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Mediation Model Differences between China and Australia and Their Possible Collaboration

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Abstract

This manuscript compares and contrasts the mediation models in Australia and China, and analyses the possibility of their combination. As an alternative to the court system, in the 1970s and 1980s, mediation became widely used as a method for dispute resolution in western countries in which the rule of law is highly valued, such as Australia. Whereas in China, the tradition of mediation has lasted for thousands of years and never ceased.

Chinese culture treats dispute as a shame because China has a proverb, “harmony is valuable.” The traditional dispute mediator was an honorable elder of the community. In China, mediation is not only a dispute resolution process, but also an educational process.

In the past century, although Chinese society has been rapidly changing and Chinese people are criticizing and rejecting their own traditions, the practices of mediation continue to maintain a strong traditional flavor. This results in an unsatisfied need of effective dispute resolution in China.

In western society, contemporary mediation is not based on collectivism or the traditional virtue of caring for others within the community, but rather for following the value of self-determination and individualism. Therefore, unlike the Chinese mediation model, the western contemporary mediation process is not bound by culture and tradition.

This essay also examines whether the Australian mediation model can address the unsatisfied need for effective dispute resolution in China. Because mediators maintain neutrality and impartiality, and empower parties to find their own solutions, among the urban professional population the Australian mediation model is more likely to satisfy parties’ various interests than the Chinese model.

Keyword: mediation, China community, Australia, tradition
Introduction

As an alternative to the court system, in the 1970s and 1980s mediation became widely used as a method of dispute resolution in western countries in which the rule of law is highly valued, such as Australia (Astor & Chinkin, 2002). Whereas in China, the tradition of mediation lasted thousands of years and never ceased (Boulle, 2005). In this essay, I will compare and contrast these two mediation styles, examine their pros and cons, and analyze their possible combination. This essay consists of four sections. In the first section, I will analyze how Chinese culture treats dispute and provide an example of traditional Chinese dispute resolution. In the second section, I will evaluate the current Chinese mediation mechanism and probe the unsatisfied needs for effective dispute resolution modes in China. In the third section, I will introduce the Australian mediation model’s process and its strength. In the last section, I will examine if it is possible to promote the Australian mediation model to the people of China to address the unsatisfied needs for effective dispute resolution.

Chinese Culture and Dispute

There is a widely-known Chinese proverb, “Harmony is valuable.” This philosophy profoundly influences not only Chinese dispute resolution, but also Chinese people’s daily lives. It is derived from the structure of traditional Chinese society, which has been formed over centuries.

China was an agricultural country for thousands of years. Throughout history, the agricultural lifestyle determined that most of the people lived in the same land where their ancestors lived. Nowadays, this phenomenon can still be found in some rural areas in China. The traditional Chinese value of harmony is based on the assumption that people live in a familiar environment with familiar people who they have known since they were born (Fei, 1993). Today, even in Beijing, a modern and international city, this assumption is still true in some communities (Guo & Klein, 2005). Unlike western society, in which the boundary between public and individual space is clear, traditional Chinese society is a network linked by interpersonal relationship (Fei, 1993). In addition, because agricultural societies change very slowly and remain stable for a long time period, experience that is passed on by the previous generation is highly valuable, and tradition becomes extremely important in people’s daily lives. Therefore, moral and traditional culture is the major power that regulates people’s behaviors in traditional Chinese society, which is composed of a network built among familiar people and an almost changeless environment (Fei, 1993). Fei Xiao-Tong (1993) uses a metaphor to illustrate dispute in traditional Chinese society.
He says that it is similar to a foul in football, whereby a player breaks the law of the game with which all of the players are supposed to be familiar obey. Therefore, a dispute among parties is considered as an immoral shame and dispute resolution is an education process (Fei, 1993). Furthermore, from the Chinese perspective, the ideal society is a society without dispute (Fei, 1993), by “spreading moral education so as to eliminate the need for litigation (Yu, 2009).”

Fei (1993) introduces a case of traditional dispute resolution in a rural Chinese village in the 1940s. In this family dispute, the father smoked cigarettes while the eldest son was against smoking because of health financial concerns. The younger son also smoked and instigated his father’s smoking so that they could share cigarettes. Once, the elder son saw his younger brother and father smoking together. He was very angry. He fought his younger brother and berated his father. Neighbors noticed this dispute because of the noise and reported it to the community center, then persuaded this family to go to the community center for mediation. The mediator was an honorable elder of the community. The mediation started with mediator’s declaration. He declared this dispute was the shame of the community, and then he employed the whole system of moral standards to analyze the dispute. He drew a conclusion as follows: the younger son is a scum of the community and should be driven out of the village. The older son should be punished because of berating his father. Because the father failed to educate his sons, he was scolded by the mediator. After announcing the settlement, in the presence of the bystanders the mediator exclaimed that the moral level of the community continues to deteriorate. This example is more like arbitration and moral lecture than mediation. However, because the parties voluntarily obeyed the moral regulation and the tradition, and, as is typical in most of the cases in rural China, the parties followed the mediation settlement which was decided by the mediator, their relationships were reconciled.

However, Fei (1993) points out the limitation of this form of traditional dispute resolution process; it could be effective only in a nearly changeless society, in which people always find moral regulations and traditional culture effective and helpful. When the society changes and tradition loses its effectiveness, there is no reason to educate people through the traditional dispute resolution process; people would not obey the settlement imposed by the people who have mastered the tradition.

Moreover, Chines people treating harmony as a core value of culture does not mean that dispute is uncommon in China.
Although there are various harmonious means to address dispute, such as avoidance, self-discipline, indirect expression and the traditional mediation process mentioned above, to name but a few, when all of these harmonious means fail, the consequence of dispute can be an undesirable exercise of revenge due to the belief of an eye for an eye (Chen, 2000).

Unsatisfied Need of Effective Dispute Resolution in China

In the past century, although Chinese society has been rapidly changing and Chinese people are criticizing and rejecting their own tradition, the practices of mediation continue to maintain a strong traditional flavor. This is attributed to collectivism being a significant cultural feature in both traditional Chinese society and the current socialist regime. When dealing with dispute, when compared to individualistic cultures, collectivistic cultures have a preference for withdrawing, compromising, and problem-solving (Holt & DeVore, 2005).

Except for courts, People’s Mediation Committees (PMCs) are the most important dispute resolution institutions in China. Nearly half of civil disputes are resolved through PMCs (Clarke, 1991). The Chinese Supreme People’s Court stipulates that family disputes, employment disputes and traffic accident disputes have to be referred to mediation before holding court (Xing, 2010). The government prefers mediation because it considers dispute as a disruption to modernization process (Fu, 1992). As a result, there are a considerable number of PMCs. There are 824,000 PMCs and 4,940,000 People’s Mediators all over China; 674,000 of PMCs served for rural or urban people are at a community level as of 2011 (People Net, 2011).

The current mediation model, People’s Mediation, does not overcome traditional mediation’s limitations, and cannot satisfy the needs for effective dispute resolution in a rapidly changing and diverse society, because of its significant resemblance to traditional mediation. This resemblance can be found in the laws and regulations regarding mediation as well as the mediation process. The Regulations on People's Mediation Commission (The State Council of People’s Republic of China, 2006) defines that the obligation of PMC is not only mediating civil disputes, but also using mediation as a tool to help people understand laws and governmental policies, and educate people to respect public virtues. According to the Regulation, People’s Mediators are chosen by election within the community. In the People’s Republic of China’s Mediation Act (The National People’s Congress of the People’s Republic of China, 2010), persuading parties and inducing agreements are recognized as major methods in the mediation process; prerequisites of being a People’s Mediator candidate are integrity, knowledge of governmental policy and law, and enthusiasm for mediation.
Similar to traditional mediation, People’s Mediation is used as an educational process and is conducted by a group of honorable people in the community. Shanghai TV has a TV program titled XinLaoNiangJiu (in Shanghai dialect, it means a mediation enthusiast in the contemporary era). This TV program shows (Shanghai TV XinLaoNiangJiu Program, 2009) the entire mediation process. Its mediator, Bai Wan-Qing, is a deputy of People’s Congress and is considered as one of the best People’s Mediators among all of Shanghai’s PMCs. The process showed on the TV program is comparable to the traditional mediation. Mediation starts with parties’ statements of the dispute. After listening to both parties’ statements, Bai makes moral judgements and suggests agreements based on her understanding of morality. Sometimes her understanding of morality, such as her advocating that virginity is the best dowry, is panned on the internet forums (Yangtze River Daily, 2011). However, PMC institution is different from the traditional mediation model, because, according to relevant laws (The State Council of People’s Republic of China, 2006) (The National People’s Congress of the People’s Republic of China, 2010), mediation cannot take place unless all of the parties are entering the agreement voluntarily, and the mediation process has to be confidential if parties raise confidential subjects.

In Cheng and Wu’s research (2010) of how Chinese people resolve dispute they interviewed people who were involved in civil disputes and asked them which form of dispute resolution was adopted for their dispute. They also interviewed people who were not involved in civil dispute and asked them which form of dispute resolution they would likely adopt for a hypothetical dispute. According to their research, the upper class is more likely to go straight to court while the working class is more likely to use the government-led mediation institution, which is PMC. Allowing a friend or acquaintance to intervene is the most frequently used dispute resolution method amongst all social classes. However, the relationship between parties and interveners can influence the mediation. It is difficult for an acquaintance of both parties to be neutral in mediation, especially in workplace disputes (Yang, Vliert & Shi, 2005). Cheng and Wu (2010) found that in real dispute situations, 23.9% of interviewees chose to live with dispute, whereas only 10.7% of interviewees who were not involved in civil disputes would choose to live with the hypothetical dispute. This indicates that the majority of Chinese people do not want to live with disputes, but many people have no choice. In summary, there is a significant unsatisfied need for effective dispute resolution in China.
Australian Mediation Model and Its Strength

In western society, the contemporary mediation model, which was rediscovered in the 1970s and 1980s, is not based on collectivism or the traditional virtue of caring for others within community, but rather for following the value of self-determination and individualism. Therefore, unlike the Chinese mediation model, the western contemporary mediation process is not bound by culture (Boulle, 2005).

Moore (2004) defines mediation as, “the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.” Therefore, although western mediation is also a kind of third party intervention, the role of the third party is very different from the Chinese mediator. The Australian Standard and The National Alternative Dispute Resolution Advisory Council (NADRAC) define mediation as, “a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the Mediator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted” (NADRAC, 2003).

In Australia, as a form of alternative dispute resolution, mediation provides an economical and available method of resolving dispute, so that taxpayers’ money, which would otherwise be spent on the legal system, is saved and people who cannot pay for litigation have an affordable option (Astor & Chinkin, 2002). According to New South Wales Law Reform Commission’s research report (New South Wales Law Reform Commission, 2004), 59.2% of participants were satisfied with the outcome of mediation, which was provided by the Community Justice Centre. Additionally, 76.3% of participants agreed that mediation improved their situation, and 85.6% of participants said that they would use mediation again.

The Australian mediation model is a process comprised of ten stages. The first stage is pre-mediation. In this stage, mediators or mediation organizations educate parties about what mediation is and what parties can expect from the mediation process. The mediation provider then receives the information about the parties and their dispute. The mediation provider examines whether the dispute is suitable for mediation (Quadan & Dan, 2011). The information acquired might affect the decision of the mediation provider.
The mediation provider may decide to change to a mediator with special expertise or qualification to resolve the dispute, because of the particular characteristics of the dispute, such as the ethnic group to which the disputants belong (Astor & Chinkin, 2002). The second stage, which is called the mediation opening statement, is the beginning of the mediation session; the mediator explains the mediation procedure and the mediator’s role and impartiality in pre-mediation communication with the parties. Mediation’s introductory part is considered as extremely important (Astor & Chinkin, 2002) because, in this stage, the ground rules are set, the confidentiality is explained and the expected behavior required during the mediation process is introduced to each of the parties (Quadan & Dan, 2011). In the third stage, each party tells their story in turn and describes their issues. In the fourth stage, the mediator summarizes the parties’ stories and recites the details. In the fifth stage, the mediator assists the parties with listing the issues to be explored and sets an agenda for the mediation. In the sixth stage, the mediator uses meditational skills, such as asking clarifying questions, reframing, and other language skills, to name but a few, to facilitate the parties’ communication with one another, while adhering to the set agenda. After fully exploring all of the issues, the mediator turns to private sessions. In private sessions, the mediator speaks with each party separately and promises confidentiality to parties (Quadan & Dan, 2011). The function of the private session is to allow the parties to discuss anything they want to mention privately, to vent emotion in a safe environment, and to discuss possible outcomes (Astor & Chinkin). The eighth stage is negotiation; parties are brought together to focus on their future relationship and negotiate possible agreements; the mediator maintains confidentiality, impartiality and future focus, and facilitates parties’ discussion. If agreement is reached, mediation moves to the ninth stage; the mediator documents in detail the agreement that the parties achieved, and provides it to each of the parties. In the final stage, the mediator formally concludes the mediation session, so that parties are provided with a sense of closure (Quadan & Dan, 2011).

Boulle (2005) argues that the values of mediation are non-adversarialism, responsiveness, self-determination and party autonomy, while different mediation practitioners may hold different values in addition to these three key values during their practices. Mediation is non-adversarial, when compared with the adversarial court system. The nature of court outcomes is “win-lose” and the court dynamic is competitive. Therefore, court can possibly exacerbate conflict. Mediation’s non-adversarialism relates to its structure, process and possible outcomes, but does not mean “compromise.” Mediation is responsive to client needs and interests. Parties feel free to depart from legal rules and policies.
Mediation’s informality and flexible process make this value possible. However, if an agreement is illegal or against public policy, it cannot be enforceable in following court proceedings. Self-determination and party autonomy are considered as the fundamental values of mediation. Moreover, self-determination is an objective of mediation practitioners and promoters; the degree of self-determination determines whether the parties will be satisfied with mediation. The parties extensively and directly participate and take responsibility for the outcomes, because the outcomes are based on their free wills and are written in their own language.

Unlike Chinese mediators, Australian mediators are required to achieve and maintain their competencies of mediation, including the knowledge of the nature of conflict and issues around mediation, communication skills, mediation management skills and ethical understanding, by the National Mediator Accreditation Practice Standards (Spencer & Hardy, 2009). In China, the Mediation Act (The National People’s Congress of the People’s Republic of China, 2010) ensures that a mediation agreement reached through PMCs has legal effect, whereas, in Australia, mediation’s legitimacy is derived from its being consensual and its neutrality. Consensual means that parties voluntarily chose mediation rather than the formal justice system; because they consider that mediation is a process that is more suitable for their needs and allows them to reach a consensual agreement. Neutrality is considered as a cornerstone of the legitimation of mediation. Because mediation is not public and cannot be reviewed according to prescribed standards of law, fairness and justice, ensuring that parties are free to make their own decision without influence from the mediator becomes crucial (Astor & Chinkin, 2002). The Australian mediation model recognizes that parties have rights to resolve their dispute without involving authorities who represent the broader society. Moreover, it also assumes that parties have the ability to assess their options objectively and work out a decision which best serves their interests. Therefore, the Australian mediation model can be more successful in an environment in which people do not tamely obey the authority.

**Possible combination of two models**

Unlike western culture, harmony is a core concept of Chinese culture (Hazen & Shi, 2009). In China, mediation is not only a negation process geared towards agreement, but also an educational process which aims to educate the parties on moral standards, thereby preventing disputes in the future. As the Chinese society has rapidly changed, especially since 1978’s economic reform, the mediators cannot monopolize the dissemination of the moral standards which the whole society should follow, because the people’s interests have become varied. Therefore, the current mediation model cannot satisfy people’s needs.
While the Australian mediation model emphasizes the mediators’ ability to understand disputes and manage the process of mediation instead of their moral standards. Because mediators maintain neutrality and impartiality, and empower parties to find their own solutions, the Australian mediation model is more likely to satisfy parties’ various interests than the Chinese one.

It is difficult to introduce the Australian model into the current Chinese mediation mechanism, People’s Mediation Committee. Unlike Australian mediators, Chinese mediators do not charge fees (The National People’s Congress of the People’s Republic of China, 2010). The reward of their efforts is getting honor from the community and praise from government. It is determined by the mechanism that they have to follow the mainstream moral standard and sometimes please the majority of the community. Hence, the Australian mediation model, which aims to empower the parties to reach the agreement by themselves instead of giving advice to the parties, cannot fit with the function of the People’s Mediation Committee. Nevertheless, introducing the Australian mediation model to the Chinese mediators can be productive mediation skills training for them, even if the model is not adopted.

There is also a broad market for mediators who are trained by the Australian system to provide mediation service to Chinese people without the endorsement of PMCs, although there are two obstacles. Firstly, there are some cultural barriers which hinder Chinese acceptance of the Australian model. Secondly, the agreement achieved from this mediation process is only agreed upon by the parties and, therefore, do not have legitimacy. Chinese people believe that “an ill bird fouls its own nest.” This is why a considerable amount of people choose to yield and live with their dispute; some people seek support from the People’s Mediation Committee because they consider PMC as not only a governmental organization but also a part of their community. Although people from higher classes believe in the rule of law and are more willing to resolve their dispute in the court, most Chinese people still do not feel comfortable resolving disputes in front of strangers. This can be attributed to the feeling of unsafety and the discomfort of confronting conflict. This is major cultural barrier which hind Chinese acceptance of the Australian model. Therefore, the professional confidentiality that is in practice in the Australian style mediation service becomes crucial to make more Chinese people accept it. Promoting the Australian mediation model in China is more likely to achieve success if it starts with the Chinese professional population. There is a sizable professional population emerging in urban China as a result of the urban growth (Hoffman, 2010). According to the old Chinese saying, “consider others in one's own place,” the professionals are more likely to trust mediators’ professional confidentiality.
Moreover, the professionals also can hold in high esteem the agreement reached through their power of their own will during mediation process, even it is not bonded by law. The Chinese urban professional population could be a large potential market for the Australian mediation model.

Conclusion

I recognize that self-determination and self-development are major selling points of the Australian mediation model. From the Chinese perspective, mediation is a kind of educational process, the Australian mediation model can be considered as a process of enhancing parties’ conflict management skills and interpersonal communication skills. These skills are essential for self-development. Given that the urban professionals attach importance to their skill development (Hoffman, 2010); developing skills during dispute resolution process can be attractive to them. Moreover, emphasizing self-development can also reduce people's discomfort with confronting the conflict. In the Chinese context, saving face or making face for the counterparts, which means respecting one’s counterpart in order to boost up their self-esteem, is an important conflict management strategy (Chen, 2000). Therefore, it is important to take the need of saving face for the counterparts into account when promoting the Australian mediation model. Respecting the rule of self-determination during mediation can help disputants to save face for their counterparts to some extent.

In summary, although mediation has been continually used as a dispute resolution method in China, the current Chinese mediation mechanism, which is based on the traditional mediation practice, cannot effectively resolve dispute in a changing society. The Australian mediation model can satisfy some of the dispute resolution needs in China, especially among the urban professional population.
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