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Mediation in Mainland China and Hong Kong: Can They Learn from Each Other?

Jeffrey Kwun-Lun Lee

I. INTRODUCTION

On 1st July 1997, the sovereignty over Hong Kong was handed from the United Kingdom (UK) back to the People’s Republic of China (PRC). Under the ‘one country, two systems’ principle, Hong Kong continues to adopt the common law legal system inherited from the UK while Mainland China maintains its civil law based system. In addition to this divergence, the use of mediation also remains different between the PRC and Hong Kong, the latter of which has been heavily influenced by a more formal and institutionalised Western approach since the 1980s.

As Hong Kong is often described as an ‘East meets West’ city exhibiting certain Chinese values as well as a Western attitude inherited from Britain, it is not surprising that Mainland China and Hong Kong share some common values in appreciating mediation as an effective means to settle disputes prior to litigation. Mediation is, for instance, considered in both places as a more expeditious and cost-effective means of dispute resolution that improves the access to informal and participatory justice. Moreover, both places also regard mediation as a way to restore peace and harmony by mending the parties’ relationship with mutual acknowledgment and responsiveness to the other disputants.

To achieve these objectives, the two places, however, has developed and implemented the mediation systems differently. While there are individual merits in both systems, each of them is also prone to problems which adversely affect the quality of mediation as a fair and effective means of dispute resolution. For example,

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1 N Alexander, Mediation Process and Practice in Hong Kong (LexisNexis, China 2010) 245.
3 Ibid.
4 Alexander (n 1) 36.
6 Alexander (n 1) 40; Zeng (n 5) 26-28.
in Mainland China, other than the serious problem of compelled mediation, many parties are unwilling to speak freely and openly in mediation for fear that what they said may be used against them in later proceedings. Meanwhile, in Hong Kong, many parties and their lawyers have been reluctant to cooperate in the mediation process because of their lack of confidence in mediators and mediation conducted outside courts. In view of these problems, the mediation systems in both places are in urgent need of reforms.

Since recent decades, there has been a massive increase in the cooperation and exchanges between Mainland China and Hong Kong in various aspects such as trade, investment and infrastructural development.\textsuperscript{7} Not only do these efforts speed up the economic integration between Hong Kong and Mainland China, they also enhance the mutual benefits of both places. The closer cooperation and interactions are certainly not confined to the economic dimension only; they have in fact also covered the legal systems between two places.\textsuperscript{8} As the use of mediation has been actively promoted by the judiciaries of both places in recent years as reflected respectively by the introduction of the Civil Justice Reform in Hong Kong and the People’s Mediation Law in Mainland China, it is of great interest to explore, by a similar token as the economic and other interactions, whether the mediation systems in both places could also mutually benefit from each other through positively borrowing one another’s decent practices and experience to address their own problems in the hope of ultimately improving the quality of mediation in both places.

In discussing this novel issue, this paper does three things. First, it will discuss the features of the existing mediation systems in Mainland China and Hong Kong. Second, it will examine the respective problems in the two mediation systems. Finally, it will demonstrate that even though there are certain problems in both mediation systems, they could be rectified by learning and borrowing from each other’s good practices and experience.

\textsuperscript{7} Alexander (n 1).

II. MEDIATION SYSTEMS IN MAINLAND CHINA AND HONG KONG

A. Mainland China

With a long history of development, mediation has been playing a significant role in Chinese dispute resolution and there are currently different kinds of mediation available both inside and outside the legal system in Mainland China.

1. People’s Mediation

People’s mediation is an important component of the mediation system in the PRC. It refers to the process where civil disputes are mediated by the people’s mediation commissions, which are mass-based organisations legally established to settle disputes among the people. While these commissions must be established by villagers’ committees and neighborhood committees, they may also be formed by enterprises, institutional units, towns, sub-districts or social organisations. In settling dispute, the people’s mediators will use persuasion and education, explaining the relevant laws and state policies to the disputants, and ultimately assisting them to reach a mutually acceptable agreement consistent with the laws and policies. In 2008, the people’s mediation commissions all over the nation handled 5 million cases and in 2010 there were more than 800,000 people’s mediation commissions and over 4 million mediators in Mainland China.

The people’s mediation system had recently been strengthened by the People’s Mediation Law of the PRC (PML) which consolidated and authoritatively codified the principles and rules governing people’s mediation and came into effect in 2011. Under the PML, the parties’ free will to engage in people’s mediation and the equal negotiations during the mediation process is emphasized. Besides, the PML

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10 People’s Mediation Law of the PRC (PML) art 7.
11 Ibid art 8.
12 Ibid art 34.
13 Ibid art 22.
15 Ibid 261.
16 PML (n 10) art 2, 3(1), 17, 22, 23(4).
specifies that people’s mediation are provided free of charge as people’s mediation commissions, according to Article 4 of the PML, would not charge fees for the mediation of disputes among the people.

2. Administrative Mediation

Another component in the PRC mediation system is the administrative mediation, which refers to a process where mediation is conducted by relevant administrative bodies upon the request of the parties to assist them in reaching an agreement on the rights and obligations of each party. For example, the environmental protection agencies, which are administrative bodies, play a significant role in mediating environmental disputes. Article 41 of the Environmental Protection Law of the PRC expressly stipulates that ‘[a] dispute over the liability to make compensation [for the environmental pollution hazard] or the amount of compensation may, at the request of the parties, be settled by the competent department of environmental protection administration’. An advantage of administrative mediation is that since the administrative bodies are responsible for enforcing relevant laws and regulation, they have the legal and technical expertise which promises a more efficient, timely and proper settlement of disputes.

3. Court Mediation

The final and also the most controversial element of mediation in Mainland China is the court mediation, where judges undertake dual roles acting as both mediator and the ultimate adjudicator in the same dispute and can switch back and forth between those two roles.

To mediate a dispute, Chinese judges will often meet with the parties separately. They may suggest the settlement proposals they think just or indicate to the parties the specific weaknesses of their claim or defence so as to give them cause

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17 Ibid art 4.
18 Ibid.
20 Environmental Protection Law of the PRC art 41.
21 Hilmer (n 2) 159.
to re-evaluate their position’s strength. Mediation efforts by judges to bring about a mutually agreed settlement will be made at various points of the civil proceedings regardless of whether the disputants had already attempted mediation before an action was brought. Generally, the court would invite the parties to attempt mediation at the preparatory stage before the trial. If mediation is unsuccessful, the court would try to mediate again upon the voluntariness of the parties before it makes a judgment. A dispute can be mediated by the court at any level of a litigation process, irrespective of whether it is a first or second instance trial or even a retrial.

B. Hong Kong

In contrast to court mediation in Mainland China, mediation in Hong Kong is separate and distinct from court trials and mediators would not hold any adjudicative authority in the same dispute. A mediator in Hong Kong is purely an impartial and trained third person assisting the parties in a dispute to reach a voluntary agreement and he/she would not adjudicate the dispute if mediation fails. In Hong Kong, disputants can seek mediation through various means elaborated as follows.

1. Family and community mediation

To start with, parties in family and community disputes can seek community mediation through community-based mediation organisations or other non-governmental organisations such as the Hong Kong Mediation Centre and the Hong Kong Family Welfare Society. Mediators are comprised of volunteers, personnel of community mediation organisations and freelance mediators employed on a contractual basis. Disputants seeking this type of mediation generally do not have to pay for the service and the costs may be fully or partially subsidised by the

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23 A Chen (n 14) 287.
24 Hilmer (n 2) 132.
25 Ibid.
26 Ibid.
28 Ibid 14.
29 Alexander (n 1) 235.
30 Ibid 231.
government where mediation services are not volunteered.\textsuperscript{31} Community mediation is often used to resolve disputes between members of the community such as neighbours, dispute within families, workplaces and other groups or organisations.\textsuperscript{32}

2. Private sector mediation

In addition to family and community mediation which covers only a limited range of practice areas, parties who are in other type(s) of dispute can access private sector mediation in Hong Kong where mediation is offered by a variety of private organisations (such as the Hong Kong Mediation Council) and freelance mediators on a fee-for-service basis.\textsuperscript{33} These organisations may have a general panel of mediators handling a broad range of practice areas and/or a panel of mediators specializing in one particular area such as family mediation.\textsuperscript{34} Mediators of each mediation organization are trained and accredited by their respective organisations and they represent a wide range of professions and qualifications depending on the corresponding accreditation criteria and professional standards of the organisations.\textsuperscript{35}

3. Court-annexed mediation when parties have already resorted to litigation

When the disputants have resorted to litigation, the court-annexed mediation system will come into play. If the parties take their dispute to court without attempting mediation but they later indicate their willingness to mediate after an action was brought, the system allows the court to channel a case to mediation at an early stage of the proceedings\textsuperscript{36} and such mediation will be outsourced to mediators who are not judicial personnel\textsuperscript{37} and conducted only at the shadow of the court.\textsuperscript{38} The mediation can be performed by community mediators or mediators from private mediation organisations mentioned earlier.

\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid 235.
\textsuperscript{33} Ibid 231.
\textsuperscript{34} Ibid 232.
\textsuperscript{35} Ibid 231-232.
\textsuperscript{37} Alexander (n 1) 229.
\textsuperscript{38} Ibid 235.
This type of court-annexed mediation has been fully incorporated into Hong Kong’s civil justice system by the introduction of Civil Justice Reform (CJR) and a number of supplementary Practice Directions in 2009. Under the CJR, the Order 1A of the Rules of High Court (RHC) and the Rules of District Court (RDC) were amended to make the facilitation of the settlement of disputes as one of the underlying objectives to which the courts have to give effect when exercising its powers.  

Further, the Order 1A r 4(2)(e) of the new RHC and RDC states that the court is under the duty to encourage and facilitate the parties to use ADR procedure if the court considers appropriate.  

In order to enable the courts to discharge these new duties and actively manage cases, courts are given the new case management power under Order 1B r 1(2)(e) of RHC and RDC to stay the whole or part of any proceedings either generally or until a specified date or event it thinks appropriate in facilitating the parties to attempt mediation and procure settlement of the disputes between them.  

In short, the new procedural rules now enable the courts to intervene in a case and make orders of mediation during the court proceedings, thereby formally annexing and integrating mediation into the civil justice system of Hong Kong.

Meanwhile, although mediation must be voluntary and mandatory mediation is not adopted in Hong Kong, parties are strongly encouraged to explore the possibility of mediation before going to the court. As the Judiciary has been taking a proactive role in encouraging the use of mediation, it introduced the Practice Direction 31 on Mediation (PD 31) in 2009 prescribing that the court may impose adverse cost sanctions against a party who unreasonably refuses to participate in mediation during the court proceedings. In addition to the discretionary cost sanctions, PD 31 also provides the framework for court-annexed mediation. According to Paragraph 4 of PD 31, legal practitioners are under the duty to advise clients to consider the use of mediation and sign a Mediation Certificate stating that both PD 31 and the availability of mediation has been explained to the client.

39 Rules of High Court (RHC) order 1a r 1(e), Rules of District Court (RDC) order 1a r 1(e).
40 RHC order 1a r 4(2)(e), RDC order 1a r 4(2)(e).
41 RHC order 1b r 1(2)(e), RDC Order 1b r 1(2)(e).
43 Ibid.
44 Practice Direction 31 on Mediation (PD 31).
46 Alexander (n 1) 272.
Clients must also sign on the Mediation Certificate to the effect that they have understood the explanation.\(^{47}\) If parties agreed to mediate, they are required to coordinate the mediation process by serving a Mediation Notice and a Mediation Response on each other.\(^{48}\)

Like the private sector mediation, the fees for the court-annexed mediation are payable by the parties\(^ {49}\) and disputants are allowed to select their own mediator inside or outside the court list or through the Joint Mediation Helpline Office located in the High Court of Hong Kong.\(^ {50}\)

### III. Problems of the Mediation System in Mainland China

#### A. Dual Roles of Judges in Court Mediation

As previously mentioned, mediation in Chinese court is not independent but part of the adjudication process and judges extraordinarily serve the dual roles as both mediators and adjudicators on a same dispute. This unique feature, however, raises serious problems which undermine the fairness and legality of the court mediation.

1. **Non-confidentiality of mediation affecting parties’ free expression**

Due to the dual roles of judges, it is not possible to keep the mediation confidential\(^ {51}\) since judges, while acting as adjudicators, will unavoidably know the information disclosed during mediation.\(^ {52}\) Thus, while mediation often requires a party to be honest with the mediator regarding the merits of its legal or factual arguments and to reveal its true interests to the mediator in private meeting,\(^ {53}\) many parties are wary of conceding issues or admitting to a weakness in front of a person who has the power to decide the case if settlement cannot be reached.\(^ {54}\) This is because the parties are

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\(^{47}\) Ibid.
\(^{49}\) Alexander (n 1) 229.
\(^{50}\) Ibid.
\(^{52}\) Ibid.
\(^{53}\) Colatrella (n 22) 421.
\(^{54}\) Ibid.
reasonably afraid that a judge’s decision would be significantly influenced by, if not based on, the parties’ true interests and attitudes towards their cases’ merits he knows during mediation rather than the admissible facts and applicable law. As a result, disputants are often not open to compromise and instead they are more inclined to stick to their original legal positions. In this case, the participation of the adjudicators in the mediation process caused by the dual roles of judges will adversely affect the parties’ free expression and willingness to make concessions during mediation, thereby undermining the chances of success of the mediation.

2. Abuse of authority by judges during mediation

In addition to the above problem, the dual roles of court mediators also allow them to take advantage of their positions and abuse their judicial authority as judges very easily in order to indirectly coerce the parties to settle the dispute by mediation for a number of personal motives.

To illustrate this, it must first be noted that mediation has been maintaining its dominant position in Mainland China when compared with the number of adjudicated cases. While one could possibly justify this phenomenon by the previously legislative emphasis on mediation, this could actually be better explained by most judges’ preference for mediation which is motivated by their self-interest. One of the reasons why they prefer mediating disputes to adjudication is because the former is a much less risky type of dispute resolution mechanism. While the unsatisfied parties may appeal a decision made under the adjudication and judges’ chances for promotion are often affected by the number of cases subsequently reversed or retried, the mediation agreement cannot be appealed after being accepted by the parties. Also, judges generally do not possess fully professional skills and sound

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55 Ibid.
56 Xin (n 51) 75.
57 Ibid 76.
58 In 2010, 65.29% of civil cases were resolved by judicial mediation at the First Instance court level. See M Tai, D McDonald, 'Judicial Mediation in Mainland China explained' Herbert Smith Freehills ADR Notes (2012) <http://hsf-adrn notes.com/2012/07/30/judicial-mediation-in-mainland-china-explained> accessed 10 January 2013.
59 Xin (n 51) 81.
61 Xin (n 51) 86.
62 L Wang (n 60).
legal knowledge and mediation enables them to avoid making hard decisions on some relatively complicated cases. Moreover, many Chinese courts, adhering to the state policy to encourage court mediation, use the success rate of mediation as a standard to assess judges’ performance and decide their promotions. The more cases judges could successfully mediate, the more praise they would receive. The pressure generated by such a bureaucracy encourages judges to inevitably choose a quicker and less risky way to dispose of a high caseload.

Motivated by self-interest, Chinese judges would always try their very best to encourage the parties to settle the dispute by mediation instead of adjudication. Although the Civil Procedure Law of the PRC stipulates that the participation in mediation must be based on the voluntariness of the parties, illegal and compelled mediation has long been a widespread problem. Under the dual roles of judges, the adjudicative power that mediators hold over the disputes gives them more opportunities to influence or even impose their decisions on parties.

While judges generally will not directly coerce parties in mediation or to accept proposal, they often do so indirectly by dropping hints. For instance, judges may repeatedly encourage a party to mediate or think about the solution proposed either by the opposite party or by the judges themselves. Since such persuasion clearly indicate judges’ preference for mediation or a proposed agreement, it often creates much pressure on the parties who are afraid of losing the case since refusal to make concessions as suggested by the mediators may consequently lead to a worse decision made by them when acting as adjudicators. Indirect coerced mediation can also occur when judges deliberately indicate that the case may take much longer to

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63 Ibid 70.
64 Xin (n 51) 84.
65 Ibid 81.
66 Ibid.
67 Ibid.
69 Xin (n 51) 88.
70 Ibid 75.
71 Ibid 88.
72 Ibid.
73 Ibid.
74 Ibid.
adjudicate if disputants decline to mediate or insist on their claims\textsuperscript{75} or when judges indicate that the possible decision reached under adjudication may be more unfavourable to the parties if mediation fails.\textsuperscript{76} Given such indications, the disputants, however unwillingly, would have no way but to follow judges’ suggestions in hopes of avoiding worse results.\textsuperscript{77}

Under all these circumstances, the mediation agreement hardly reflects the parties’ voluntariness and self-determination. In short, the practical reality of mediation being forced upon the parties simply undermines the original idea to combine mediation with litigation by appreciating social and moral values within a legal framework.\textsuperscript{78}

B. Poor Quality of People’s Mediators

As for the people’s mediation in Mainland China, most urban mediators are retired workers or housewives and were either illiterate or with low education level.\textsuperscript{79} As such, the knowledge and technical skills of people’s mediators in general are far from adequate to conduct the mediation work well,\textsuperscript{80} which requires an increasingly greater understanding of law than in the past due to the rising complexity of disputes in a rapidly developing society.\textsuperscript{81}

As a result, although people’s mediators are required under the People’s Mediation Law to stick to principles, make legal reasoning\textsuperscript{82} and explain the relevant laws\textsuperscript{83} when assisting the disputants, many of them only aim at settling the dispute and avoid the burden of investigating either facts or law as they are incompetent to determine the liability of parties based on law.\textsuperscript{84} This problem, however, is even more serious in some rural areas in China as most well-educated people left those areas to

\textsuperscript{75} Ibid 88-89.
\textsuperscript{76} Ibid 89.
\textsuperscript{77} Ibid.
\textsuperscript{78} Hilmer (n 2) 134.
\textsuperscript{79} Xin (n 51) 101.
\textsuperscript{80} Y Huang, ‘A Rational Thinking of the People’s Mediation System of China’ (2012) 8:2 Canadian Social Science 141.
\textsuperscript{81} A Halegua, ‘Reforming the People’s Mediation System in Urban China’ (2005) 35 Hong Kong Law Journal 719.
\textsuperscript{82} PML (n 10) art 21.
\textsuperscript{83} Ibid art 22.
\textsuperscript{84} Y Huang (n 80).
live in the cities for better job opportunities and very often those who still stay in their
counties are rarely qualified for the mediation work.\textsuperscript{85}

\textbf{IV. HOW THE MEDIATION SYSTEM IN MAINLAND CHINA CAN LEARN
FROM HONG KONG’S EXPERIENCE}

\textbf{A. Separating Court Mediation from Adjudication}

As mentioned previously, the court-annexed mediation in Hong Kong is distinct from
the adjudication by the courts.\textsuperscript{86} The mediator would be an independent third party
totally unrelated to the dispute and the judge who adjudicates the dispute would not
serve as the mediator. Under this setting, the information disclosed during mediation
can be kept confidential with the understanding that they cannot later be used in court,
which encourages the parties to be more forthcoming during mediation.\textsuperscript{87} Besides, as
the mediator has no ultimate adjudicative authority over the dispute, parties would not
feel unduly pressured into making the mediation agreement.

In hopes of rectifying the problems in Chinese court mediation caused by the
dual roles of judges, Chinese courts should positively borrow Hong Kong’s practice
and make the court mediation an independent process separate from adjudication.

In order to achieve this, a possible suggestion would be that the court
procedures be divided into two stages, namely the pre-trial stage and the trial stage.
Different court personnel should sit in different stages and no one should be allowed
to sit in both stages for the same dispute. The court mediation is to be conducted at
the pre-trial stage where the pre-trial judge will identify the relevant issues of the case
and conduct mediation on the basis of parties’ voluntariness. If parties do not reach an
agreement to mediate or mediation fails, the pre-trial judge cannot adjudicate the
dispute and the case will proceed to the trial stage for adjudication without delay.\textsuperscript{88} At
the trial stage, the trial judge, who does not hear the case at the previous stage, will no
longer attempt mediation and will only adjudicate the dispute in accordance with the

\begin{footnotesize}
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\item \textsuperscript{85} Y Huang (n 80).
\item \textsuperscript{86} P Huang, ‘Court Mediation in China, Past and Present’ (2006) 32:3 Modern China 1.
\item \textsuperscript{87} Ibid 30.
\item \textsuperscript{88} Xin (n 51) 113.
\end{itemize}
\end{footnotesize}
law. While the arbitrary use of mediation at all stages of litigation process should be prohibited by amending the Civil Procedure Law in a bid to prevent coerced mediation mentioned earlier, any settlement by parties through negotiation or conciliation without courts’ intervention should not be precluded.\(^89\) Meanwhile, in order to eliminate the cause for the pre-trial judges to coerce mediation and ensure parties’ voluntariness, the success rate of mediation should no longer be used to assess their performance and decide their promotions.

As this approach prohibits mediators from further involvement in the adjudicative process, the confidentiality of information disclosed during mediation can be maintained. This ensures that the result of adjudication would not be affected by the mediation process and one party would not be given unfavourable treatment in the judgment simply because that party is unwilling to mediate.\(^90\) Besides, it also guarantees that no mediation agreement proposed by one party would be referenced by a judgment.\(^91\) As a result, parties would be willing to engage in more open discussions in accordance with interest-based mediation principles without much hesitation.\(^92\)

Moreover, when the court mediator does not have any adjudicative authority, the abuse of authority by judges to coerced mediation indirectly can also be avoided. Parties would no longer feel obliged to accept the mediator’s suggestion and their free will in making the settlement agreement can be guaranteed.

This approach is also consistent with the conditions in Mainland China where there is a large discrepancy in the quality of judges. Before the amendment of the Organic Law of the People’s Courts in 1983, judges recruited were not required to have legal professional knowledge and many of them received little education and training.\(^93\) In fact, it is only in recent decades that the quality of judges has been beginning to improve.\(^94\) Therefore, under the suggested approach, those who are less capable can be designated to become the pre-trial judges since the knowledge

\(^{89}\) Xin (n 51) 113.
\(^{90}\) L Wang (n 60) 74.
\(^{91}\) Ibid.
\(^{92}\) Colatrella (n 22) 421.
\(^{93}\) A Chen (n 14) 205.
\(^{94}\) Ibid.
required for this position is lower. They do not have to decide on complicated legal issues and can specialize themselves in identifying the root of the problem and mediating disputes. On the other hand, outstanding and experienced judges with sound legal knowledge can be designated to become trial judges to adjudicate disputes and they can thus specialize in resolving complex legal issues. Since practice makes perfect and practical wisdom comes from experience, different judges specializing in different duties will gradually become experts in their respective work and hence the quality of the court service and its mediation work can be significantly enhanced in the long run.

B. Allowing People’s Mediators to Charge for Their Services

In fact, the problem of poor quality of people’s mediators in Mainland China mentioned earlier can be largely attributed to the fact that only low or even no remunerations were paid to people’s mediators. While it is intellectually demanding as well as time-consuming to conduct the mediation, people’s mediators are prohibited to charge for their services and only very outstanding people’s mediators may be rewarded by the government. Without sensible financial reward as a kind of motivation for most mediators, it is very hard to attract talents to become people’s mediators or to prevent brain drain since many capable professionals find running profitable business more important than performing duties relating to dispute resolution.

To address this problem, references can be made to Hong Kong’s mediation system in which mediators are allowed to charge for their services. While there are some community mediators in Hong Kong offering mediation service on a pro bono basis, private sector mediators normally charge from HKD $2000 to $8000 per hour,

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96 Ibid.
98 Xin (n 51) 101.
99 PML (n 10) art 4.
100 Ibid art 6.
101 Y Huang (n 80) 141.
102 Xin (n 51) 101.
depending on their qualifications and experience. \(^{103}\) Given the favourable financial incentives, professionals from all walks of life such as lawyers, engineers, surveyors and social workers are all very willing to receive mediation trainings and get accredited as mediators. \(^{104}\) Not only does this fully utilize the skilled manpower available in the society, \(^{105}\) it also increases the chance of success of mediation. This is because when mediators who come from different backgrounds assist in mediating different types of disputes relevant to their respective professions (such as social workers or psychologists mediating family disputes, engineers or surveyors mediating construction disputes), they can accurately identify the crux of the matter and can thus guide the disputants into reaching an amicable solution more easily and efficiently. \(^{106}\)

As such, in order to improve the quality of people’s mediators and attract more professionals to engage in people’s mediation work in Mainland China, the excellent experience in Hong Kong should be borrowed and people’s mediators in Mainland China should also be allowed to charge for their services. This not only helps to attract new and better qualified mediators such as retired judges, lawyers and other professionals, but also gives the incentive for the professionals to spare their time to attend regular mediation trainings as the tuition fee can subsequently be reimbursed by the mediation services they later provide. With more well-established professionals engaging in the mediation field, citizens and entrepreneurs will have greater confidence in the people’s mediation system and thus the development of some currently immature mediation sectors in China such as commercial mediation can be impressively boosted.

Meanwhile, for some people’s mediation organisations at the grass-roots level in rural areas, while the mediation services provided by them to the underprivileged should remain free of charge, people’s mediators should still be remunerated by the


\[^{104}\] Ibid.


government for their services in order to give them motivation and incentives to attend ongoing professional training that consequently helps to improve the quality of mediation services. To make this possible, the people’s government should increase the funding allocated to these people’s mediation organisations so that a reasonable amount of remuneration can then be given to the people’s mediators whenever they conduct the mediation.\textsuperscript{107} Not only can this measure attract more talented mediation professionals to join the people’s mediation work and attract the existing mediators to receive regular training, this measure could also show the government’s efforts to implement the statutory provisions of the People’s Mediation Law which requires the local people’s governments to guarantee the funds needed for the people’s mediation work\textsuperscript{108} and subsidize the people’s mediators for loss of working time.\textsuperscript{109}

V. PROBLEMS OF THE MEDIATION SYSTEM IN HONG KONG

Although the mediation system in Hong Kong has a number of merits from which Mainland China can learn, the current court-annexed mediation system in Hong Kong is, however, inadequate in view of a number of factors.

A. Lack of Confidence in Mediators and Mediation Conducted Outside Courts

With the long period of development with peace and stability, the well-developed legal system in Hong Kong and its robust rule of law commands the respect of both the international and the Chinese community.\textsuperscript{110} Even after Hong Kong was handed back to China in 1997, the people’s faith in the legal system, an independent judiciary and a law-abiding government remains strong.\textsuperscript{111} Accordingly, the reliance of people on their access to court as the primary means for resolving disputes has not changed\textsuperscript{112} and many people are very reluctant to settle disputes through other means not coordinated by the judiciary in which they have faith.\textsuperscript{113} Since mediation is currently conducted outside the court under the court-annexed mediation system in Hong Kong, many parties do not have confidence in it and the normal judicial process

\begin{itemize}
\item \textsuperscript{107} Z Wang (n 103).
\item \textsuperscript{108} PML (n 10) art 6.
\item \textsuperscript{109} Ibid art 16.
\item \textsuperscript{110} E Leung, ‘Mediation - A Cultural Change’ (2009) 17 Asia Pacific Law Review 44.
\item \textsuperscript{111} Ibid.
\item \textsuperscript{112} Ibid.
\item \textsuperscript{113} Ibid 45.
\end{itemize}
is still inherently more attractive to them because of their confidence in the legal system.\textsuperscript{114}

At the same time, disputants also have the concern over the discrepancies in the quality of mediators since there is not any common benchmark in Hong Kong for mediator accreditation comparable to the high standard set in major jurisdictions.\textsuperscript{115} Private mediators are currently only accredited by a number of different bodies and each of them adopts its own accreditation criteria.\textsuperscript{116} In fact, there have been occasional mediators who use inappropriate pressure to convince the parties to settle or delay the mediation process or even terminate the mediation before the parties have the chance to mediate.\textsuperscript{117} These unhappy incidents have made many disputants lose faith in the quality of mediators as well as the whole mediation process which is already inherently less attractive than litigation in disputants’ eyes. Despite the recent proposal to set up a single accreditation body in Hong Kong in hopes of addressing this problem, it is very unlikely that those mediators accredited by their respective mediation organizations in the past would be strictly assessed once again.\textsuperscript{118}

\textbf{B. Rigid Mindset of Individual Lawyers}

Till now, many legal professionals are still having the rigid mindset and their habitual practice is shaped by an adversarial and confrontational approach to litigation.\textsuperscript{119} Litigation as a ‘legitimate’ form of dispute resolution is also firmly ingrained in the mind of all law students.\textsuperscript{120} Thus, other than the settlement negotiations reached in non-contentious matters, many lawyers regard litigation as the typical form for resolving their clients’ disputes.\textsuperscript{121} They think that alternative dispute resolution such as mediation is a threat to their income\textsuperscript{122} and therefore many do not strongly encourage and fully assist their clients to settle the dispute through mediation since they would receive lower fees if clients decided on mediation instead of pursuing

\textsuperscript{114} Ibid.
\textsuperscript{115} R Leung, \textit{Hong Kong Mediation Handbook} (Sweet & Maxwell, China 2009) 296.
\textsuperscript{117} R Leung (n 115).
\textsuperscript{118} YL Wong (n 116).
\textsuperscript{119} Gu (n 42) 43.
\textsuperscript{120} Ibid 52.
\textsuperscript{121} Ibid 53.
\textsuperscript{122} Ibid 62.
litigation. While lawyers are under the duty to advise their clients of the possibility of the court making an adverse costs order where a party unreasonably fails to engage in mediation, many of them, however, actually treat the mediator as a member of the opposite camp. As a result, they often discourage their clients to engage in direct dialogue in the mediation or they either inadequately or incorrectly prepare their clients for mediation. In some cases, instead of using the problem solving approach, some lawyers continue to adopt the adversarial strategy and focused only on legal issues when preparing clients for mediation or advising them during the mediation process.

C. Inadequacy of the Court-Annexed Mediation to Make the Parties Cooperative

As PD 31 places a duty upon civil litigants to consider and reasonably engage in mediation before trial with costs sanction for failure to do so and lawyers are also under a duty to advise their clients of the consequences of non-compliance with this obligation, most parties are willing to attempt mediation according to the Mediation Certificates filed with the courts so far. However, it should not be surprising to also realize that the triggering factor for compliance is often the fear of being ordered to pay costs, instead of truly appreciating and understanding the fundamental benefits of a mediation process itself. As a result, even when their cases are suitable for mediation, many disputants do not wholeheartedly and genuinely seek to resolve the dispute through mediation and are often uncompromising during the mediation.

124 PD 31 (n 44) paragraph 4.
127 Ibid.
128 Ibid.
129 Ibid.
130 PD 31 (n 44) paragraph 4, Alexander (n 1) 275.
131 Alexander (n 1) 275.
133 Hilmer (n 2) 158.
While some litigants ‘attempted’ mediation by choosing mediators of dubious qualifications or ethics charging unusually low fees in hopes of merely going through the formality as requested by the lawyers, many lawyers also merely regard mediation as a ‘tick-box’ before litigation just to satisfy the Bench when the question is asked in court whether the parties have already sought mediation.

Worse still, nothing could be done under the current court-annexed mediation system in Hong Kong to prevent the occurrence of these situations and make sure parties are cooperative and not intractable during the mediation process. For instance, for cases listed in the Construction and Arbitration List where Practice Direction 6.1 applies, while it is stated clearly that the court will use its discretion in deciding what constitutes an unreasonable refusal to mediate, it will not take into account what happened during the mediation, why the mediation failed or whether any failure in the mediation may be ascribed to unreasonable conduct by any party. While there is no such provision stipulated in PD 31, it, however, recognizes that the court will only look at the currently admissible evidence such as Mediation Notice and Mediation Response in determining the reasonableness of a party who refuses to mediate. Since the conduct of the parties during mediation, no matter how unreasonable it was, would not be taken into account by the court in making the costs order, the court-annexed mediation and the supporting practice directions in Hong Kong are unfortunately inadequate to ensure parties are genuine but not intransigent in attempting mediation which, if genuinely pursued, could be very helpful to settle disputes and cases that now go to the trial may have already been settled if parties did endeavour in the mediation process.

VI. HOW THE MEDIATION SYSTEM IN HONG KONG CAN LEARN FROM MAINLAND CHINA’S EXPERIENCE

In the existing court-annexed mediation system in Hong Kong, mediators are not court personnel but are only private mediation service provider and litigants also have

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135 YL Wong (n 116).
136 Ibid.
137 Hilmer (n 2) 158.
138 Practice Direction 6.1 paragraph 44, Yip and Yeung (n 125).
to pay extra fees for participating in mediation which is presently independent from the legitimate duties of the court.\textsuperscript{139} As such, among community, there has been a lack of confidence in the court-annexed mediation conducted outside the reliable judicial system and many still have the mindset that mediation is inferior to litigation. In order to address this problem, we shall see how the good practice in Mainland China can help to change the community’s mindset about mediation so as to improve the use of mediation in Hong Kong.

To begin with, notwithstanding the problems discussed earlier, the ‘court-performed’ mediation in Mainland China has been playing an important role in solving disputes timely, easing conflicts as well as maintaining social stability.\textsuperscript{140} After the disputants have resorted to legal action, the Chinese courts will take the primary responsibility for directing and performing mediation.\textsuperscript{141} Besides, mediation in court is offered on a more comparable basis with litigation. For example, there are no differences in training or education between judges and mediators as the officials presiding over disputes perform both functions\textsuperscript{142} and no additional costs are charged for mediation. Litigants, therefore, generally do not perceive that mediation is an inferior method of resolving disputes.\textsuperscript{143} As such, despite the fact that the legal system in China generally has recognized defects in need of reform, Chinese litigants have no reason to have less confidence in mediation than they would have in the litigation process.\textsuperscript{144}

In light of boosting the public’s confidence in the mediation system, Hong Kong can possibly borrow these decent features from the Mainland China and transform the current court-annexed mediation system which is a rather tangential approach into a ‘court-performed’ approach in which mediation becomes a customary and legitimate responsibility of the court after an action has been brought.\textsuperscript{145}

\textsuperscript{139} Colatrella (n 22) 418.  
\textsuperscript{140} L Wang (n 60) 68.  
\textsuperscript{141} Colatrella (n 22) 418.  
\textsuperscript{142} Ibid 419.  
\textsuperscript{143} Ibid.  
\textsuperscript{144} Ibid.  
\textsuperscript{145} Ibid 418.
By adopting the ‘court-performed’ approach, the mediation process in Hong Kong could be changed to take place in the court building with court-based mediation practitioners who include full-time mediators, judges and registrars trained in mediation and accredited by the Judiciary. Mediators could be chosen and appointed by the court in order to prevent the parties from treating the mediators as the opposite camp. The costs of the mediation, excluding the legal costs of the parties’ own lawyers, should be borne by the justice system so that the court mediation will not be deemed as an inferior process or ‘second class’ remedy that does not warrant funding like traditional litigation. Yet, there should not be a wholesale adoption of China’s ‘court-performed’ approach and it must be stressed that when considering this approach, the judge who adjudicates a particular dispute must not perform mediation of that same dispute and the success rate of mediation must also not be used to assess the mediator’s performance given the reasons previously discussed.

The implementation of the new approach can bring in several benefits. First, as mentioned earlier, litigants in Hong Kong generally have greater respect for the established legal system and court personnel such as judges. Therefore, when mediation is structured more integrally with the court process and the mediation duties is assigned to full-time, highly trained court personnel rather than private mediators, it is more likely that the mediation can earn their trust and confidence and consequently litigants would be more willing to participate in mediation genuinely.

Furthermore, when the court mediators are all accredited by the Judiciary acting as the sole accreditation body, a standardized and reliable set of accreditation criteria can be implemented so that those who mediate must have certain qualifications, skills, knowledge and experience deemed essential by the Judiciary. As such, the skepticism over the discrepancies in the accreditation standards of different

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146 Alexander (n 1) 230.
147 Colatrella (n 22) 419.
148 Ibid.
149 Ibid 420.
150 Ibid 419.
private mediation organisations and also the quality of private sector mediators, which currently shatters the public confidence in using mediation, can be avoided.\textsuperscript{151}

Last but not least, the ‘court-performed’ approach can, together with proper amendments of Practice Directions, also help to increase the likelihood that disputants are genuine but not intransigent when attempting mediation. This is because when mediation is conducted by the court personnel, these personnel can also assist the court to oversee the mediation process. For instance, in cases deemed by the court suitable for mediation but the failure of mediation is ascribed to insufficient preparation or even the unreasonable conduct by any party, the court mediator should be allowed to reflect this, without disclosing the substance of the mediation conference (such as the information obtained relating to the case), to the trial judge who can then take this into consideration when considering the issue of costs. In consequence, parties will no longer regard the mediation as just a formality and a ‘tick-box’ before litigation since their preparation beforehand and their conduct during mediation will be assessed. In order to avoid adverse costs sanction for the best economic interests of their clients, lawyers would have no way but to properly prepare their clients not only on the real merits of their case but also the available options and their needs.\textsuperscript{152} In this way, the ‘court-performed’ approach can help to significantly raise the probability that parties are genuine and cooperative but not intractable during the mediation process, which can then unquestionably improve the quality of mediation and its chance of success.

\textbf{VII. CONCLUSION}

The analysis of this paper has shown that despite the efforts in both Mainland China and Hong Kong to improve the use of mediation, the current mediation systems in both places are still facing many problems respectively which undermine the quality and effectiveness of mediation as a powerful dispute resolution tool. Having said that, they could all be effectively rectified by learning and borrowing from the merits of each other’s mediation system. Learning from Hong Kong, the Mainland China should separate mediation from adjudication and also enable people’s mediators to

\textsuperscript{151} YL Wong (n 116).
\textsuperscript{152} J Lam (n 132).
charge for their services. On the other hand, Hong Kong should actively consider adopting the ‘court-performed’ approach implemented in Mainland China (on the premise of separating mediation from adjudication) in hopes of gaining the public’s confidence and increasing the likelihood that the mediation would be used by disputants more cooperatively and genuinely. Once these reforms are in place, it is anticipated that the quality of mediation in both places would be much improved and mediation would assume an even more significant role in the resolution of disputes.