ARTICLES

CHINA’S DISPUTE-RESOLUTION MECHANISMS AND INNOVATION IN THE TRANSFORMATION ERA

Feng Yujun & Peng Xiaolong

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CHINA’S DISPUTE-RESOLUTION MECHANISMS AND INNOVATION IN THE TRANSFORMATION ERA

Feng Yujun*  Peng Xiaolong**

How to solve contradictions and settle disputes are both crucial and practical problems which every society has to face. This paper introduces the formation, development and the basic structure of China’s current disputes resolution mechanisms. This also serves to provide the basic background and the theory framework for subsequent discussion. Then briefly analyses the legal rules, the practical operation and the problems of litigation and alternative dispute resolution and discusses possible reform measures. It finally offers a preliminary summary and some prospects on the relationship between innovations in the realm of dispute-resolution mechanisms and the improvement of the legal system in general.

I. INTRODUCTION

How to solve contradictions and settle disputes are both crucial and practical problems which every society has to face. Dispute-resolution mechanisms in China have a long history and have continuously developed and changed in the course of time. Against the background of the formation of a socialist legal system with Chinese characteristics as it has been officially propagated the questions of which patterns and characteristics China’s dispute-resolution mechanism display how they operate practically whether they need change at system level and how such change could be brought about are problems which need to be treated seriously in the course of the establishment of the rule of law. This paper consists of four sections. It first introduces the formation, development and the basic structure of China’s current disputes resolution mechanisms (Section 1). This also serves to provide the basic framework for subsequent discussion. It then briefly analyses the legal rules, the practical operation and the problems of litigation (Section 2) and alternative dispute resolution (Section 3) and discusses possible reform measures.
measures. It finally offers a preliminary summary and some prospects on the relationship between innovations in the realm of dispute-resolution mechanisms and the improvement of the legal system in general (Section 4).

II. FORMATION, DEVELOPMENT AND BASIC STRUCTURE OF CHINA’S DISPUTES RESOLUTION MECHANISMS

A. The Formation and Development of China’s Disputes Resolution Mechanism

China’s disputes resolution mechanisms mainly originate from the practice in the revolutionary base areas① during the 1920s and the 1940s. ② Even earlier during the First Revolutionary Civil War (1924-1927) organizations of the peasant movement had established mechanisms for mediation and arbitration. In 1932 the Communist Party of China (CPC) for the first time enacted rules on the litigation process namely Directive No. 6 of 1931 entitled Treatment of Counter-revolutionary Cases and the Establishment of Judicial Procedures and the Temporary Regulations of the Department of Adjudication. They mandated public trial mobile courts a people’s jury system a system of avoidance (回避制度) a system of advocacy a two-tiered trial system etc. During the Anti-Japanese War and the so-called War of Liberation (1937-1949) the border region governments as well as the base areas promulgated various sets of rules regulating the judicial hierarchy simplified procedures etc. in some detail. At the same time the mediation system gradually entered the stage of institutionalization and regulation by the legislator. Formally it included civil mediation (民间调解) community mediation (群众调解) government mediation (政府调解) and judicial mediation (司法调解). The first three were forms of out-of-court mediation while the last one was in-court mediation and developed the famous Ma Xiwu trial form. These explorations provided a good foundation for the establishment and development of dispute-resolution mechanisms after the founding of the People’s Republic of China (PRC) in 1949.

① The revolutionary base areas are those areas which were controlled by the Chinese Communist Party between the 1920s and 1940s. They were normally located in hinterland areas such as the Jiangxi Soviet in Jinggangshan controlled by Mao Zedong and Zhu De and later during the war against Japan Yan’an and were used by the Party to experiment with new policies or to perfect them.

② Strictly speaking the current legislation and practice of dispute resolution mechanisms constitutes a hybrid of traditional Chinese law the legal tradition of the former Soviet Union the legal tradition of the West etc. This chapter by no means attempts to deny the impact of these diverse influences but limits itself here to only dealing with those factors which had the most direct effect on the current legislation and practice.
If we look into the relevant norms and practices and leave aside the ten years of the Cultural Revolution (1966–1976), dispute resolution mechanisms in the newly founded PRC can be divided into the following three stages:

First, from 1949 to the beginning of the Reform Era (1978) in China, after the Complete Book of Six Codes of the Guomindang government had been abolished, multifaceted dispute-resolution mechanisms were established, which were based upon the experience of the so-called “liberated areas” in order to meet the practical needs of dispute solution. It had the following special characteristics:

A simple and convenient form of civil adjudication was established, which had the special characteristic that it paid particular attention to mediation by judges and to the authority of the judge. Except for the Summary of Court Procedure of Civil Cases at All Levels, which was issued by the Supreme People’s Court in 1956, this characteristic was also highlighted in the Constitution, the Court Organization Law and elsewhere.

Mediation was widely used, including the modes of judicial mediation, administrative mediation, people’s mediation, civil mediation, etc. The Instruction in Order to Strengthen the People’s Judicial Work promulgated on 3 November 1950 by the Government Administration Council of the Central People’s Government pointed out clearly that “people’s mediation should be employed to its utmost extent in order to reduce people’s litigation.” With the promulgation of the General Principles of the Organization of People’s Mediation Committees in March 1954, the organizational structure and the modes of operation of people’s mediation were formed in a preliminary fashion. Mediation was to be widely used in disputes within working units as well as by administrative organs in order to deal with traffic accidents, incidents influencing the public order, medical malpractice and accidents due to negligence as well as to determine compensation for damages caused by such incidents.

Administrative mechanisms were developed. Governments at all levels and in all the relevant administrative departments undertook the responsibility for settling many civil disputes. From the 1960s, China established administrative arbitration for economic contracts in order to solve disputes between enterprises.

Second, during the 1980s and 1990s, after the termination of the Cultural Revolution (1976), China gradually continued its earlier efforts to construct a democratic legal system and successively promulgated a number of important standardizing documents such as the Civil Procedural Law (Trial) and Provisional Regulations of Notarization of 1982, the Economic Contract Arbitration Rules of 1983 and the Organizational Rules for the People’s
Mediation Committees. In this way the regulation relating to dispute-resolution mechanisms made marked progress.

Thirdly, with the deepening of reform and the opening policy, China also gradually entered a period of social transformation: social structure, thought and concepts, the interest patterns, etc., all experienced profound changes which resulted in the growth of the number and the types of disputes. Against this backdrop, China’s dispute-resolution mechanism underwent some significant changes:

A reform of the civil trial procedure, with special emphasis on the reform of the burden of proof, was gradually developed. Procedural justice became the main focus of the reform. The main targets of the reform were to realize the modernization of the judicature and further to establish and improve the modern judicial procedure. Litigation as a means for the resolution of disputes was highly praised.

The arbitration system was further standardized. The Arbitration Law, which was implemented on September 1, 1995, marked the transition from initially administrative arbitration to unified civil arbitration in China’s civil and business arbitration.

Non-litigious procedure became less important in solving disputes, and more emphasis was put on the effects of litigation procedure. It is important to point out here that because of the deepening of the social transformation and the changes of the social structure, the acquaintance society gradually changed into a society of strangers. The cohesive forces of the community formerly provided by work-units decreased accordingly. On top of this, the expectations of the state towards judicature and litigation were quite high, so that non-litigious procedures were not taken seriously enough and the resources provided were insufficient. The development of a legal system of non-litigious procedures was insufficient and its practical importance decreased.

Fourth, from the year 2000 to the present: since entering the new century, in the face of the need to find a resolution to its social contradictions, the state has adjusted its social governance strategy at macro-level. The departments involved have engaged in various reforms and innovations of the dispute-resolution mechanisms. Some of the new features are as follows:

Comprehensive society management and the goal of building a harmonious society were put forward: In August 2000, the General Office of the Central Committee of the Communist Party of China and the General Office of State Council published a document entitled Opinions of the Commission for the Comprehensive Management of Public Security of the Central Committee regarding further Strengthening of the Investigation and Handling of Contradictions and Disputes in which comprehensive social management...
became the focus for the reform and for innovations of the dispute-resolution mechanisms. It emphasized the fusion of traditional modes of governing with the modern concept of the rule of law and brought into play all state power and social resources for participating in the prevention and resolution of disputes. In 2006, the sixth plenary session of the sixteenth Central Committee of the Communist Party passed the CPC Central Committee Decision on Some Major Issues regarding the Building of a Harmonious Socialist Society which clearly outlined the comprehensive co-ordination of the different interest relationships and the proper handling of social contradictions. It proposed a pluralistic dispute-resolution mechanism in which courts, judicial administrative organs, government and its administrative organs at all levels as well as societal organizations would take part.

Changes of judicial policy: in a talk at Yale University in 2004, the President of the Supreme People’s Court Xiao Yang clearly put forward that “law will not be the panacea for resolving all disputes... the ‘idealism’ of pursuing complete justice to a certain extent will have to give way to ‘realism’ in resolving disputes.” At this time, the courts began to reflect upon the possible problems of the ideas of “litigation above all” and “orientation towards procedure” in the judicial reform process in order to appraise reasonably the role of the trial in solving disputes and to handle the relationship between litigation and non-litigation in a proper way, which became the main focus of reform during this period. Non-litigious procedures such as mediation and arbitration developed very fast. “Large scale mediation working mechanisms” were put forward and promoted. Increasing attention was paid to the convergence of the various non-litigious and litigation procedures.

Standardization and regulation of dispute-resolution mechanisms: following the perfection of the legal system, the regulation of dispute-resolution mechanisms during this period entered a stage of fast development. The Civil Procedure Law was amended in 2007 and again 2012. Rules pertaining to petition and administrative review etc. were amended. A series of laws and regulations such as Labor Dispute Mediation and Arbitration Law, Land Contract Disputes Mediation and Arbitration Law, and the People’s Mediation Law were promulgated. The Supreme People’s Court issued Some Opinions on the Vital Role of Litigation Mediation in Building the Harmonious Society (2007) as well as Opinions on Establishing and Perfecting a Mechanism for Resolving Contradictions and Disputes Characterized by the Linkage of

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③ Yan Maokun, Xiao Yang’s Speech at Yale University, People’s Court Daily, 10 October 2004.
Elements of Litigation and Non-Litigation (2009) which became important milestones for the development of dispute-resolution mechanisms in China.

B. The Basic Structure of Dispute Resolution Mechanisms in China

With regard to the question of the structure of dispute-resolution mechanisms there are different categories which are the consequence of different standards. For example, if we look from the perspective of the resolution body and relief mechanisms we can distinguish between public relief, private relief and social relief. If we look at the question from the perspective of the form of dispute resolution we can distinguish between three basic ways namely consultation (negotiation), mediation and decision as well as a hybrid form which has been formed by means of combining different forms such as the combination of mediation and arbitration and med-arbitration. In this paper we will mainly look at the question from the perspectives of litigation and non-litigious mechanisms.

1. Litigation Mechanisms. — Litigation is the process of judging cases and solving disputes led by state judicial organs through judicial activities. China’s current procedural laws mainly include the criminal procedure law, the civil procedure law and the administrative procedure law. Traditionally, litigation mechanisms mainly refer to civil suits that is to activities of hearing and solving civil disputes according to law by the people’s courts with the participation of the parties and all other persons involved in the litigation. With the development of society and the changes in the concept of the rule of law the scope of theoretical research and the practice of dispute resolution continuously expanded. In the area of criminal law for example under the influence of the penal law policy “combining punishment with leniency” and the Western concept of restorative justice criminal reconciliation or mediation has become a hot issue of dispute solution. In 2011 the Criminal Procedure Law was amended by the addition of the “reconciliation of the parties in cases of public prosecution procedure”. In addition, although prohibiting mediation in administrative procedure has been a general rule for a long time in China in practice a great demand for mediation in legal studies research on dispute resolution is initially developed in two different directions. The first is non-litigious mechanisms (alternative dispute resolution) oriented and mainly dependent on Civil Procedure Law. The second is from the research on sociology of law which focuses on the relationship between law and society particularly paying attention to the actual situation of solving disputes “living law” and “law in action”; see FAN YU & LI HAO THE RESOLUTION OF DISPUTES: THEORY, SYSTEM AND PRACTICES at 1 (Tsinghua University Press [2010]).

exists. Quite often, the courts engage in mediation between the administrative bodies and the counterparts of the administration in order to facilitate the forming of a consensus and the resolution of disputes and settle cases by having the plaintiff abandon his or her claim. This practice is often called administrative litigation and mediation. Since 2003, the Supreme People’s Court’s judicial interpretations have consistently become part of mediation.⑥

It is important to point out that the two basic ways of dispute resolution mediation and trial are clearly very different in many ways. However, it is the “combination of mediation and trial” which constitutes the Chinese tradition of dispute resolution; both are the basic forms of the People’s Court’s exercising judicial power and at the same time constitute the main way of settling cases. In practice, in-court mediation differs considerably from out-of-court mediation but is closely related to trial. The relationship between trial and in-court mediation is one indicator of the orientation of judicial policy the judicial function of the Court the trust of the parties in the administration of justice and other concrete circumstances. It can provide basic information for the understanding and the assessment of resolution by litigation. For these reasons, this paper includes in-court mediation in its treatment of litigation mechanisms.

2. Non-litigious Mechanisms. — Non-litigious mechanism (非诉讼机制) is a generic term for methods, procedures or systems of dispute resolution other than litigation. They aim to complement rather than to replace a court trial or a judgment and they are in principle based upon the free choice of the parties. Based upon the differences of value orientation and the differences in the relationship between litigation mechanisms and non-litigious mechanisms, current non-litigious mechanisms include two major categories. One is oriented towards “access to justice”; its function is to play a supporting role for the administration of justice to alleviate the pressure and the current crisis and to improve the convenience of the use of justice for the masses. The other one is its autonomy or its direction towards autonomy; its function is to provide an autonomous way of dispute resolution which suits the needs of both the parties and the community. It may also help to avoid the corrupt practices as they often occur in judicial proceedings.

From the point of view of the subjects of dispute resolution non-litigious mechanisms in present day China include the three forms of civil ADR, administrative ADR and judicial ADR (司法性). First, civil ADR includes non-litigious procedures or mechanisms established or managed by the non-governmental organizations or social organizations (or individuals).

⑥ On criminal reconciliation (mediation) and the historical development of administrative litigation co-ordination see CHINA LAW DEVELOPMENT REPORT 2011: TOWARDS A PLURALISTIC IMPLEMENTATION OF LAW at 352-359 (Zhu Jingwen ed. China Renmin University Press 2011).
communities and other autonomous bodies. These include most importantly people’s mediation, arbitration, notarization, etc. Second, administrative ADR, meaning dispute resolution activities and procedures managed by local governments, administrative authorities, and judicial administrative organs. These include administrative mediation, administrative decision-making, administrative re-consideration, administrative decision-making, administrative complaints (appeals and petitions), as well as administrative arbitration and administrative conciliation. Last, judicial ADR mainly refers to the non-litigious procedure annexed to courts and judicial investigation, including people’s mediation windows established at People’s Courts and other forms of social mediation, entrusted mediation and assisted mediation. It also refers to procedures of judicial investigation or confirmation of results of non-litigious dispute resolution.

By now, specialized dispute-resolution mechanisms have emerged in some areas in China. These include adjusting laws and the specialization of dispute resolution for certain issues, making specific substantive rules and determining legal responsibility for certain issues and establishing relative independent dispute-resolution mechanisms. It also includes the formation of combinations between civil, administrative (or quasi-administrative) dispute resolution procedures and judicial procedures. On the whole, the current specialized dispute-resolution mechanisms in China are still in the process of formation and perfection. There are however some rather mature mechanisms which include: (1) Labor dispute-resolution mechanisms, which consist of consultation, trade union and social mediation, labor supervision, labor arbitration, and civil lawsuits; (2) Consumer dispute-resolution mechanisms, consisting of consultation, consumer association mediation, administrative mediation, arbitration and litigation procedures; (3) Traffic accident resolution mechanisms consists of assessment of traffic accident liability, traffic police administrative mediation, insurance company mediation, court entrusted mediation and litigation procedures; (4) Medical dispute-resolution mechanisms consist of medical-dispute consultation, medical-dispute people’s mediation, procedures for the identification of medical accidents, administrative mediation and litigation procedures. Lastly, there are: (5) Dispute mediation and arbitration mechanisms for rural land contracting issues.⑦

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⑦ FAN YU, LECTURES ON ADR at 149 (China Renmin University Press, 2012).
III. LEGISLATION AND PRACTICE OF DISPUTE RESOLUTION MECHANISMS

A. Legislation

Legislation related to dispute resolution procedures in China mainly belongs to the category of civil procedure law. Following the recent development of the theory and practice of dispute resolution, however, dispute resolution legislation in administrative procedure law and the criminal procedure law is developing rapidly. With regard to civil procedure law, there are mainly three kinds of procedures which meet the actual needs for solving different types of disputes:

1. Procedures for Lawsuits. — Including the procedures of first instance, the procedures of second instance, and trial supervision procedures. More specifically, the procedures of first instance comprise common procedures and summary procedures. The common procedure is the basic procedure for courts to hear a case at the first instance, in which the collegial bench consists of at least three judges and the trial time is typically limited to six months. The summary procedure is the procedure for the lower courts and the tribunals dispatched to hear the less controversial cases in which the facts and the rights and obligations of the parties are clear and other civil cases agreed upon by both parties. In the summary procedure, a single judge judges the case and the case has to be concluded within three months. In 2012, a simpler and more convenient small claim procedure was added to the Civil Procedure Law. The amount claimed has to be lower than thirty per cent of last year’s annual average wage for employees in each province, autonomous region or municipalities directly under the central government. The judgment of first instance in such cases cannot be appealed.

2. Non-litigious Procedures (非诉讼程序). — Strictly speaking, “non-litigious procedure” is not a legal term used in legislation. It is normally assumed that non-litigious procedures are applied in non-controversial cases. Special procedures prescribed in the fifteenth chapter of the Civil Procedure Law, except for cases regarding the eligibility of voters, are within the scope of the non-litigious procedure. This includes declarations of disappearances and declarations of deaths, the determination of the deprivation and restriction of civil capacity, the determination of property as ownerless, the confirmation of mediation agreements and the enforcement of security rights. In addition, the Procedure for Hastening Debt Recovery in the seventeenth chapter of the Civil
Procedure Law and the Procedure for Publicizing Public Notice for Assertion of Claims in the eighteenth chapter are commonly considered as non-litigious procedures. A number of other civil and commercial laws also prescribe non-litigious cases such as the cancellation of the right of a guardian’s supervision and the right of inheritance in the General Principles of Civil Law and the Inheritance Law. The Company Law refers to the nullification of a resolution of the shareholders’ meeting, permitting access to accounting books, the dissolution of a company, liquidation, the designation of the liquidation group, the confirmation of the liquidation scheme and the liquidation report, etc. Although non-litigious procedures mainly deal with non-litigious cases, they have a special function in conflict resolution cases. On the one hand, by employing methods of non-litigious procedure such as monitoring, verification, licensing, certification, etc., judicial power under certain circumstances can intervene during the stage when civil rights or a legal relationship are formed. Not having to wait until a dispute has happened may help to prevent disputes. On the other hand, non-litigious procedures and litigation procedures are clearly different in many ways, such as procedural value, operational principles and mechanisms. In particular, their authority and their non-confrontational ways, which help to redress some of the problems of litigation procedures and solve those parts of disputes for which litigation procedures are not applicable, provide them with a rather high degree of flexibility.

3. In-court Mediation. — In-court mediation has a long history in China. In recent years, in particular, the role of in-court mediation in resolving disputes and creating a harmonious society has increasingly received attention. The Supreme People’s Court, for example, issued Some Opinions on the Vital Role of Litigation Mediation in Building the Harmonious Society in 2007 and the fourth article of Some Opinions on Further Implementing the Work Principle of Giving Priority to Mediation, Combining Mediation and Adjudication of 2010 stipulates: “Treat mediation as the first choice for ending civil cases and as the basic working method. For all cases that can be mediated according to law and with view to the nature of the case the method of mediation has to be attempted first.”

When the Civil Procedure Law was amended in 2012, it absorbed the content of the judicial interpretation mentioned above and prescribed the “mediation conducted first” system in the following way: “Where mediation is appropriate for the civil dispute involved in an action initiated by a party in a People’s Court, mediation shall be conducted first unless the parties refuse...”

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mediation."

In addition, the “special procedures” in the fifteenth chapter also specifically added judicial confirmation procedures for mediation agreements. Court mediation is applicable for all types of cases except for special procedures, the supervision procedure, the procedure of public summons, bankruptcy procedure cases, marriage relationships, identity identification cases, and other civil cases to which mediation is not applicable due to the nature of the case. From the perspective of the stage of a case, in-court mediation can be used at each stage, such as trial, appeal, and retrial, and also in every part of a trial.  

B. Practice

Traditionally, dispute resolution in the first place refers to the resolution of civil disputes. In litigations, civil litigation plays the dominant role. For this reason, this section mainly looks into the practice of civil litigation.  

Table 1 shows data relating to civil trials in China from 1981 to 2011. With the help of these data but not limited to them, we try to observe and analyze the number of disputes settled by litigation and the actual effect of dispute resolution. When looking into these issues, this section focuses on specific indicators such as the total amount of cases, the workload of the single judge, the rate of appeals, erroneous judgments in the first instance, the ratio between judgments and mediation, the rate of enforcement based upon mediation agreements, etc. These indicators correspond to the efficiency, the effect and the form of dispute resolution.

1. Number of Total Cases and Workload of Single Judges. — Upon the basis of Table 1, it is possible to analyze the cases accepted by the Chinese People’s Courts since 1981. There are two basic trends: (1) The number of first instance cases accepted by the People’s Courts increased from 906,051 in 1981 to 7,596,116 in 2011, an increase of 7.38 times with an average annual growth rate of 7.34 percent; (2) The number of first instance civil cases accepted by the People’s Courts increased from 673,926 in 1981 to 6,614,049 in 2011, an increase of 8.81 times and an average annual growth rate of 7.91 percent. This implies that both the total amount of civil cases as well as the number of disputes settled through litigation has increased rapidly during the past thirty years and this, to some extent, also shows that litigation or trials have become an increasingly important way to settle disputes for the people.

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9 See The Regulations of the People’s Supreme Court on Some Questions of the Work of People’s Courts in Respect to Mediation of Civil Cases.
10 For practices of criminal reconciliation, litigation and mediation for administrative compensation and administrative mediation and reconciliation, see Zhu Jingwen supra note 6.
Over the years, the percentage of the number of first instance civil cases among the civil cases has basically remained over 80 percent. At the same time, the workload for Chinese single judges soared rapidly from 15 cases in 1981 to 39 in 2011. Compared with some Western countries, however, the number of disputes resolved by a single judge is still quite small.

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Collected Statistical and Historical Material on the Administration of Justice by the Supreme People’s Court: 1949-1998 (part on civil cases).
2. Appeal Rate in Civil Cases and Error Rate of First Instance Judgments.

The appeal rate refers to the ratio of the number of second instance cases to those first instance cases for which appeal is possible. This rate to a certain extent shows the parties’ subjective feeling towards the fairness of the first instance trial and towards the effectiveness of the dispute resolution. Figure 1 shows the changes of the People’s Courts appeal rate from 1981 to 2011 after deducting the number of first instance cases which were completed by mediation and withdrawal. Three areas of change can be detected: (1) The appeal rate increased from 32.1 percent to 40.9 percent between 1981 to 1983; (2) There is a downward trend from 1984 to 2002 when it fell from 38.4 percent to 16.6 percent and (3) It markedly increased from 17 percent to 26.8 percent in 2011.

Figure 1 People’s Courts Civil Cases Appeal Rate from 1981 to 2011
Appeal is a regular procedural mechanism. Compared to other indices such as the number of petition letters, number of re-trials, etc., it is less affected by policy changes. Appeal thus constitutes a comparatively stable method to measure the efficiency of dispute resolutions. The appeal rate is however a reflection of the parties’ attitude to the first instance trial and the efficiency of the dispute settlement. It constitutes a kind of external evaluation which to a certain extent is influenced by factors such as legal consciousness, the legal costs for a second instance trial, the implementation of the first trial judgment, etc. It is therefore necessary to add an internal evaluation standard, namely the first instance trial error rate, which means the ratio of the number of the cases changed by the second instance trial plus the number of cases ordered to re-trial by the second instance court to all cases completed by first instance courts. The rate directly reflects the degree of accuracy of the confirmation of the facts and the application of law in the first trial. As Figure 2 shows, the first instance judgment error rate shows irregular variations for the period between 1981 and 2002 and then a clear downward tendency from 2.4 percent in 2002 to 1.3 percent in 2011.

Figure 2 People’s Courts of First Instance Civil Judgment Error Rate 1981 to 2011

C. Preliminary Conclusion

Based upon these observations, we can provide a preliminary analysis of dispute resolution by litigation: Firstly, judged from the perspective of the number of cases, it is very clear that the number of cases resolved through litigation has increased significantly in recent years. This reflects the perception of society that litigation or trial has already become an important way for resolving the conflicts of present-day society. This phenomenon of course correlates to factors such as economic development, social transformation, the
increase of mobility as well as the increased legal awareness of the people. However, it is also clear that the single judge’s workload has also increased, which likewise illustrates to a certain extent the enhanced ability of the courts to resolve disputes. At the same time, we should also observe that the increasing number of cases obviously puts pressure on the court system so that the phenomenon of “too many cases with insufficient personnel” objectively exists. Compared with other countries, however, the current number of cases handled by a single Chinese judge is still relatively small. If we look into the reasons for this situation, we can observe that, apart from the need to improve the professional skills of judges, a number of factors such as China’s current judicial system, litigation procedures, and the allocation of human resources, etc., play an important role. From the perspective of the judicial system, for example, judicial independence in China is still at a rather low level at the moment. The long-existing internal report and request system (请示回报制度) of the courts further tends to reduce judicial efficiency. From the perspective of litigation procedure, China has not managed to establish an effective case-distribution mechanism. The role of non-litigious procedures such as summary procedures (small claim procedures) and proceedings for supervising and urging the clearance of debt and other non-litigious procedures for dispute resolution needs to be improved. From the perspective of the allocation of human resources, the boundary between administrative and judicial functions is blurred. Judges actually engaged in trials are much less than the total number of judges. Judged from these factors, with regard to the ability to resolve disputes through litigation, there is still some room for improvement. Future reforms should focus on the quality of judges, the allocation of human resources, litigation procedures and the judicial system, etc., in order to enhance the ability to solve disputes.

Secondly, with regards to efficiency, the statistical data clearly shows that the first instance trial error rate has decreased markedly since 2002. This basically reflects a general improvement of the ability of the People’s Courts to adjudicate cases. It is necessary to point out, however, that the improvements of trial accuracy do not necessarily imply an improvement of the efficiency of dispute resolution. The former relates to the degree of accuracy in confirming the facts and the application of law during litigation. The latter, however, pays more attention to “ending a case and settling the dispute” which emphasizes the parties’ consensus and their willingness to identify with the results of a

\[\text{It needs to be pointed out that “too many cases with insufficient personnel” is a very rough description of the situation at national level and that the situation in different regions may be very different. The most important problem of the eastern regions and cities is that the number of cases has increased sharply while the main problem of the Western regions and rural areas is a serious lack of judges. For a more concrete analysis of the problem, see Peng Xiaolong, Reviving the System of People’s Jurors in Practice 1998-2010, Chinese Journal of Law, 15-32 (2011).}\]
trial. Actually there are cases in which “finding out the facts and distinguishing right from wrong” is not necessary for a satisfactory solution of the dispute. On the whole, however, the improvement of trial accuracy is without doubt the basic guarantee for solving disputes by means of litigation. Its significance lies in not only providing a legal solution for the dispute in question but also in being able to provide a basic framework for consultations and negotiations between the parties. It can even be said that it protects public expectation by clearly showing the rules and also has the function of disciplining the behavior of people by means of law. From this point of view, the improved trial accuracy in recent years has provided a foundation for the improvement of the efficiency of dispute resolution. From the point of view of the appeal rate, however, this effect could not be fully unfolded. After 2002 the appeal rate did not decrease in the same way in which the first instance trial error rate decreased. On the contrary: the appeal rate shows a clear upward trend which suggests that many cases did not reach the stage of “case ended and dispute settled”. Clearly the situation that an “ended case does not settle the dispute” is brought about by a number of different factors. It correlates to some inherent limitations of the litigation mechanism in balancing interests namely an “all or nothing” (win or lose) situation. At the same time, the current Chinese legal environment also influences it. A situation in which the public credibility of the judiciary and the judicial authority is not high undoubtedly affects the extent of the acceptability of a judgment for the parties. In a number of cases, it is impossible to resolve a dispute properly through litigation because the legal rules in a changing society contradict social life. From this point of view at least in these types of cases there are serious limitations for resolving disputes through litigation.

Thirdly, from the perspective of the methods of solution, mediation has after a long period of time and since 2002 increasingly become a method for judges to hear cases and resolve disputes. The renaissance of court mediation had its specific reasons and has to be evaluated with a view of the social background. For instance, within society during the transformation period (since 1978) the number of social contradictions has multiplied and they have become much more complex and judges were willing to transfer risks while at the same time the approval of mediation by judges, lawyers and parties was rising. Judicial policy developed an affirmative position towards mediation and promoted it enthusiastically. As pointed out above from a theoretical analysis compared with litigation and trial mediation should enjoy obvious advantages in dispute resolution with regards to the efficiency of the solution.

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3 Fan Yu, Re-constructing Mediation, 2 Law and Social Development 3 (2005).
However, in recent years, the proportion of enforcement cases based upon court mediation has become very high in some places, and this to a certain extent implies that the advantage of court mediation in dispute resolution cannot be fully developed. This is not only closely related to the current “difficult to enforce” phenomenon but has also to be viewed in connection with other factors such as some parties’ “malicious mediation” mandatory mediation ordered by some judges in order to fulfill performance indicator standards, etc. For these reasons, in the future, it will be necessary to unfold fully the advantages of judgment and mediation in dispute resolution and on the other to ensure that the parties voluntarily agree to mediation are honest and trustworthy and serve as subjects in the litigation process.

IV. THE LEGISLATION AND PRACTICE OF NON-LITIGIOUS DISPUTE-RESOLUTION MECHANISMS

A. Legislation

There are two definitions for legislation on non-litigious dispute-resolution mechanisms (non-litigious procedural law): a broad and a narrow one. Non-litigious procedural law in a narrow sense focuses on the aspect of form, namely, the system of laws and rules which specifically regulates the non-litigious dispute resolution organs and their procedures including arbitration law, notary law, mediation law, etc. In a broader sense, non-litigious procedural law focuses on the functional level, the system of legal norms consisting of laws and regulations, judicial interpretation and other normative documents which serve to adjust all kinds of non-litigious dispute resolution methods, procedures, organizations and mechanisms. This section focuses on the relationship between innovation in the realm of dispute-resolution mechanisms and the attempts to perfect the socialist legal system with Chinese characteristics. It not only pays attention to the normative level but also takes the practice into account. Consequently, it analyses non-litigious resolution mechanisms on a broad level. On the whole, China has already formed a legal system for non-litigious dispute resolutions which consists of various legal sources such as constitutional law, all kinds of special laws, administrative regulations, departmental rules and regulations, local laws and regulations as well as judicial interpretations. According to the nature of non-litigious dispute resolution procedures, the current legislation mainly consists of four categories:

1. Legislation Related to Civil Non-litigious Dispute Resolution
Mechanisms (Civil ADR). — At this stage, the relevant Chinese legislation includes laws such as the Arbitration Law, the People’s Mediation Law, Notary Law and special dispute resolution organs and procedures such as those regarding consumer protection established according to the Consumer Protection Law, the labor dispute-mediation organizations which have a non-governmental organization nature as well as organs and procedures established by insurance companies, trade associations and other non-governmental organizations dealing with traffic accidents, medical malpractice disputes related to tourism and travel, building maintenance, etc.

2. Legislation Related to Administrative Dispute-Resolution Mechanisms (Administrative ADR). — Apart from specific laws and regulations such as the Administrative Reconsideration Law, Regulations on the Implementation of the Administrative Reconsideration Law, most of these kinds of rules at present belong to the category of special laws, administrative regulations as well as departmental rules and regulations, etc. such as Trademark Law, Patent Law, People’s Police Law, Road Traffic Safety Law, Regulations on Handling Medical Accidents, Petition Regulations and other related regulations.

3. Non-Litigious Dispute-Resolution Mechanisms Attached to the Court (Judicial ADR). Although judicial ADR is often set up in court, it is totally different from litigation procedure. It normally operates by relying on special procedures or specifically stipulated procedural law. There are aspects which relate to litigation procedure. With regard to present China, the People’s Mediation Law of 2010 and the revised Civil Procedure Law of 2012 clearly prescribe the judicial confirmation procedures for the people’s mediation agreement, etc. In addition, the people’s courts in all localities have established people’s mediation windows and other forms of social mediation. Some courts have also taken other measures such as entrusted mediation, etc. However, up to now, while the mediation mechanisms attached to the courts in the different areas differ, they are generally based upon judicial interpretations and internal court rules rather than having a clear legal basis.

4. Special Dispute-Resolution Mechanism (Special ADR). — At present, except for the Labor Dispute Mediation and Arbitration Law, the Rural Land Contract Disputes Mediation and Arbitration Law and a few other special laws, special ADR generally uses the form of combining substantial law and procedural law in order to form a complex mechanism formed out of non-governmental, administrative and judicial procedures.
B. Practice:  
A Special Focus on Mediation

The range of aspects involved in non-litigious dispute resolutions is very broad. For this reason, we need, before examining the practice, to provide a brief limiting explanation of two aspects. Firstly, when examining the situation of one type of dispute resolution, one rather appropriate way consists in taking the various dispute-resolution mechanisms into consideration so that we can achieve a more complete view, which will enable us to analyze comprehensively the practice of litigation and the various non-litigious resolution mechanisms and the relationship between them. In this way, we will be able to grasp rather objectively the practice of one kind of dispute resolution. Given that the aim of this paper is to study the whole practice of non-litigious dispute-resolution mechanisms and that special ADR involves a large number of areas for which the integration of substantive and relevant law in the related areas is still continuing and that most special ADRs from the perspective of their operation mechanism are a fusion of civil ADR, administrative ADR and judicial ADR, this section mainly deals with the practices of the latter three types of dispute-resolution mechanisms. Secondly, even though these types of non-litigious dispute-resolution mechanisms from the perspective of dispute resolution methods also include negotiation, mediation, and arbitration, it mainly deals with the development of mediation.

There are three additional reasons for such treatment. Firstly, from the view of historical development, mediation has a long tradition in China, which is often regarded as a symbol of traditional Chinese culture but has also been affected by the modern concepts of the rule of law and modern judicial concepts. Investigating the current development of mediation and the relationship between mediation and litigation can be seen as an indicator of this. Secondly, from the view of practical operations, mediation is not only a kind of typical non-litigious dispute-resolution method but has also already been integrated into or merged with many other dispute-resolution mechanisms. In the present day, countries all over the world increasingly pay attention to the flexibility and negotiatory and non-confrontational nature of this kind of dispute resolution. Mediation as a dispute resolution method has been widely

applied in every mechanism and procedure including trial and litigation. Thirdly from the view of practice the working mechanism of “grand mediation” （大调解） combines people’s mediation, judicial mediation, administrative mediation, civil mediation and other dispute resolution together and attempts to construct a dispute resolution network. This in recent years has already become the main focus of the work of dispute resolution departments. This not only affects the patterns of dispute resolution but also causes a lot of controversy. This section will briefly review the situation of the implementation of people’s mediation, administrative mediation, court-annexed ADR and the implication of “grand mediation” mechanisms.

1. People’s Mediation. — Table 2 assembles the basic data for people’s mediation from 1981 to 2011. Combined with other material we can perform the following analysis.

Table 2 Number of Disputes Resolved by People’s Mediation Committees between 1981 and 2011

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CHINESE LAW YEARBOOK volumes 1987-2012; and Zhu Jingwen supra note 6 303-304.
Firstly, seen from the total number of disputes mediated by people’s mediation, it basically maintained a range from six to eight million during the 1980s. It clearly decreased after the beginning of the 1990s, but from 2008, it entered a period of rapid growth and was close to nine million by 2011. The number of cases mediated by People’s Mediation Committees basically every year constitutes more than 50 percent of the total number of cases brought to People’s Mediation Committees or the courts. Although these data are provided in aggregate form from the Justice Departments and the possibility of error and exaggeration cannot be completely excluded, it cannot be placed in doubt that people’s mediation dealt with a large number of disputes.

Secondly, if we observe the general trend of the people’s dispute mediation over the past thirty years, the number of cases accepted by People’s mediation fluctuates, but the total number has not greatly increased. There is an overall trend of decline in the ratio of the number of civil cases mediated by People’s Mediation Committees to the total number of cases mediated and accepted by courts. The ratio was 92.1 percent in 1981 and only 57.5 percent in 2011. From such a macro-perspective, it seems that the trend to have disputes settled by people’s mediation is weakening. There are, however, two factors worth noting behind these data.

The changes of the total number of cases dealt by people’s mediation and especially the changes of the ratio of cases dealt by people’s mediation to cases accepted by courts are to some extent caused by law, policy, and other institutional arrangements of different periods from the beginning of the reform period in 1978. From the 1990s, litigation and trial were in the limelight of judicial reform, and the state paid less attention to people’s mediation and reduced investment in people’s mediation, which to some extent resulted in the reduction of the number of cases mediated by this form of mediation. After 2008, influenced by judicial policy adjustments, the number of disputes mediated by people’s mediation increased.

The number of disputes dealt with by people’s mediation is closely related to the development of other non-litigious dispute-resolution mechanisms. In the current situation in which diversified dispute-resolution mechanisms are vigorously promoted, all kinds of negotiation mechanisms, trade-organization dispute-resolution mechanisms, arbitration mechanisms and administrative dispute-resolution mechanisms develop very quickly and divert a large number of disputes. In fact, viewed from the situation in recent years, people’s mediation has adapted itself to the new situation. It has not only developed a

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3) We here mainly refer to the analysis of Professor Fan, see Fan Yu, supra note 15.
3) The development of property disputes, medical disputes, labor disputes and other specialized areas of dispute-resolution mechanisms illustrates this point well. For more details, see Zhu Jingwen, supra note 6, 419.
number of methods and forms linking it to other dispute-resolution mechanisms. It has also established news types of organization of people’s mediation.

Thirdly, with regard to the role of people’s mediation in dispute resolution, further analysis is necessary as it is not possible simply to conclude that upon the basis of the data mentioned above the role of people’s mediation is weakening. This is not only due to the flexibility and convenience of people’s mediation but also because a large number of daily mediation activities have not been included into the above-mentioned statistics. More importantly, in addition to directly accepting cases and resolving disputes, people’s mediation also has the function of disseminating legal knowledge, preventing disputes from happening and forestalling disputes from intensifying, etc. To a certain extent, people’s mediation is an important part of grassroots level governance. For this reason, if one wishes to evaluate the efficiency of people’s mediation dispute resolution, it is necessary to look at other data beyond the number of cases accepted, etc. These factors include the level of perfection of people’s mediation organizations and mediation networks, the quality, number and representativeness of mediators, as well as the situation and the efficiency level of local governance. According to latest statistics, there was a total number of 810,926 People’s Mediation Committees in China in 2011. There were 677,934 village committees, amounting for 83.6 percent of the total number, 42,091 township and street-level committees, accounting for 5.2 percent of the total 65,194 work-unit committees (8 percent) and a total of 25,077 of social organization committees including enterprise mediations, accounting for 3.2 percent of the total. The total number of people’s mediators amounts to 4,336,000 persons, among them 2,535,958 (58.5 percent) with a high-school degree or above. Nineteen percent of them are full-time mediators, the rest are part-time mediators.

2. Administrative Mediation. — It is normally assumed that administrative mediation is an activity in which the administrative organs or the dispute resolution organizations specifically established by them preside over the negotiations by the two conflicting parties—based upon the free will of both the parties—and reach an agreement and in this way resolve the dispute. The scope of administrative mediation mainly includes civil disputes but it also extends to a number of administrative disputes caused by some specific administrative acts. Seen from the practice of dispute resolution, the types of administrative mediation are diversified. From the point of view of institutional settings, administrative mediations not only include permanent mediation organs

\[\textit{Fan Yu, supra note 15.}\]
\[\textit{Zhu Jingwen, supra note 12, 457 and 474.}\]
\[\textit{FAN YU & LI HAO, supra note 4, 36.}\]
(such as the civil mediation of traffic accident compensation dealt by the traffic management department) but also subsidiary mediation activities (such as the mediation of civil disputes carried out by the police in public security cases). From the point of view of procedure it includes independent mediation procedures (such as the independent mediation organs and procedures set up at grass-root government level) as well as mediation connected to adjudication procedures (such as mediation in administrative adjudication). Thus administrative mediation in China is not a fixed or unified concept: the operation modes and characteristics of the different types of administrative mediation are different. The level of development of the different administrative bodies also has clearly visible differences.

In general, however, administrative mediation is quite often related to administrative functions and thus has the characteristic of being a combination of administrative law enforcement and dispute resolution. It combines the dynamics, directness and high efficiency of administrative power with negotiability, equity and specialization. At the same time, administrative mediation has the advantage of expert knowledge and power resources which civil ADR lacks. It can obtain the trust of the parties comparatively easily and in this way accelerates the appropriate resolution of conflicts. It is precisely because administrative mediation enjoys these advantages and also because administrative power has been of great importance in the state governance and the social development of China that administrative mediation plays an important role in dispute resolution. Directly after the founding of the PRC special administrative mediation procedures were mandated in fields such as labor disputes, marriage disputes, contract disputes, etc. In addition, despite the lack of clear legal rules, county, district and township governments performed a great deal of administrative mediation in practice. According to incomplete statistics, there are currently more than 40 provisions which prescribe administrative mediation mechanisms in laws as well as administrative regulations and even departmental rules. Most of them target civil disputes in specific domains involving resource-ownership disputes, telecom disputes, consumer disputes, intellectual-property disputes, traffic-accident disputes, etc.

In practice, administrative mediation in China has declined since the 1990s. Factors which affected the role of administrative mediation in dispute resolution include: First, the weakening of the systemic structure of...
administrative mediation: Given the fact that the Chinese administration and its administrative powers have been very strong, one important task of the construction of the rule of law is to limit administrative power. Because of a misunderstanding of the role of administrative power in resolving disputes and social governance within Western societies and, in particular, because of the impact of the concepts of “weak government, strong society” and “the administration of justice is the last line of defense of social justice” etc., a number of fairly effective administrative mediation mechanisms were weakened (in the road traffic safety law, for example, the original legal requirement of pre-litigation mediation was transformed into a voluntary requirement). Some important departments in charge of social governance lacked any system for administrative mediation. For this reason, many cases were channeled into the judicial area. At the same time, the dispute-resolution consciousness, responsibility and ability of some administrative organs declined, and methods became too simplistic with the corresponding result of widespread ineffectiveness.

Second, the procedure design of administrative mediation was quite antiquated. Until August 2007 for example, before the Regulations on the Implementation of the Administrative Reconsideration Law of the People’s Republic of China were put into force, mediation and reconciliation had not received their due attention for administrative re-consideration. Normally, administrative adjudication rarely applies mediation and some administrative organs, and petition institutions, lack the competence and the ability to engage in dispute solution.

Third, the legal status of supplementary administrative mediation is unclear. For a long time, the law has not prescribed the validity of administrative mediation agreements and the related procedures in a clear way. For this reason, it is impossible to implement a related system of judicial review, relief and accountability. The parties tend to renege on their words, which influences the resolution of conflicts as well as social stability.

Fourth, the advantages of administrative mediation have not been fully developed. Facing the need for dispute resolution and the pressure to maintain social stability, many administrative authorities have currently begun to pay attention to administrative mediation. Because of the problems mentioned above, we can observe two trends: one is “judicialization” namely, that administrative mediation, in some aspects, imitates the courts, especially with regard to administrative layout and procedures, and thus, to some degree, emphasizes the antagonism between the parties and the mandatory nature of law. The other trend is to link up with people’s mediation and use the way of entrusted mediation, and, in this way, enable the societal forces to participate
in administrative mediation. While these methods have brought about some positive results, they also meant that some of the advantages of administrative mediation could not be fully developed. This not only affects the results of mediation but is also one of the reasons for the major differences in both the quantity and the effects of mediation between different localities.

3. Court-annexed Mediation and Judicial Review Procedures. — Since the beginning of the new century, the courts of the different localities have continued to explore the modes and mechanisms of mediation annexed to courts. The Supreme People’s Court’s Provisions on some Problems of Civil Mediation at People’s Courts in particular has clearly defined the scope of the “relevant (work) units and masses” and has created a system of entrusted mediation and reconciliation in order to ensure harmony.

Viewed from the perspective of practice, the forms of court-annexed mediation are quite various. Some courts have typically established a “window for mediation prior to a lawsuit” and “people’s mediation rooms”. The former is usually established by the filing department of courts and it specifically hires retired judges, judicial mediation cadres, lawyers, arbitrators or members of the people’s jury; all persons who have ample experience in mediation are highly-skilled professionals and are keen to provide services for social welfare in order to serve as mediators prior to litigation. The parties of cases which have been filed and examined are encouraged to choose pre-litigation mediation in order to solve disputes. The Shanghai Changing District Court first created the latter in June 2003. The district justice bureau paid and established a people’s mediation window in the court and the court provided a mediation office and the mediation room. When the parties file a lawsuit the staff of the filing department will actively introduce and promote the people’s mediation window to the parties. If the parties agree to mediate, the parties will select mediators from among the published list of permanent mediators who will take care of the mediation. After reaching a mediation agreement, with the exception of cases relating to identity and cases which must be confirmed by the court through the procedure of filing and fee payment (half the litigation fee), there is generally no need to file a lawsuit and the parties also do not need to pay the cost of the litigation and mediation. Moreover, judicial ADR and the litigation procedures are related to each other at institutional level. Under some legal conditions, judicial ADR can be used as the pre-litigation procedure and can also be used as the non-litigious resolution method after the court has

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accepted a case. The court can also make a judicial review of the results. In 2009 the Supreme People’s Court issued Some Opinions on Establishing and Perfecting Contradiction and Dispute Resolution Mechanisms in which Litigation and Non-litigation are Connected to Each Other which provided that agreements of civil contract nature which have been mediated by administrative organs people’s mediation organizations commercial mediation organizations enterprise mediation organizations or other organizations with the function of mediation can apply for judicial confirmation. Part of these provisions was re- affirmed by the 2010 People’s Mediation Law and the 2012 Civil Procedure Law.

On the whole court-annexed mediation in China is still at the exploratory stage. While it has achieved some fairly positive results it is nonetheless also not free from problems. The quality and ability of mediators for example needs to be improved the scope of judicial confirmation needs to be further expanded in some instances court-annexed mediation depends too much on “mandatory force” and it may even go so far as to require that the agreements mediated by people’s mediation be submitted to the court for judicial confirmation. These problems to some extent affect the effect of court-annexed mediation.

4. Grand Mediation. — “Grand mediation” is a diversified dispute-resolution mechanism which has emerged in China since the turn of the century and which in practice has different modes. These include for example the Lingxian-county model which is a judicial administrative mode or quasi-judicial mode proposed by judicial and administrative organs the Fengqiao-experience model using a coordinative mode of political and law committees the Nantong-model of linking litigation and mediation the three-in-one model of Shijiazhuang in Hebei province and the “three-mediations” model of Huairou in Beijing etc. Although there are regional and local differences between these modes from the point of view of the operating mechanism grand mediation is usually led by Party and government agencies in a unified way. By integrating the force of all organs of authority and functional departments they combine people’s mediation judicial mediation administrative mediations non-governmental mediation and even petition letters in order to build a dispute resolution network.

With view to the practical results grand mediation has made significant achievements in resolving social contradictions and maintaining social stability since it mobilizes all social resources including Party organs and governmental departments integrating all kinds of mediation and other dispute-resolution mechanisms. From the perspective of sustainable

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development and normative operation, however, there are some problems which need to be addressed in a serious way:

First, since it is basically led and supported by the power of the Party and the government, this mode is rather costly. The ability to resolve disputes and the efficiency with which this is done to a considerable extent depends on the importance of the superiors accorded to the cases. Since it lacks clear legal provisions, this approach is political and ideological in nature and depends on “social mobilization”. For these reasons, its legitimacy is easily called into question.

Second, since it is a government-led co-ordination mechanism, its overall design displays the strong centralism of national power and the ideas from beyond the judicial sphere. Not enough attention is paid to societal autonomy and negotiation mechanisms. Non-government mediation and trade mediation do not receive sufficient room for cultivation and development.

Third, in some places, mechanisms of grand mediation are characterized by certain confusion. For example, petition-letter procedures are mixed with judicial procedures and administrative considerations. There are instances of “administrate civil mediation as well as “civilizing” administrative mediation. There is also the tendency of the emergence of mergers between judicial mediation and other forms of mediation.

Fourth, there are places in which we can observe a homogenization of mediation within the framework of grand mediation. Especially visible is the tendency of the homogenization, legalization and formalization of judicial mediation, administrative mediation and people’s mediation. The same standards of evaluation and similar incentive mechanisms are designed for different mediation procedures. Access conditions for various mediators are standardized. There are standardized teaching programmers of legal principles, rules, procedures and cases, which have a unitary value orientation as a goal.

Fifth, many courts over-emphasize mediation which has a certain effect on trials. There are even courts which propagate a “zero-verdicts” approach, which is not only harmful with regard to the improvement of the judge’s judicial skill and the self-improvement of the system but also does not pay enough attention to the comparative advantages and disadvantages of mediation and trial in the different types of cases or with the different parties involved and thus is not beneficial for solving practical problems.

C. Preliminary Conclusions

It is necessary to stress that a multiplicity of forms to solve disputes are a normal condition of social life. In different disputes, social relationships
conflicts of interests, values and cultural traditions as well as social background vary greatly, and for this reason it is necessary to provide different types and mechanisms of conflict resolution. The significance of such a diversification of the dispute resolution patterns does not just lie in diverting lawsuits into other channels. Different modes of non-litigious conflict resolution have their unique advantages, and in this way can help to satisfy the needs of the parties even better and thereby contribute to balance the ecosystem of conflict resolution and the harmony and stability of society. From our analysis it has become clear that in recent years legislation and practice in China have actively and consciously promoted the diversity of non-litigious dispute-resolution mechanisms. Civil, administrative and judicial non-litigious dispute-resolution mechanisms were further developed and the various mechanisms were further diversified internally. People’s mediation is based upon the traditional village mediation committees of the grass-root society. Professional mediation mechanisms have developed very quickly and administrative mediation now comprises specialized mediation, permanent administrative mediation as well as court-annexed and temporary mediation. There are both independent mediation procedures and adjudication-connected mediation. The forms of court-annexed mediation and grand mediation have become extremely diversified.

Because the contents of non-litigious procedures are very complicated, there are great differences between the various mechanisms. They are still in a stage of rapid development and drastic change.

Between jurisprudence, the legal profession and the public, no consensus on non-litigious conflict resolution has been reached. The moment for drafting a unified ADR basic law (i.e., a basic law which fixes the legal status, the institutional build-up and the development strategy of ADR) has not yet come. This task can only be carried out when non-litigious procedures have reached a certain stage of development because only then will co-ordination become possible. Upon the basis of the relevant legislation and the practices of non-litigious dispute resolution analyzed above the following points should be taken into consideration in present-day and future law-drafting processes:

1. The Practice of Non-Litigious Dispute-Resolution Mechanisms Needs to Have a Positive and Affirmative Response. — On the one hand, it is necessary to clarify further both the position and the effect of non-litigious dispute resolution. Dispute resolution service organizations and procedures established by all kinds of social or professional organizations according to the law need to be supported and regulated in order to induce the public and the parties to choose non-litigious dispute-resolution mechanisms in order to resolve disputes. On the other hand, the tendency of “juridification” in addressing different
types of non-litigious dispute resolution procedures needs to be overcome. The scope of application as well as the operational mechanisms of the different types of mediation, arbitration and all kinds of mixed procedures needs to be clarified in order to avoid the “confusion” and “homogenization” phenomena which have emerged in the current dispute resolution practice.

2. Attention Needs to be Paid to the Coordinated Development of Dispute Resolution Mechanisms. — It is firstly necessary to make more reasonable rules for connecting mechanisms among all kinds of non-litigious dispute-resolution procedures and for those between the non-litigious procedure and the litigation procedure in order to develop the advantages of different approaches and messages even better and to avoid or reduce dispute resolution costs. Secondly, through combining separate laws or substantive law and procedural law, special dispute resolution mechanisms should continue to be explored in areas such as labor, the environment, intellectual property rights, finance, social security, etc. in order to realize an effective link between civil administrative and judicial mechanisms and to improve the effectiveness of dispute resolution. Finally, a non-litigious dispute resolution network should be constructed and special attention should be paid to non-litigious dispute resolution mechanisms, institutions and the human resources of village mediation committees and other grass-root non-litigious dispute resolution mechanisms in order to develop its preventive, restraining and dispute-settling potential fully in order to improve grass-roots governance.

3. The Rights of the Parties Need to be Fully Protected. — Compared with litigation, non-litigious dispute resolution mechanisms pay more attention to the consent of the parties. For this reason, legislation should focus on fully protecting the parties’ right to choose the procedure: with regard to initiating mediation, determining the subject of the mediation and the operation of the mediation, the will of the parties needs to be respected. Also the parties need to be informed of the possible risks of the different choices of procedure. At the same time, judicial review and remedy procedures for the results of mediation and other non-litigious dispute-resolution mechanisms should be established in order to prevent the abuse of mediation and biased mediation. It should be stated that the 2010 People’s Mediation Law and 2012 Civil Procedure Law have made great efforts in these areas, especially with regard to the establishment of judicial review procedures for the mediation agreements. In future legislation, on the one hand, it will be necessary to summarize the efficiency of these new laws and to expand their scope of application in a suitable way. On the other hand, attention should be paid to the reform of the supporting measures such as the reform of the methods of examining the courts and judges and reducing the emergence of phenomena such as forced mediation.
and other practices which are against the will of the parties.

4. The Quality and the Skills of Non-litigious Dispute-Resolution Practitioners Need to be Improved. — For a long time legislation has not paid due attention to the quality and skills of non-litigious dispute-resolution practitioners. The relevant training access mechanisms etc. are still at the initial stage and this affects the results of dispute resolution. In the future it should be focused on building a law-based system of granting access certification and training for ADR dispute-resolution practitioners and improve their dispute-resolution skills and quality. In this process it is necessary to take into account the actual needs of different types of cases and disputes and also the actual situation of different areas and environments.

V. COHESION AND INNOVATION IN CHINA’S DISPUTE-RESOLUTION MECHANISM

A. Correctly Understanding the Three Relationships

From the point of view of dispute-resolution system innovation China’s current dispute-resolution mechanisms need to handle the following three relationships properly:

1. Litigation and Non-Litigation. — As discussed above influenced by factors such as the judicial system litigation procedures the allocation of human resources etc. Chinese judicial resources currently still have a certain potential which can be exploited. Therefore in order to improve the legal system it is necessary to focus on perfecting and reforming litigation procedure with a special emphasis on the differentiation of procedure the limitation of hasty lawsuits frivolous litigation and the abuse of litigation rights in order to improve judicial effectiveness. It is even more important to pay attention to the reform of supporting measures beginning with the improvement of the quality of the judges over the allocation of human resources to the trial management in order to improve further the ability of litigation to solve disputes. On the other hand it is necessary to be aware that judicial resources cannot be expanded in an unlimited way and that the increase of judicial resources will not necessarily result in better dispute resolution but on the contrary may even contribute to stimulate more judicial demand which may result in a vicious circle or crisis. For this reason non-litigious

2) Fan Yu The Paradox of the Lost Balance between Supply and Demand in Legal Resources and Countermeasures 3 The Application of Law 14-49 (2011)
dispute-resolution mechanisms need to be further developed and the people need to be induced to seek more rational ways of remedy with the goal of improving the quality and quantity of dispute resolution.

2. The Unification and Flexibility of Legislation. — Dispute resolution is an area in which theory and practice, norms and actual tasks frequently interact with each other. It also changes the transformations of the social environment, inter-personal relationships, values, the institutional environment and other factors. In the process of improving the legal system, it is therefore necessary to pay attention to clearly mandating the basic principles, the systemic framework, the limitations and the prohibitive norms of dispute resolution in order to ensure the voluntariness of the parties, the efficiency of dispute resolution as well as judicial security. At the same time, it is necessary to maintain an appropriate degree of flexibility and to leave some judicial room for the development of everyday, newly emerging non-litigious dispute-resolution mechanisms. With regard to some concrete systems, the design of procedures, and the ways of carrying them out, the practices of different localities and departments need to be explored in order to meet the needs of the different social environments in dispute resolution. This may provide opportunities for correcting mistakes in the future system as well as material for coming legislation.

3. Chinese Characteristics and Worldwide Trends. — The resolution of disputes is a Chinese problem and also a problem that the whole world is facing. In fact, since the 1960s, dispute resolution has increasingly become a major practical concern for all countries in the world. Based upon their own needs and suited to their own environment, different countries have done a large amount of research into different aspects of litigation and non-litigious dispute resolution and have put into practice different experiences and models. In the process of improving the legal system, on the one hand, attention should be paid to summarize certain objective laws of resolving disputes and, from the perspective of social governance, rationally allocate public resources and social forces in order to pursue a sustainable development of the society and the rule of law. On the other hand, the existing condition of the country and the social environment need to be taken into account since only in this way can the role of mediation, grass-root governance and other traditional resources be developed. It is also important to take seriously and guide the dispute resolution consciousness and attitude and to pay close attention to the needs of present day society. Starting from practice, the experiences should be summarized and the system reflected on in order to refine the Chinese experience and the Chinese characteristics.
B. Realizing a Seamless Connection between
Mediation and Litigation Procedures

1. Case Filing Mediation (立案调解).—Case filing mediation, also called pre-trial mediation, usually refers to mediation or conciliation procedures set up or taken charge of by the case filing department. For cases for which the facts are uncontested, the rights and obligations are clear, and in which the controversy between the parties is not large, and for which the parties are willing to accept mediation or where there is compulsory mediation, the court can temporarily desist from accepting a filed case or could file the case but refrain from charging litigation fees and have the case first mediated by special mediators (including special invited or entrusted social forces). This could result in reaching a mediation agreement (case not filed) drawing up a mediation document or transferring the case to judicial procedure. Without the need of trial, the cases ended by mediation agreement and withdrawal directly save judicial resources and litigation costs. Upon the basis of the practical experience of mediation at the stage of case filing combined with mediation, the scheme follows examples developed within the framework of case filing mediation with the combined judicial mediation and court-annexed non-litigious mediation:

The first step: Mediation before case filing also known as pre-trial mediation belongs to the category of court-annexed non-litigious mediation. This step starts with suing but for the time being, the case is not filed. The case-filing department of the court performs the tasks of risk disclosure and persuasion for mediation. The parties then choose whether they want a pre-trial mediation or not. Pre-trial mediation is supported by the people’s mediation window attached to courts and specially invited mediators in the courts. Outside the courts, grass-roots people’s mediation organizations and administrative organs assist pre-trial mediation. Mediators are typically social forces such as village and town (or street) judicial mediation cadres, lawyers, arbitrators, retired judges, retired police officers, etc. Pre-trial mediation is not independent from court and is generally guided and managed by the filing departments or specialized agencies. When a mediation agreement has been reached, there is normally no need to file the cases on record and there is no need for the parties to pay litigation and mediation fees except for cases involving identity relationships which must be confirmed in the form of legal instruments by the court and must go through a filing and payment procedures (half of the litigation costs). The basic sequence of actions is shown below:
The second step: Mediation after the case is filed, also called case-filing mediation or pre-trial mediation, belonging to the category of litigation mediations. This step is started by a case being filed. The main responsibility rests with the case-filing department. It is also possible to use a preceding mediation undertaken by assistant trial judges or clerks so that there is a close inter-relatedness with the courtroom which can result in the combination of mediation and pre-trial preparation procedures. There are also courts in which the cases are firstly assigned to immediate trial courtrooms for speedy mediation. If mediation does not work the case will be directly settled by immediate trial procedures. This at the same time can be complemented by entrusted mediation or invited mediation. The basic flow of procedures is shown below:
2. Mediation in Litigation. — Mediation in litigation (诉讼中的调解), also known as mediation in trial, refers to mediation which is presided over by a collegial panel or a presiding judge after the stage of trial has been entered. At the same time, it can be supplemented by forms of entrusted mediation and invited mediation. Mediation in litigation can be initiated on request of the parties and can also be ordered by the People’s Court by relying on its official powers. The mediation can be presided over by the judges or a collegiate panel and is normally open to the public. Presided by judicial personnel, the lawful mediation agreement negotiated and reached voluntarily by both parties will be approved. When the mediation agreement is reached the People’s Court draws up a mediation document. The mediation agreement specifies the claims, the facts of the case, and the results of mediation, and is to be signed by the judicial officers and the court clerks and sealed by the People’s Court. After delivery to be signed by both parties, the mediation document is valid. If the mediation fails, the court will promptly pronounce judgment.

3. Connecting People’s Mediation and Litigation. — When using the long-time practical experience of people’s mediation, people’s mediation and litigation could be connected with each other as follows: First, when a conflict has occurred, people’s mediation committees may, on request by the parties or actively, be involved in the mediation. If the parties refuse to accept mediation, people’s mediation should direct the parties to other legitimate ways to solve the dispute. Second, except for cases clearly precluded by Some Rules for the People’s Mediation Work, all cases that the parties, in principle, can dispose of by themselves can be mediated. This includes cases such as civil and commercial disputes, labor disputes and some administrative disputes. In practice, the scope of application of people’s mediation should extend from traditional disputes such as marriage and family, neighborhood relations, small debts, slight infringements, etc., to hotly debated social problems such as land contracts, the demolition of neighborhoods and re-settlement, environmental protection, medical disputes, etc., in order to expand the effects of mediation further. Third, if the mediation agreement is reached after being mediated by the People’s Mediation Committee, a mediation agreement clearly specifying the basic information on the parties, on the disputes, as well as the specific contents of the results, needs to be drafted and finally signed or sealed by both parties, the people’s mediations and the mediation committee. Fourth, mediation agreements reached through mediation by the People’s Mediation Committee have the nature of civil contracts and are legally binding for both parties. The parties may apply for the People’s Court’s judicial
confirmation of their validity. After having reviewed the mediation agreement, the court can confirm the validity of the mediation agreement and issue a decision if the parties have full capacity for civil conduct and genuinely display voluntarily and interest. The agreement does not violate mandatory provisions in laws and administrative regulations; the agreement does not infringe upon national interest, public interest or the legitimate rights of relevant stakeholders; and there is no content which is not clear and cannot be confirmed or enforced etc. If one party does not perform the mediation agreement, the other party may apply to the court for compulsory execution of the decision of the court and the mediation agreement. Stakeholders who have a dispute over the mediation agreement can file a lawsuit at the People’s Court requiring the enactment of the mediation agreement, changes to the agreement, the cancellation of the mediation agreement or requiring the invalidation of the mediation agreement.

Fifth, if the People’s Mediation Committee does not reach a mediation agreement, the People’s Mediation Committee is expected to guide the parties in a timely fashion to choose litigation or other methods of dispute resolution in order to solve the dispute. On the other hand, if the parties directly file a lawsuit for a dispute which has arisen without having made use of people’s mediation, all grass-roots courts should guide the parties to use people’s mediation first by making use of the people’s mediation window, mediation and expeditious procedure centers and other forms of dispute resolution.

(Translated by Dai Xinze and Iwo Amelung)
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