenboom, *supra* note 58, pp. 175–6.
87. Huang & You (2009), pp. 2–7.

Beyond this, the successful court-connected ADR practice in coping with a complicated case has constructive impact within the dispute resolution system. According to Professor Carrie Menkel-Meadow, "many important changes in human society have come from hard-fought conflicts that resulted in the change of human institutions, relationships or ideas."[88] The dispute can contribute "to the maintenance of group boundaries,"[89] and help to "maintain the total system by establishing a balance between its component parts."[90] In other words, the experience of court mediation found within complicated dispute settlements can be learned and even institutionalized by the judicial authority at least regionally. Regarding this, Professor Fan Yu suggested that one of the most important functions of ADR concerns the fact that this mechanism can accumulate experience of dispute resolution in order to relocate a line of rights and obligation within the new-style cases under new social circumstances.[91] These experiences are references when restructuring the social-legal system or drafting new legislation afterwards. For China, the settlement of multicentre and complicated disputes creates a dynamic picture showing the interaction between the institutional arrangement and social realities: "Thus, the search for an alternative dispute resolution process is perhaps better described as a search to more precisely locate adjudication and in particular judicial adjudication, on the continuum of dispute resolution mechanisms."[92] Based on these experiences, the judicial authority may find a realistic and contextual, rather than a theoretic and idealist, approach to make law within the realm of dispute resolution.

5.2 The Dark Side

5.2.1 Impairing Justice and Individuals' Rights

Court mediation may impair justice by producing a bargaining culture in the shadow of law. This is especially true in a case where illegal acts exist. This is unlike adjudication which has a "'marked orientation toward the past.' They interpret and assess, in terms of legal doctrine, past actions and events, accrued entitlements, established obligations, and claims."[93] The ultimate goal of court mediation is to find a compromised outcome acceptable to all parties which will allow for the continuance of their lives tomorrow. Indeed, mediation is future-oriented.

> When people first appear in the mediator's office, all they want to do is to talk about the past … Continuing discussion about the past inevitably casts the mediator into a judge's role. Searching for solution requires a future focus because the solution lies in the future … The mediator is not interested in discussing or evaluating complaints about the past but redirects the disputants to talking about their aspiration for the future.[94]

In this regard, the right and wrong, and legal and illegal, found within the past, are usually facts both the disputants and the mediator should be less concerned about. After all, "determining who was right or wrong about the past is the function of a judge, not

88. Menkel-Meadow et al., *supra* note 4, p. 7.
89. Coser (1956), p. 34.
90. *Ibid*., p. 35.
91. Fan (2002), pp. 32–3.
92. Emond (1989), p. 4.
93. Cotterrell (1992), pp. 211–12.
94. Haynes & Charlesworth (1996), pp. 13–14; Erickson and McKnight (2001), p. 25.

the mediator."[95] Court mediation in this case is concerned less about the law. Speaking of the nature of court mediation, Professor Zhu Suli even suggested that it is not necessary to mediate according to the law, because mediation is not an adjudicative process at all. Zhu said:

> In order to promote the development of [court] mediation, the restriction should be loosed in terms of the requirement of "[mediating] according to the law." Firstly, even though mediation can be implemented according to the law, the key point of mediation is to achieve successful dispute settlement rather than to act in accordance with the law. Secondly, from the perspective of society, if the mediation is carried out regardless of law, it will not necessarily produce an unjust outcome. On the contrary, it may deepen our understanding of law [in context] and may create new feasible regulations. Thirdly, no matter whether the judge is concerned with the law or not, legal regulation will become an inevitable counter in the bargaining process of mediation. Fourthly, it is only necessary to require the judge-mediator not to gain personal interests from mediation and not to prejudge any party. That will be fine if the final outcome is just in general and is not too far away from the moral common sense or does not excessively accommodate the outdated social conventions and customs.[96]

From the judge's perspective however, his duty is to investigate the facts and to safeguard justice in accordance with the law of the land.[97] According to China's law, "to strictly observe the Constitution and laws" is also part of the legal duty of a judge.[98]

In the case mentioned earlier regarding the house demolition and removal dispute, the lessor claimed that the contract of the house lease was invalid and contract modification was needed. Technically speaking, according to *China's Contract Law* and *Judicial Interpretation of Supreme People's Court on Implementation of the Contract Law of People's Republic of China II*, he could argue that the objective circumstance has significantly changed compared to the time when the original contract was signed. Based on this reason, he could require the court to modify the contract.[99] In fact, the objective situation truly changed as the lessor received more monetary compensation than normal residents. However, he could not state the reason publicly or provide relevant evidence. That is because in each house demolition and removal case, the compensation standard should be equally applicable to all the relevant residents. Why could the lessor get a higher compensation? Under what situation did the officials agree to provide more

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95. Haynes & Charlesworth, *ibid*.

96. Su, *supra* note 9, p. 13.

97. Hamburger (2008), p. 103.

98. According to the *Judges Law of People's Republic of China* (amended 2001), art. 7 also provides that (emphasis added):

> Judges shall perform the following obligations: (1) to *strictly observe* the Constitution and laws; (2) to take facts as the basis, and *laws as the criterion* when trying cases, to handle cases *impartially*, and not to bend law for personal gain; (3) *to protect the litigation rights of the participants* in proceedings according to law; (4) to *safeguard* the State interests and public interests, and to safeguard the lawful rights and interests of natural persons, legal persons and other organizations; (5) to be *honest and clean, faithful* in performing their duties, and to abide by discipline and professional ethics; (6) to keep State secrets and the secrets of judicial work; and (7) to accept legal supervision and supervision by the masses.

99. According to the *Judicial Interpretation of Supreme People's Court on Implementation of the Contract Law of People's Republic of China II*, art. 26 provides that:

> After the establishment of the contract, the objective situation has significantly changed that is unpredictable, not due to Force Majeure or not commercial risk when the contract was signed; [in this case] the further performance of the contract will be obviously unjust for one party or cannot fulfill the goal of the contract. The people's court will decide to modify or terminate the contract according to the principle of justice and the actual situation of the case.

compensation? Was there something "fishy" going on? Was there corruption "under the table"? Was there illegal behaviour occurring? In the court mediation process, these questions would be ignored to a certain extent in order to achieve an agreement and conclude the case as soon as possible. Therefore, the interests of the residents living in the same area will be impaired by blinding them to knowledge about this bargaining in the court mediation room, and they may be less compensated compared with the lessor in this case. The dispute would be solved at the expense of justice, with the tolerance of unfairness, in and out of the courtroom.

More seriously, the disregard of justice, under the climate of "mediation first" and "social harmony," can be justified and become politically correct. In contrast, if this case went down the litigation route, it may cause serious unexpected problems. For example, if the presiding judge led the involved parties in the HDRD case to the litigation track, it would be necessary to require the lessor to provide relevant evidence to show to what extent the compensation was higher than normal and whether there was a significant change in the terms of an objective situation that the contract should be modified or even be considered as a frustration of contract. However, the answers to these questions are inaccessible as the compensation negotiation between the lessor and government occurred "under the table." More problematically, if the case proceeded to the litigation stage, that will be heard by the open trial.[100] The unequal compensation among residents thus would probably cause public anger and mass incidents.[101] This resolution would be a bad and frustrated resolution; the judges thus would be labelled as "trouble makers."

In fact, this is a typical case in which a "the private process has a public effect."[102] Several studies note that the mediation process may also impact the third party positively or negatively.[103] From the perspective of institutional economics, if a transaction can internalize all the costs and benefits of their activities, it is unnecessary for the government to intervene. However, in a case in which the costs and benefits of the activity could not be wholly internalized, the external power must become involved in order to cope with the portion which cannot be internalized in order to prevent the third party from potential interference or hurt. From a particular angle, the intervention of the public power, like the involvement of the court and judge in a particular case, aims to protect other non-participants from being interfered with by the external impact of the dispute. However, the implementation of court mediation in this case actually justified the external cost of the dispute to the non-participants. All of the other residents' interests who were living on the same road had been impaired due to the unfair compensation which was produced by the court.

One of the conclusions that can be drawn from the above analysis is that when encountering a dispute in which the externality stemming from the illegal behaviour exists, the function of court mediation may be alienated. Mediation may be utilized to cover illegal

100. Art. 134 of the *Civil Procedural Law of the PRC* (Amended 2012), provides:

> Civil cases adjudicated by people's courts shall usually be heard publicly, except for the cases that involve state secrets or the private affairs of individuals, or are otherwise provided by law. A divorce case or a case involving trade secrets may not be heard publicly if a party so requests.

101. Since ancient times, the Chinese have hated uneven distribution. Confucius said in the *Analects* that: "I have heard that the lord of a state or a family concerns himself not with the scarcity but rather with uneven distribution." Unfair distribution has sharpened social cleavages and class conflict. See Yang, *supra* note 69.

102. Guzman (2000), p. 1284.

103. Wall & Dunne, *supra* note 46, p. 233.

behaviours, which may even be justified by the "Big Mediation" policy which places the target of the proceedings on pursuing the result of concluding the case. This kind of consequentialism policy may encourage a judge to achieve a resolution through whatever means he desires, placing justice and the individual's rights aside.

5.2.2 Confusing the Role of Judges

Court mediation may confuse the role of judges. When a judge plays the role of mediator, instead of investigating facts, assessing evidence, and applying law, the main concern of the judge-mediator is to achieve a compromise solution which, to some extent, will shade or tolerate the illegal acts and make the judges become relatively loose and flexible when implementing law. Moreover, all the information obtained from the mediation process should be confidential.[104] That requires the judge to keep silent on illegal issues.

In terms of the implementation of court mediation, Article 32, Section 12 of the *Judges Law of the PRC* (amended 2001) provides that "no judges may meet the party concerned or his or her agent without authorisation, or attend dinners, or accept presents given by the party concerned or his or her agent." However, in order to arrange person-to-person communication, the private session is a very practicable and commonly used method in mediation. Such communication would allow the mediator to meet the party privately.[105] This will cause confusion in a judge's identity when playing the role of judge-mediator.

In addition, under current policy, the interest of a judge is closely related to a successful mediation, which generates the possibility that the judge may render an unfavourable decision to the unco-operative party in the court mediation stage. In this case, the parties may be subject to significant coercion and find mediation in practice to be a mandatory rather than a consensual process.[106] So, it is true in some cases that:

> in order to distract the plaintiff's attention from the essential points in the dispute (particularly effective in the Basic Level People's Courts where the Parties are less likely to be legally represented); "encouraging mediation by applying pressure" (yiya cutiao: 以压促调); and "using inducements in order to promote mediation" (yiyou cutiao, 以诱促调); and "procrastination in order to compel mediation" (yituo yatiao: 以托压调).[107]

Consequently, the parties' voluntariness in the mediation process is more or less limited, and it may also impair the judge's impartiality when adjudicating a case after an unsuccessful mediation.

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104. As a commonly accepted principle, confidentiality is a very important ethical principle for the profession of mediator. In the provisions governing mediation issues in different jurisdictions, they all provide that the mediator should keep confidentiality for the parties. See Golam (1996), p. 401; Nswbar.asn.au (2011); Hklawsoc.org.hk (2011); and Abanet.org (2011). In Chinese mediation law, there is a simple regulation governing confidentiality issues of the dispute resolution process. Art. 12 of the "Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society (2007)" provides that "the judge responsible for handling the case and the relevant organization and other personnel participating in the mediation shall strictly keep the mediation information secret, if any party requires not to disclose the content of the mediation agreement, the people's court shall permit it." This regulation is usually overlooked by the legal profession and scholars by saying that there is no regulation on confidential issues of mediation in China. However, it should be admitted that in addition to this, there is no regulation governing confidentiality in China's mediation law.

105. The private session is also admitted by the *UNCITRAL Model Law on International Commercial Conciliation* (2002), which provides that "The conciliator may meet or communicate with the parties together or with each of them separately." See Alexander, *supra* note 4, p. 508.

106. Palmer (2010), p. 266.

107. *Ibid*.

6. CONCLUSION

Even in T District, one of the most developed regions of Southwest China, the heterogeneity of society and the diversity of social values still exist. Values of urban citizens, rural villagers, and ethnic minorities' customs all co-exist, and social transformation is still on the way. These realities generate a hard case when legal pluralism and multicentred issues are involved, which make the application of highly uniform norms difficult and calls for a nuanced and flexible dispute resolution design. Indeed, cases which involve conflicting fundamental policy goals are difficult for the court. The litigation approach will meet resistance, no matter how such cases are decided, and the enforcement of this kind of judgment is extremely difficult, if not impossible.[108] Therefore, from a pragmatic perspective, court mediation expands the court's capacity regarding accepting and hearing cases, gains more support from the government, and is suitable for Southwest China with regard to the social complexity in a transitional era in which both informal and formal rules co-exist. In this regard, court mediation is feasible in the investigated Southwest urban context, as it can provide a public good regarding an official remedy and a flexible dispute resolution service for the disputants.

However, because China's current court mediation policy is designed and promoted for political ends, and, to a large extent, it is a quick response to circumstances of social unrest,[109] this institutional setting lacks systematic design and seems too eager for quick success and instant benefits. Although realizing justice and solving disputes are both the fundamental functions of a court, the different preferences between them may lead the parties to quite different destinations. In China today, the core mission for the court system is to solve disputes. Based on a dispute resolution oriented judicial policy, the judge may abuse court mediation in unsuitable cases and disregard the justice he should have safeguarded.

Actually, mediation cannot solve all social conflict. The nature of disputing parties, the mediator involved, and the specific conflict management context will definitely influence the effectiveness and feasibility of the application of court mediation. As to this, the SPC has clearly known the potential risk of the inappropriate implementation of court mediation. Article 17 of Notice (2010), for example, provides that:

> as for cases involving *national interests or social public interests, having guiding significance on the application of law, or having positive meaning on the formation of the awareness of social rules,* we shall attach importance to making a timely judgment and closing the case according to law, give full play to the positive role of judgment in making a clear distinction between right and wrong, regularizing behaviors, punishing the evil and encouraging the good. (emphasis added)

However, as politics influences everything, this guideline was more or less ignored by the local judge when implementing court mediation in practice. So the most important mission of China's court mediation law is to ensure that the ill-suited cases should not be mediated in the court.

A practical and feasible amendment should start from reclarifying the bottom line and the limitation of the implementation of court mediation. All ill-suited types of dispute which have been mentioned in the SPC's judicial interpretations should be clearly and

108. Peerenboom, *supra* note 58, p. 187.

109. Minzner, *supra* note 8, p. 938.

straightforwardly excluded from court mediation practice. This is not a new regulation, but sticks to the old rules, like the list of cases unsuitable for mediation, from the SPC. This can also avoid the unduly high rate of court mediation by funnelling suitable litigation cases to the mediation approach. When designing China's mediation law in the future, the list of cases unsuitable for mediation should be included as a principle to safeguard the quality of mediation and justice. In addition, although many at the Southwest grassroots level cannot do so due to several reasons, it should be also kept in mind that when the condition allows, the people's mediator should be encouraged to get involved in the pre-court dispute resolution procedure in the current court mediation stage, instead of the judge-mediator's role. After mediation is exhausted, litigation can follow. At this stage, the judge should only conduct adjudication. These amendments can avoid a confusing situation caused by a judge playing the role of a mediator, and also help the people's mediator improve their professional competence through learning from judges and court practice.

Furthermore, it is worth mentioning that under the ideology of dispute resolution, co-operation between government and the court may be strengthened to some degree. After all, the dispute resolution oriented approach presented by court mediation is isomorphic with the social stability ideology presented by the government, which allows external political and social reasons to influence the disposition of the disputing matters. "Big Mediation" policy thus may influence judicial independence; however, the extent should not be exaggerated. As the local courts are deeply embedded into the local community and the political-legal system, the "Big Mediation" policy, as a technical and partial institutional arrangement, cannot change the basic characteristics of the grassroots society of China, and will not refresh the fundamentals which are governing China's structure in the political-legal regime. The interdependence between court and government has been there for a long time and was not newly created by the promotion policy from People's Supreme Court regarding court mediation. Therefore, judicial independence will not be obviously impaired by the court mediation mechanism. Or at the very least, longer observation and more empirical data are needed for this argument.

Finally, it should also be noted that all the arguments raised in this paper should be carefully limited to Southwest China and cannot naturally become universal or nationally generalized. To know whether these arguments are effective in the developed regions of the PRC, for example Beijing and Shanghai, more empirical research and data are needed. This research thus cannot and should not rule out other possibilities of the application of court mediation in other differentiated contexts in China. After all, China is too huge. To some degree, China's legal issues should be analyzed on a "regional basis," not on a generalized "national basis" where one size fits all.

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