**WHY CHINESE PEOPLE TEND TO BE MEDIATED BY AUTHORITY**

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# Introduction

It has been said that China is “the most heavily mediated nation on earth.”[[2]](#footnote-2) That is a fair statement. Mediation plays a remarkably important role in resolving disputes in China, sharing a roughly equivalent number of disputes with the judicial system. For the past several years, more than nine million civil disputes were resolved through mediation every year, while the annual number of first trial civil cases has been remaining in a range from seven million to ten million. [[3]](#footnote-3) Needless to say, it is worth examining how mediation works in China.

Though having the same name as its western counterpart does, Chinese mediation differs significantly from western mediation in many ways. One of the unique characteristics of Chinese mediation is that, mediations in China are frequently conducted by people of authority. On the contrary, in western mediations, mediators are often third-party professionals who enjoy equal status as the disputants do. Throughout the Chinese history, most mediations have been carried out by government officials or local gentry. Even in the contemporary China, mediators are usually government officials, who work part-time to mediate, or village leaders. [[4]](#footnote-4) It is very often to see that parties are inclined to choose a mediator with authority, formal or informal, over the community, even though this authority would mean undue pressure.[[5]](#footnote-5) Generally, the higher authority a mediator has, the easier and faster a dispute can be resolved. [[6]](#footnote-6)

Why do people in China tend to be mediated by mediators of authority? This is the question that my article tries to answer. The first part of this article gives an overview of the evolution of mediation in Chinese history. This part will be divided into three sections describing mediation in imperial China, mediation in the transition period between imperial China and Communist China, and mediation after the establishment of People’s Republic of China. This first part aims to provide readers with a sense of the long-standing involvement of authority in Chinese mediation. The second part describes the role of mediators by breaking down the traditional techniques expected to be employed by the mediators, all of which suggests the implied authority of mediators. The third part tries to explain the necessity of authority in Chinese mediation from three perspectives, including the cultural reasons behind this mediation tradition, the political reasons which contribute to the top-down promotion of authority-led mediation, and the social reasons that necessitates the authority of mediators.

# Evolution of Chinese Mediation and the Agelong Involvement of Authority

## Evolution of Mediation in Imperial China

Mediation in China can be dated back to 2000 years ago, the dynasty of the Western Zhou. In Western Zhou (1046 – 771 BC), there was a type of government officials called “*Tiaoren*,” which means mediator. According to the *Rites of the Zhou* (*Zhou Li*), *Tiaoren* was in charge of disputes and the harmonization of them. [[7]](#footnote-7) There are few historic accounts about how *Tiaoren* actually worked, but it is still worth noting that mediators achieved such an official status at such an early time. In the Qin dynasty (221-207 BC), the headmen of towns, who were called as *Youzhi* or *Sefu* depending on the size of the town they governed, had the power to mediate. [[8]](#footnote-8) Though the Qin dynasty only lasted for fourteen years, the administrative system that it set up, including the arrangement of giving town leaders the power of mediation, was largely followed by dynasties afterwards. In the Han dynasty (202 BC – 220 AC), every town had an officer in charge of dispute resolution who was titled as *Sefu*. It was specifically stated that *Sefus* resolve disputes only through mediation, which means that they did not have the authority to adjudicate. [[9]](#footnote-9) In the Tang dynasty (618-907 AC), before a dispute got into the court, it must first be mediated by the head of the community where the dispute took place. [[10]](#footnote-10) By the time of the Song Dynasty (960-1279 AC), mediation had become very prevalent among ordinary people. Mediation by local authorities such as clan leaders, gentry and the elder was well established, and it was usually stipulated in clan regulations that disputes shall not be submitted to the court unless family mediation failed.[[11]](#footnote-11) In the Yuan dynasty (1271-1368 AC), the most basic unit in the administrative division was called *she*, which consisted of fifty households. The government of Yuan highly promoted mediation, and entitled *shezhang*, the headman of the *she*, with the power to mediate minor civil disputes related to marriage, household property, land and houses, and debt. [[12]](#footnote-12) During the early stage of the Ming dynasty (1368-1644 AC), a mediation institution called *Shenmingting* was set up in every town. In each *Shenmingting* were three to five mediators called *Lao* (the elderly) or *Lilao* (the elderly of the town). The *Laos* were supposed to be “fair and just” senior citizens elected by people in the town. It was a prerequisite that a case shall be mediated by the *Laos* in the *Shenmingting* before reaching the government. In the middle stage of the Ming dynasty, the *Shenmingting* gradually ceased to exist, the mediation function of which was taken over by *Xiangyue*, a type of non-administrative town-level association voluntarily formed by local residents. The Xiangyue maintained the order of the town, promoted the common interests of the residents and mediated disputes in a timely manner. [[13]](#footnote-13) In the Qing dynasty, mediation was very much favored by many of the emperors. Provisions about mediation were included in the decrees of Emperor *Shunzhi*, Emperor *Kangxi* and Emperor *Yongzheng*, the documents of which were called respectively the *Shengyu Six* (The Six Sacred Decrees), the *Shengyu Sixteen* (The Sixteen Sacred Decrees), and the *Shengyu Guangxun* (The Sacred Edict). [[14]](#footnote-14) The process of mediation can also be found in the *Great Qing Legal Code*. According to the Code, most civil disputes, especially disputes relating to marriage or inheritance, shall be resolved within the clans where they arose by clan leaders.

After the overview of mediation in the feudal time of China, we can see that mediation existed throughout the feudal history, and mediators were always people with some kind of authority. The mediators could be government officials with administrative authority, or leaders of towns or clans, who had semi-administrative authority, or elder people who enjoyed high prestige and social status in the community. Despite the reason behind this phenomenon, it seems that letting people with authority to mediate is a tradition deeply rooted in the history and culture of China. This tradition may have shaped the public perception of mediation to the notion that mediators should be somebody with authority.

It is also worth noting that mediation was sometimes set up as a prerequisite for a case to enter the trial proceeding, as it was in the Ming and the Qing dynasty. Even when mediation was not mandatory, government officials still preferred to refer disputes to community mediations before handling the cases by themselves, as they did in the Song dynasty. There are mainly two reasons for this promotion of mediation. Firstly, Confucianism was the ideology behind the rule of nearly every feudal dynasty. Confucianism values harmony and promotes the notion of *Wusong*, meaning no litigation. According to the *Analects of Confucius*, Confucius once said that “I hear disputes not differently than how others do it, but my goal is to make people not conflict with each other.”[[15]](#footnote-15) The notion of *Wusong* shaped the ideology of dispute resolution in imperial China, which strongly discouraged litigation and favored mediation.[[16]](#footnote-16) Secondly, mediation was a way of decentralization. Because of the authoritarian nature of the feudal dynasties, local governors were generally appointed by the central government, who may not necessarily come from the region where he governed. Therefore, the governors or other government officials needed local leaders, who had wide connection and prestige among the community, to help them resolve disputes and educate the disputants, thereby preventing conflicts and maintaining a stable social order. In my opinion, the governmental preference of mediation made courts not immediately accessible for most of the civil disputes and a portion of criminal disputes. Consequently, it was inevitable that mediators assumed some of the responsibilities of judges, by which I mean mediators frequently judged the behaviors of the disputants. In other words, mediation could to some extent be viewed as quasi-adjudication in imperial China. Bearing this notion in mind, it may not be hard for us to understand why mediators in pre-modern China always has some kind of authority.

## Evolution of Modern Mediation Before People’s Republic of China

The year 1912 marked the end of the imperial China and the beginning of the Republic of China (“ROC”) under the leadership of the Nationalist Party (*Guomin Dang*). After coming into power, the ROC government initiated a legal reform to replace the feudal legal norms by promulgating a set of westernized laws, among which was the *Law on the Civil Mediation*. [[17]](#footnote-17) This law, coupled with several regulations promulgated thereafter, attempted to build a modern mediation system consisting of institutionalized judicial mediation and administrative mediation. However, due to the domestic strife and foreign aggression faced by the ROC government at that time, the mediation laws could not be adequately implemented. Consequently, in many rural areas, the Qing mediation was still functioning. [[18]](#footnote-18)Meanwhile, the Communist Party was gradually taking over rural places, implementing its own mediation policy. Since the Communist Party later overthrew the ROC government in mainland China, together with the legal system that the ROC government built, I will now focus on the evolution of mediation under the rule of the Communist Party, which will shed light on how the contemporary mediation system in China came into being.

The Communist Party was founded in July 1921. Following the Mass Line (*Qunzhong Lixian*), the Communists endeavored to unite peasants and workers by giving the peasant associations and the labor unions the power to administrate local affairs, including mediation. A number of mediation offices were set up under the institutions of peasant associations or labor unions. [[19]](#footnote-19)The mediators were peasants or workers, with no prior training of law. However, the peasant associations and labor unions lasted not more than ten years until 1927; and after the Nationalists purged the Communists, the peasant associations and labor unions collapsed. During the decade from 1927 to 1937, the Communist Party quickly revived from the suppression from the ROC government and established its own revolutionary bases in multiple areas. In those revolutionary base areas, disputes were mainly resolved through judicial or administrative proceedings rather than mediation. It was not until the outbreak of the Sino-Japanese War (1937-1945) did mediation regain its popularity. [[20]](#footnote-20)

In 1938, in order to cope with the boom of wartime disputes, the Communist Party promulgated a mediation law in the Shanxi-Chahar-Hebei Border Area, which was the main revolutionary base of the Communists. Largely referring to the ROC mediation law, the 1938 mediation law followed the three-tier administrative division created by the ROC government, set up different levels of mediation committees in districts, villages, and towns, and required that members of the mediation committees shall be elected by the local residents. However, the notion of democracy in the establishment of mediation institutions were significantly diminished when the *Provisional Regulations of the Shandong Province on the Organization of Mediation Committees* (hereinafter “the 1941 Regulations”) was promulgated in 1941. [[21]](#footnote-21)

According to the 1941 Regulations, members of the mediation committees shall not be elected by the residents but shall be selected by the local government from representatives of mass organizations and progressive gentry. [[22]](#footnote-22)Also, heads of villages and districts, who were once explicitly excluded from serving on the mediation committees, could now serve as members or heads of the mediation committees.[[23]](#footnote-23) The regulations also stipulated that a mediation record, which was created for successful mediations, had the same power as a judgement; and that mediation shall be free of charge. [[24]](#footnote-24) Pursuant to the 1941 Regulations, mediation became quite formal and administrative, and the mediators had the formal authority delegated by the government to mediate. The disputants, however, had limited autonomy to select the mediators. Since the implementation of the 1941 Regulations, the contemporary mediation system in China started to take shape.

From 1941 to 1949 when the People’s Republic of China was founded, numerous mediation regulations were carried out, which basically followed the framework established by the 1941 Regulations. The regulations formalized mediation into three categories: folk mediation, administrative mediation, and judicial mediation; and delegated the power of mediation mainly to mediation offices in the government. It is worth noting that in 1944, an instruction letter was issued in the Shanxi-Gansu-Ningxia revolutionary base, which articulated that mediation shall be the primary method of dispute resolution. It was the first time for the Communist Party to announce a mediation-first policy, the notion of which is still dominant in the contemporary legal system in China.

Contrary to the poor implementation of mediation laws by the ROC government, mediations in the Communists-controlled areas were relatively successful. According to statistics provided by the government of some revolutionary base areas, more than sixty percent of the disputes were resolved through mediation. [[25]](#footnote-25)

Despite the prevalence of mediation in revolutionary bases, mediation was not always a voluntary choice by the parties. Though not explicitly stated in the regulations, it was often assumed by government officials that mediation was a prerequisite for litigation. Therefore, before being admitted to the court, disputants were often forced to go through exhausting and time-consuming, sometimes repetitive, mediations in several administrative levels, which were generally conducted by government officials or members of mediation committees who enjoyed a semi-administrative position.

## Evolution of Mediation after the Establishment of People’s Republic of China

The People’s Republic of China (“PRC”) was founded in 1949. From 1949 to 1980, the legal system was not completely established, and mediation played a dominant role in dispute resolution. In 1954, the PRC government issued the *Provisional General Rules for the Organization of the People’s Mediation Committee* (hereafter “the 1954 Rules”). [[26]](#footnote-26)Pursuant to the 1954 Rules, one of the objectives of people’s mediation is to propagate and educate the people with political policies. Under the 1954 Rules, each neighborhood shall establish a mediation committee and members of the committee shall be elected by the residents of the neighborhood. There were no strict requirements of the mediators as long as they were fair, just, close to the people, and passionate about mediation. No prior professional experience was required from the mediators. Shortly thereafter, the Supreme People’s Court issued two opinions respectively in 1956 and 1963, incorporating mediation into the judicial system and obligating judges with the duty to mediate as much as possible. The set of mediation rules promulgated before 1980s reflected Mao Zedong’s view towards mediation, which takes mediation as a political tool to “thrust totalitarian political institutions intrusively into Chinese society,” to carry out political education, to control public disturbance, and to monitor and correct private thoughts. [[27]](#footnote-27)

After the passing away of Mao Zedong and the end of the cultural revolution, Deng Xiaoping strived to restore the legal order of China. As part of this effort, mediation was reiterated and specifically regulated in numerous laws and regulations. The new laws changed mediation’s status from a position superior to adjudication to a position coexisting with adjudication and under the supervision of courts or judicial offices of the administration. It is also worth noting that at this time mediation was officially written into the now effective 1982 Constitution, stipulating that “[t]he residents’ and villagers’ committees establish sub-committees for people's mediation, public security, public health and other matters in order to manage public affairs and social services in their areas, mediate civil disputes, help maintain public order and convey residents opinions and demands and make suggestions to the people's government.”[[28]](#footnote-28) Consistent with the prior trend, mediation is still regarded as something more than a dispute resolution method – i.e., a tool to maintain social order.

It seems that the balance between mediation and adjudication is hard to strike, and the policies have been moving back and forth. Two decades after Deng took away mediation’s superiority over adjudication, a “Mediation First” policy came back to the stage.[[29]](#footnote-29) This time, the policy was promoted by the Supreme People’s Court during the presidency of Wang Shengjun (2008-2013), requiring judges to mediate all civil cases which are likely to be resolved through mediation. [[30]](#footnote-30) Judges are expected to maintain a high mediation settlement rate, which in reality forced them to impose mandatory and never-ending mediation on disputants. Though the mediation settlement rates are unprecedentedly high in courts all over China, it turns out that the involuntary mediation does not ultimately solve the disputes, and that a significant portion (30 to 40 percent on average) of cases settled come back to courts as the parties refuse to fulfill the obligation under the mediation agreement. [[31]](#footnote-31) Therefore, the “mediation first” policy is widely criticized, including by judges. [[32]](#footnote-32) To respond to this criticism, the implementation of the “Mediation First” has been softened since Zhou Qiang, the current president of the Supreme People’s Court, took office.[[33]](#footnote-33) However, the judicial documents articulating the “Mediation First” Policy remain to be in effect.

# Authoritative Role of Mediators in Chinese Mediation

To figure out why the authority of mediators is attached with huge importance, we must first understand how mediators in China normally conduct mediations. Unlike the facilitative function of western mediators, mediators in China take a more active role in solving disputes. Specifically, Chinese mediators may try to investigate and decide on facts, propose solutions to the dispute, and give advisory opinions. [[34]](#footnote-34) Mediators may also educate or criticize one or both of the parties and suggest punishment to the wrongdoers. To some extent, what mediators do when solving disputes resembles the role of a teacher. A further examination of the techniques employed by Chinese mediators may help us understand the role played by mediators.

## Mediators to Educate and Persuade

Education has always been a function of Chinese mediation. In imperial China, mediators educated people about moral rules derived from Confucianism. In Mao’s China, mediators educate the mass about political policies. Today, mediators educate people about law and socialist moral values. A technique of educating often comes with persuading the parties to abide by the general principles on which people are being educated. In fact, the method of persuasion is written down in the People’s Mediation Law which was just enacted in 2010. In its second article, the People’s Mediation Law defines mediation as a process where a mediator “persuade” the parties into reaching a mediation agreement. [[35]](#footnote-35)

When using the technique of educating and persuading, mediators normally just tell the parties how they should think or behave, but they rarely give logical explanations on why the parties should think or behave in the way that they suggest. According to the field research conducted by James Wall and Michael Blum on the techniques used by Chinese mediators (hereinafter “Wall & Blum Research”), educating is the most frequently used technique by Chinese mediators, with a rate of 0.55 times per case; whereas the frequency of mediators giving explanations on why the parties should think or behave in a certain manner is only 0.11 times per case. [[36]](#footnote-36)

There are some real-life examples on how the mediators educate and persuade parties in mediation. A field research led by Robert Perkovicht has provided us with some examples of how mediation techniques are used by mediators in China. Under this field research, the mediation conducted by the Chang Zing People’s Mediation Committee in Hangzhou reveals the mediation process of an assault case. In this mediation, the mediators, with the assistance of the police, educated the assaulter that beating a person infringes upon this person’s human rights, and “helped the guilty party realize” that what she did was wrong. [[37]](#footnote-37) In another case reported by this field research, a grandson was having a dispute with his grandmother regarding the grandmother’s living arrangement. The mediators in this case educated the grandson that his grandmother did not have long to live and he should therefore sacrifice his own interest to make her happy.[[38]](#footnote-38) Apparently, the Confucian principle of filial piety played a part in this mediation. Another instance of education appeared in a case officially named as an outstanding example of mediation case, where a construction company and its employee were involved in an occupational injury dispute. In this case, in order to secure a compensation for the injured worker, the mediator educated the person in charge of the construction company on the law and the moral principles, with emphasis on the financial hardship suffered by the worker. The construction company then was persuaded to pay for a specific amount of damage to the injured worker. [[39]](#footnote-39)

## Mediators to Criticize and Punish

Unlike the neutral and facilitative position assumed by western mediators, mediators in China feel the need to praise the behaviors they deemed good and criticize the party they view as having done something wrong. According to the Wall & Blum Research, mediators criticize 0.29 times per mediation and praise 0.05 times per case. Understandably, the technique of praise was not used very often as normally both parties in a dispute are partly liable for the conflict. [[40]](#footnote-40) The use of criticism is worth examining, as the ability to condemn and criticize reflects the superior position of the mediator over the parties.

Because of the limitation of mediation records, we may hardly know how exactly mediators criticize the parties. However, a self-criticism essay is often included as part of the settlement of mediation, from which we can get a hint of the criticism delivered by the mediator. In a self-criticism essay, one should explain in detail what she had done wrong, why she committed the wrongful conduct, and how she is going to change to prevent making the same mistake again in the future. A self-criticism is usually an acknowledgement of wrongdoing and a form of punishment. Therefore, when a self-criticism essay is included in a mediation settlement, we can presume the existence of criticism delivered by the mediator in the mediation process. There are some examples which reveal under what circumstances a self-criticism essay may appear in a mediation settlement. In a case where a woman became pregnant without getting married, the woman agreed to write a self-criticism essay and pay a fine after the mediation. [[41]](#footnote-41) In another instance, a woman who assaulted another party also agreed to write a self-criticism essay after mediation. [[42]](#footnote-42)

Though self-criticism is deeply embedded in Chinese culture, originated from Confucianism, and reinforced by Maoism, a self-criticism essay is a form of punishment and, to some extent, humiliation. [[43]](#footnote-43) In the contemporary Chinese society, a person will be asked to write a self-criticism essay by his or her parent at home, teacher at school or superior in the workplace. Because of the humiliating nature of a self-criticism essay, it is rarely written voluntarily. Thus, we can infer the superiority of the mediator from the self-criticism essay agreed to write by the party in a mediation. One may think that the superiority of the mediators, especially their power of condemnation and punishment, is not something voluntarily sought by the parties, but an inevitable byproduct of the current semi-administrative and politically-intruded setting of mediation in China. However, records reveal that, even for private mediation that took place before the rule of the Communist party, where parties had the absolute autonomy to choose mediators, the superiority of mediators was still presumed and accepted by disputants. In the memoir of Zhang Gang, a private mediator living in the late Qing dynasty and the ROC period, he was constantly sought by disputants to mediate even though he frequently condemned parties in mediations with words such as “shameless” and “unscrupulous” and settled cases with light punishment.[[44]](#footnote-44)

## Mediators to Propose Solutions

It is the spirit of modern mediation that the parties themselves should take responsibility for resolving their dispute. [[45]](#footnote-45) Therefore, in many countries including the US, mediators are not supposed to, or at least, not encouraged to propose solutions to the parties. [[46]](#footnote-46) This has not been the case in China. In China, mediators normally are not restrained from proposing solutions to the parties. Despite the modernization of mediation after imperial China, it has remained to be common practice that mediators take the initiative to propose solutions based on their findings of facts and their own past experience and impose the solutions on the parties. [[47]](#footnote-47) Even in the recently promulgated mediation law, proposing solutions is still stipulated as a technique that mediators may adopt during mediations. [[48]](#footnote-48) Therefore, we can safely say that Chinese people perceive mediation as a process where a solution to their disputes will be provided by the mediator.

The aforementioned lack of autonomy in mediation proceedings does not seem to hinder people from actively seeking mediation to solve their problems. In practice, people tend to look for dispute resolutions from mediators with high reputation and authority over the community.[[49]](#footnote-49) The more authority the mediator has, the more the disputants trust his or her proposed solutions, and the more likely the mediation settlement will be fulfilled.[[50]](#footnote-50) The authority of a mediator could either be informal or formal, and it could be derived from the mediator’s knowledge, reputation or official position in the government. Usually, people in China trust government officials more than they trust people in their community, as they assume that government officials know more about the law and are fair and just when handling disputes. A common phenomenon that reflects this assumption is that, parties may not accept the solution offered by a community mediator but may accept the same solution offered by a judge’s assistant in a judicial mediation. [[51]](#footnote-51)Even though sometimes the parties do not feel satisfied about the solution suggested by the mediator, or the parties feel embarrassed after being scolded by the mediator, they still abide by the decisions of the mediator considering the authority the mediator has. In other words, the fulfillment of a mediation agreement is ensured by the authority of the mediator.

# Reasons for the Prevalence of Authority-Led Mediation

## Authority-led Mediation as a Tradition

As is discussed in the first chapter of this article, mediation has existed in China for a long time (since two thousand years ago), and it has always been conducted by mediators with some kind of authority, which could either be administrative or non-administrative. When discussing the contemporary mediation in China, we cannot deny that the mediation tradition formed in the imperial time has contributed to the formation of the mediation principles and norms in contemporary China. Therefore, in order to answer why contemporary mediations in China are usually conducted by authorities, we have to answer why it has already been the case in imperial China.

As we all know, in nearly every dynasty, the imperial rule of China was guided by the ancient philosophy of Confucianism. Among the core values of Confucianism are social harmony and hierarchy, which shape the ideas of mediation. [[52]](#footnote-52) Hereafter, I will analyze these two values and how they influence the traditional mediation one by one.

As mentioned before, from the pursuit of social harmony derives the idea of *Wusong* (No Litigation). Pursuant to the *Wusong* theory, litigation should be discouraged, as it stands for conflict, which is the opposite to harmony. This idea has a strong influence both on the administrative methods of the government and on the behaviors of the people. Interpreting the principle of *Wusong*, imperial governments believe that disputes shall be resolved outside of the court harmoniously, with each party making concessions (which echoes with the idea of *Rang[[53]](#footnote-53)*) and developing empathy (which reflects the idea of *Ren[[54]](#footnote-54)*). As a result, the government very frequently require that mediation, administrative or semi-administrative, shall be a prerequisite to trials, which makes court proceedings not easily accessible by the people.

As for the people, they spontaneously try to avoid conflict as much as they can, for many reasons. Firstly, under the influence of Confucianism, they believe that a compromise made at the moment of dispute is a necessary sacrifice for the long-term harmony, and that continuous litigation for a dispute is unworthy considering its profound impact on the harmonious relationship between people.[[55]](#footnote-55) In other words, they think winning on one dispute in the court would make both parties enemies forever. Secondly, people also do not want to litigate as they believe that demonstrating their disputes publicly is shameful and face-losing. Thirdly, for some minor criminal cases, people are reluctant to go to court as the legal codes in imperial China often consist of brutal corporal punishments, such as beating people with a lash or a bludgeon.[[56]](#footnote-56) Even for some serious criminal offenses such as manslaughter, people sometimes believe that since a dead people cannot come back to life, fierce revenge or punishment on the offender is futile. Thus, people are more inclined to solve the criminal cases through mediation which usually result in a lighter punishment than the one ordered by the court, such as monetary compensation or feasts. Consequently, ordinary people in imperial China tend to avoid litigation.

Because of the discouragement of litigation from the government and the avoidance of litigation by the people, adjudication is largely excluded from dispute resolution. However, the function of adjudication cannot totally be eliminated out of the society. When adjudicating, the court explains the law, which could either be natural law or statutory law, promotes fairness and safeguards social justice. These functions of adjudication are crucial to maintaining social order and have to be realized in one way or another. Hence, when the judicial process is generally excluded from the means of dispute resolution, whichever dispute resolution mechanism that replaces the judicial system has to take on some of the characteristics of adjudication so as to make up for the absence of the court. That is to say, mediators have to, to some extent, act like a judge to investigate, to evaluate, to offer solutions and to punish. And that is indeed what they do. Consequently, the mediation process becomes a quasi-adjudication process.

In the realm of adjudication, the adjudicators, or judges, must have authority delegated by the law or by the government; and judges are superior to the disputants as they stand for justice and order. Therefore, when mediators take over some of the responsibilities of judges, they are also expected to have some sort of authority recognized by the disputants. This partly explains why people generally want to be mediated by authorities, without regard to the type of the case. Moreover, for criminal cases that are submitted to mediators, punishment to the culprits, albeit light, is inevitable. But a settlement including punishment can hardly be reached voluntarily by both parties, as compared to monetary compensations, punitive measures can hardly be viewed as an ideal trade-off by the party who allegedly engages in criminal conduct, especially when it is still disputable whether the conduct accused of actually constitutes a criminal offense. One can only be punished when he or she is wrong, which requires the adjudication by the dispute resolver, hence the authority of the mediator implied. Also, the unpleasant nature of punishment requires an authority to enforce it. Since mediation serves as a form of quasi-adjudication in the imperial time, mediators must have some form of authority over the parties and the whole community.

Confucianism also strongly emphasizes *Li* (rites), from which derives a sense of hierarchy. [[57]](#footnote-57)This sense of hierarchy requires people to identify their superiors in any circumstance and defer to them. Nearly in every scenario, an evaluating rule of deference or superiority can be found: a son shall defer to his father, a wife shall defer to her husband, the young shall defer to the old, a teacher is superior to his students even when the teaching is over, a peasant is superior to a businessman, etc.[[58]](#footnote-58) This constant effort of identifying the social hierarchy allows people to find their appropriate position and prevent them from doing things that they are not supposed to do.[[59]](#footnote-59) Only in this way, as Confucians believe, a stable social order can be achieved and maintained. Following this mindset, people may be inclined to identify mediators as superior to the disputants, or people may assume that a mediator should be someone with a higher social status than the parties so as to be qualified for the superior position that he or she enjoys over the parties. Considering the adjudicative characteristics of mediation discussed above, it is not surprising that the people may have reached this conclusion. Therefore, when seeking candidates for a position that will be superior to the one of himself or herself, the seeker may want a candidate who is already superior to him or her in the social hierarchy, so that the power inherent in this position will not be abused. In other words, people have to find someone with authority to solve their disputes in mediation.

The educational attainment of ordinary people is also a key factor to the selection of mediators. The society under the imperial rule is an agricultural society, with peasants taking up most of the population. The literacy rate among peasants is very low. On the other hand, the literary language is in Classical Chinese, which is obscure and totally different from the spoken language.[[60]](#footnote-60) Thus, most peasants have little access to Confucian literature, which defines and explains the social rules, or imperial decrees and legal codes. Despite the fact that Confucianism has developed into a set of social norms widely acknowledged, when disputes arise, people still need someone with adequate educational attainment to interpret the Confucian rules or the law and apply those interpretations to the problem at hand. The individuals who have adequate educational attainment, or whose families can afford the education required when they are young, are often the ones who enjoy high social status in the community, such as an elder in the family of a landlord. In other words, it may sometimes be inevitable that mediators are people who enjoy a form of authority, as only they are equipped with the knowledge and potential skills to mediate. This may still be the case in some rural areas in contemporary China.

Because of the reasons discussed above, the tradition that mediators are people with authority has been long established. As is described in the second section of this article, after Qing Dynasty, Nationalists tried to build a modern mediation system, but the implementation of it was very poor. Therefore, the traditional mediation was not thoroughly reformed. When the Communists came into power in some areas, they first took the nationalist approach of mediation, but shortly thereafter, they went back to the traditional approach which actually fit the peasant society more. Therefore, the tradition is to a large extent preserved and shapes the contemporary mediation norms in China.

## Authority-led mediation as a Top-Down Policy

The contemporary mediation system in China is not formed spontaneously. Rather, it is deliberately established by the central government. Ever since the establishment of the first revolutionary base of the Communist Party, several rounds of mediation campaign have been carried out. Through the campaigns, a mediation system with unique Chinese characteristics is built, adjusted and reinforced. During each mediation campaign, there are policies, laws or regulations regarding the promotion and reform of mediation being promulgated. Not only do they regulate administrative and judicial mediation, but they also regulate community mediation in detail, with mandatory rules about the mediation institutions, mediators, and mediation agreements.

Pursuant to laws on People’s Mediation, a People’s Mediation Commission must be established in every neighborhood, and the mediators must offer free mediation service to the community.[[61]](#footnote-61) People’s Mediators have an authoritative role, as they are appointed by the People’s Mediation Commissions, serve the people for free, receive political direction from the government, and are given the responsibility to promote public security.[[62]](#footnote-62) Because of the prevalence of the semi-administrative community mediation institutions offering free service, there does not seem to be sufficient demand for additional mediation service that may be offered by a private entity. Moreover, the validity of the agreement reached after a people’s mediation is specifically recognized and is entitled with a more favorable protection than that of a private mediation agreement. According to the People’s Mediation Law, parties may apply for judicial confirmation within 30 days after an agreement is reached upon mediation by a people’s mediation commission; and when one party refuses to fulfill the mediation agreement, the other party may directly file a judicial enforcement action to the court.[[63]](#footnote-63) As I have discussed, Chinese people have an aversion to litigation. Thus, a mere contract does not provide the parties with sufficient safety, because even if it is breached, the parties may still not resort to litigation out of concerns of money, time and face. Consequently, the actual effect of a contract is less than it legally is. Under this circumstance, a judicial confirmation of the enforceability of the mediation agreement is highly valued by the parties as it offers security and excuse the parties from the hassle of litigation.

Because of the prevalence of peoples’ mediation and its advantages over private mediation, private mediation is not fully developed in China. Consequently, it may not always be the case that parties are actively seeking mediation led by an authority; the reason why they end up in a mediation proceeding with authority involved may simply be that there is no other form of mediation available or affordable. Furthermore, it is also questioned that whether the people voluntarily submit their disputes to people’s mediation. A phenomenon in the urban area has been reported that some people try to give gifts to people’s mediators to curry favor from them.[[64]](#footnote-64) This phenomenon sheds light on whether the people’s mediation is voluntarily requested or not.

To further examine this issue, we may need to answer why the government builds the mediation system in an authority-centered way. For the Chinese government, mediation is not just a dispute resolution mechanism to alleviate the pressure received by the court, it is mainly a political tool that facilitates a stable rule of the Party. Firstly, the government uses mediation to monitor people’s thoughts. The rule of the Party is guided by Maoism. The *Mass Line* is one of the political methods developed by Mao Zedong, which requires the political leaders to understand the needs of the mass and adjust the relevant policies accordingly.[[65]](#footnote-65) Mediation helps the Party understand how the mass think and what the main sources of disputes and complaints are in the society, so that the Party can adjust policies to suit the society or take measures to solve problems before they become serious threats to the social stability. Secondly, the Party uses mediation to educate the people about political ideas of the Party and the socialist core values that the Party promotes, in order to maintain the people’s support of the government. Mediators view the politically correct ideas as criteria to be relied on when making judgements or suggestions in a mediation. They will spare no effort to educate the party what is right and to persuade the parties to follow the suggestions which are consistent with politically correct principles. Thirdly, the Party uses mediation as a method of decentralization. China is too big, and the central government may not function very well locally. Even though the court is always available, people’s legal awareness is not always sufficient. When there is a lack of legal awareness of the disputants, the enforcement of a court ruling might meet resistance, which can lead to social instability. Therefore, the Party needs local authorities to act as their agents to approach the people, who can utilize their understanding of the local people to ease the tension and, in the meantime, serve for the will of the Party. In sum, the political goals expected from mediation requires the mediators to have some sort of authority to represent the government and fulfill their political responsibilities.

## Authority-led Mediation as a Societal Need

As discussed before, the functions of mediators in a Chinese style mediation include educating, persuading, criticizing, punishing, and proposing solutions. Considering the long tradition of Chinese mediation, it is fair to say that these functions have been incorporated into the public perception and expectation of mediation. The combination of these functions can only be effectively realized by the facilitation of authority. Therefore, to understand why authority is needed in Chinese mediation, we need to figure out why these functions are necessary.

Despite the long tradition of mediation, “mediation” is a quite modern word. In the old times, people use “*ping li*” to describe the process of mediation.[[66]](#footnote-66) Literally, “*ping li*” means to judge between right and wrong, or to reason things out. From the use of the term “*ping li*,” we can see that what people expect from mediation is a judgement from a third party. When seeking mediation, individuals are eager to have a third party evaluate who did right and who did wrong. To cope with this psychology, mediators may scold both parties for each of their contribution to the dispute, so as to deliver moral judgements sought by the parties without closing the door for concessions. After blames are placed, parties are easier to be persuaded to adjust their behaviors, pay compensation or receive punishment. On the contrary, in western mediation, the mediator should refrain from making moral judgements or impose her political or moral beliefs on the parties. The respect to diversity and the endeavor to promote mutual understanding is emphasized in western mediation theory and the western culture. However, in a homogeneous society like China, diversity is not something that should be maintained or promoted; and it is sometimes viewed as the source of social instability. In China, there is only one set of moral principles, and it should be strictly observed by everyone. In imperial China, the moral standard was Confucianism. In contemporary China, it is a mix of Confucianism and Communism (with Chinese characteristics), an essential part of which has been summarized as the *Eight Honors and Eight Disgraces*. [[67]](#footnote-67) Since the whole nation follows a universal morality, moral evaluations made accordingly will be accepted by every member of the society. Thus, in mediation, when a disputant is convinced by the mediator that his or her conduct violates the universal moral principles, he or she will voluntarily adjust the unwarranted behaviors or accept punishment for the wrongdoing, hence the resolution of the dispute. Consequently, the evaluative function of mediators plays a pivotal role in Chinese mediation and is sought and expected by the people. That is why we see mediation frequently conducted by local authorities whose moral judgements are widely respected.

Sometimes, the disputants do not voluntarily seek for mediation, but are forced to present their case to a mediator by their relatives or neighbors. One may think that neighbors or relatives have no right to interfere in a person’s own business. However, in a collectivist society like China, an individual’s personal life belongs to the group, the community and the whole society. A public dispute that an individual has with another, is an embarrassment of his or her family and a disturbance of the harmony in the community. Therefore, in order to eliminate such embarrassment and disturbance, people in the community want the disputes to be effectively resolved by an authority, whose authoritative power expedites the mediation process and ensures the adherence of his or her proposed solutions. Furthermore, it is in the interest of the community that the disputants be disciplined by an authoritative mediator. In an ideal Confucian society, everyone is brought up with the education of Confucian rites, which is a reflection of Confucius morality, and proper upbringing incorporates the obedience of Confucian rites into one’s habits, which enables an adult to automatically do the right things without supervision or guidance from others, leading to a harmonious society with no personal conflicts. [[68]](#footnote-68) It is a traditional view that conflicts arise from violation of social norms by at least one of the disputants, which poses a threat to the public order. Therefore, such violators should be educated, criticized, or punished.

As discussed earlier, mediation served as quasi-adjudication in imperial China. This is still the case in some remote and rural areas in China. Though the judicial system is available to every citizen, its accessibility requires a certain level of legal awareness and economic capability. Therefore, for people living in some remote and rural areas where legal education is poor, the court may seem distant and formidable. In contrast, mediation is free, with mediators living in the community and speaking the same language as other community members. Under this circumstance, people use mediation as an alternative of litigation, not for its autonomy, but for its accessibility. Inevitably, mediation is perceived as quasi-adjudication, and is expected to be conducted by a local authority who can offer widely respected judgement and solution.

# Conclusion

Why do Chinese people tend to be mediated by authority? There are many reasons underlying this phenomenon. The Confucian culture, the political ideology, and the societal needs have all contributed to the formation of the current authority-led mediation system in China.

From a cultural point of view, the authority-led mediation is a result of two Confucian values ––harmony and hierarchy. Since Confucianism prioritizes social harmony, people tend to avoid public display of conflict, i.e. litigation, and seek mediation which is virtually regarded as quasi-adjudication. The adjudicative feature of mediation perceived by people determines that the mediator should have some kind of pre-existing authority over the disputants. The deeply-rooted sense of hierarchy created by Confucianism makes people constantly trying to identify their position in the social hierarchy in different situation. Mediators, as dispute resolvers, are identified as superior over the disputants, therefore the pre-existing authority of mediators is required.

From a political perspective, mediators serve as the connection between the central government and the local people, helping the government to maintain social order. The government needs local authorities to propagate political ideas, monitor thoughts of the mass, and timely discover and solve disputes and dissatisfaction. All these goals can be achieved through mediation. Therefore, the government has established a nationwide community mediation system, where mediators have semi-administrative authority. In other words, the dominance of authority-led mediation in China is a result of top-down mediation campaigns.

Authority-led mediation meets the needs of the society. The Chinese society is homogeneous and guided by a single set of moral principles. The universal morality calls for mediators who make authoritative moral judgements to solve disputes, so as to ensure the observance of social norms. The authoritative moral judgement is sometimes sought by the disputants motivated by a psychology of *ping li*, and sometimes sought by the relatives or neighbors of the disputants who have an interest of eliminating embarrassment and restoring the harmony of the community. Moreover, in some remote areas, because of the lack of legal awareness and economic capability, the courts are far less accessible than authority-led community mediation.

The authority-led mediation is a special product of the unique Chinese culture, politics and social environment. It has been entrenched in the Chinese dispute resolution system for a long time and working reasonably well both for the government and for the people, as it is tailored to the needs of them both. It is unclear whether the dominance of authority-led mediation will continue to exist in the future. In my opinion, it is determined by how political policies and the society will evolve.

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47. See, e.g., Roger Richman, *Civil Dispute Resolution in China During Reform*, 7 Ohio St. J. Disp. Resol. 83, 100 (1991); Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Cal. L. Rev. 1201, 1226 (1966); Martin C. Yang, A Chinese Village: Taitou, Shantung Province 165–166 (Colum. U. Press 1945). [↑](#footnote-ref-47)
48. Article 22 of the People’s Mediation Law states that “People's mediators may adopt various means to mediate disputes among the people in light of the actual circumstances of disputes, hear the statements of the parties concerned, explain the relevant laws, regulations and state policies, patiently persuade the parties concerned, propose solutions on the basis of equal negotiations and mutual understanding between the parties concerned, and help them reach a mediation agreement on free will.” *See* Zhonghua Renmin Gongheguo Renmin Tiaojie Fa, *supra note* 34, art. 22 (China). [↑](#footnote-ref-48)
49. Chang, *supra note* 4, at 129. [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 H. K. L. J. 715, 735 (2005). [↑](#footnote-ref-51)
52. For the value of harmony in Confucianism, see generally, Li Chenyang, The Confucian philosophy of harmony (Routledge 2014). [↑](#footnote-ref-52)
53. *Rang* means to yield or to concede. See Şerban Toader, *Confucian Values and the Revival of Confucius’ Thought in Contemporary China*, Studia Universitatis Babes-Bolyai-Philologia Mar. 2010, at 127, 127. [↑](#footnote-ref-53)
54. For a thorough analysis of the meaning of *Ren*, see Yuxian Zhu, *The Role of Qing (Positive Emotions) and Li 1 (Rationality) in Chinese Entrepreneurial Decision Making: A Confucian Ren-Yi Wisdom Perspective*, 126 J. Bus. Ethics 133, 134–135 (2012). [↑](#footnote-ref-54)
55. As a proverb goes: “Ren Yishi Fengping Langjing, Tui Yibu Haikuo Tiankong (忍一时风平浪静，退一步海阔天空),” which means that endure for a while, and it will become uneventful; take a step back, and you will find a boundless world. Zhu Yongwen (朱永文), Zeng Guang Xian Wen (增广贤文), in Zeng Guang Xian Wen (Zhou Xitao et al. eds., Anhui Wenyi Chubanshe 2004). [↑](#footnote-ref-55)
56. Du Bingqian (杜冰倩), *Zhongguo Gudai Xingfa de Lishi Fenxi* (中国古代笞杖刑罚的历史分析) [Historical Analysis of Chinese Ancient Punishments of Whipping and Flogging], 101 Heilongjiang Sheng Zhengfa Guanli Ganbu Xueyuan Xuebao (黑龙江省政法管理干部学院学报) [Journal of Heilongjiang Admin. Cadre C. Pol. & L.] 32 (2013). [↑](#footnote-ref-56)
57. Henry Rosemont Jr., *Two Loci of Authority: Autonomous Individuals and Related Persons*, in Confucian Cultures of Authority 1, 11 (Peter D. Hershock & Roger T. Ames eds., St. U. N. Y. Press 2006). [↑](#footnote-ref-57)
58. Xing Fan, *The Chinese Cultural System: Implications for Cross-Cultural Management*, 60 S.A.M. Advanced Management J. 14, 16 (1995). [↑](#footnote-ref-58)
59. Jia Wenshan, *The Wei (Positioning)-Ming (Naming)-Lianmian (Face)-Guanxi (Relationship)-Renqing (Humanized Feelings) Complex in Contemporary Chinese Culture*, in Confucian Cultures of Authority 49, 51 (Peter D. Hershock & Roger T. Ames eds., St. U. N. Y. Press 2006). [↑](#footnote-ref-59)
60. It was not until the New Cultural Movement in the 1910s did written language be reformed from Classical Chinese to vernacular. [↑](#footnote-ref-60)
61. *See* Zhonghua Renmin Gongheguo Tiaojie Fa, *supra note* 34, art. 4, 8; *see also*, Renmin Tiaojie Weiyuanhui Zuzhi Tiaoli (人民调解委员会组织条例) (General Rules on People’s Mediation Committees) (promulgated by the St. Council, June 17, 1989, effective on June 17, 1989) CLI.2.4331 (Lawinfochina), art. 11. [↑](#footnote-ref-61)
62. *See* Zhonghua Renmin Gongheguo Tiaojie Fa, *supra note* 34, art 1, 4, 5, 13. [↑](#footnote-ref-62)
63. *Id.* art 33. [↑](#footnote-ref-63)
64. Niel J. Diamant, *Conflict and Conflict Resolution in China: Beyond Mediation-Centered Approach*, 44 J. Conflict Resol. 523, 532 (2000). [↑](#footnote-ref-64)
65. Tian Xinming (田心铭), *Qunzhong Luxian: Cong Mao Zedong dao Dang de Shiba Da* (群众路线：从毛泽东到党的十八大) [Mass Line: From Mao Zedong to the Eighteenth National Congress of the Communist Party of China], 175 Sixiang Lilun Jiaoyu Daokan (思想理论教育导刊) 22, 23 (2013). [↑](#footnote-ref-65)
66. Fei Xiaotong (费孝通), Xiangtu Zhongguo (乡土中国) [From the Soil] 56 (Shenghuo Dushu Xinzhi Sanlian Shudian 1985). [↑](#footnote-ref-66)
67. The *Eight Honors and Eight Disgraces*: “Love the country; do it no harm. Serve the people; never betray them. Follow science; discard ignorance. Be diligent; not indolent. Be united, help each other; make no gains at others' expense. Be honest and trustworthy; do not sacrifice ethics for profit. Be disciplined and law-abiding; not chaotic and lawless. Live plainly, work hard; do not wallow in luxuries and pleasures.” Liu Dan, *New Moral Yardstick: 8 Honors, 8 Disgraces*, Gov.cn (April 27, 2018, 5:18 PM), <http://www.gov.cn/english/2006-04/05/content_245361.htm>. [↑](#footnote-ref-67)
68. Fei Xiaotong, supra note 65, at 55–56. [↑](#footnote-ref-68)