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## **BETWEEN JUSTICE AND HARMONY: SOME FEATURES AND TRENDS OF CHINESE ADR FROM A WESTERN PERSPECTIVE**

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# BETWEEN JUSTICE AND HARMONY: SOME FEATURES AND TRENDS OF CHINESE ADR FROM A WESTERN PERSPECTIVE

by

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## **Abstract:**

For the last couple of years, many people, in China and abroad, have reported a change of attitude in the communist leadership of the PRC towards the law and legal policy.

The emphasis on the “government by the law” or *fazhi* that had characterized Chinese political communication since the mid-nineties seems to have been abandoned in favour of a more traditional discourse on the principle of the “government of man” or *renzhi*.

ADR, and mediation in particular, is a perfect litmus test of this phenomenon. Since the early 2000, the entire legal system has been directed with great determination and consistency towards the ADR through regulatory and policy documents, propaganda bombardment, judicial incentive policies, but when necessary also by informal conditioning methods and coercion on individual cases.

The trend of the leadership of over-emphasizing harmony and putting it even before the law raises many concerns. As it is very well known, ADR practices may be easily used to weaken people's insistence on subjective rights and to reduce the annoyances arising from a strict adherence to the principle of legality.

The strengthening of the ADR system in China can be seen as part of a new strategy of social control which, by slowing down the *fazhi* may also slow down the protection of rights and legitimate interests of the weakest parts of Chinese society, so difficultly acquired in the last decades.

*Keywords:* Mediation; State Civil Justice.

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For the last couple of years, many people, in China and abroad, have reported a change of attitude in the communist leadership of the PRC towards the law and legal policy.

The emphasis on the construction of the “rule by law” or *fazhi*<sup>1</sup>, that had characterized both Chinese institutional developments and political communication since the mid-nineties, has been abandoned in favour of a more traditional discourse on the harmonious governance of the society.

China seems somehow to be "escaping from the law", from its technicality and its rhetorical celebration, and if such escape has not assumed the tone of a real reversal, however it demonstrates the willingness of the leadership to try a new cocktail of social control, where the law could be reduced to a use even more marginal and functional than in the past and the old-styled, indigenous, *renzhi* – the “rule of man” (or rule of politics) - regains its central role.

The title of a recent article by Carl Minzner appeared in the latest issue of the American Journal of Comparative Law - "China's Turn Against Law"<sup>2</sup> – is strong but particularly meaningful. Also many Chinese scholars have remarked this phenomenon and even a pillar of Chinese legal reform as the Emeritus of Zhengfa Daxue, prof. Jiang Ping came to say in the press that "China's rule of law is in full retreat."<sup>3</sup>

Apparently, the Chinese government has decided to set stricter limits not only to the autonomy granted to legal subjects, which had grown exponentially in the last decades, but in general to the affirmation of the principle of legality, perceived as too problematic and risky for the stability of power. No claim for rights and no legal technicality whatsoever can be used to elude or undermine party's and governmental policies or to endanger the stability of the state and society: law-makers, judges and legal practitioners are undoubtedly encouraged to establish and operate a legal system more and more sophisticated, but they are expected to use their technique to serve the party's interests, not to make the law a tool of political disruption.

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<sup>1</sup> In this context it is not important that *fazhi* is translated as rule by law or rule of law, because it is mostly the use of the techniques of law itself - functional or not as the case may be - that have generated and protected the extraordinary growth of the individual subjects' autonomies that has characterised recent Chinese social history.

<sup>2</sup> C. MINZNER, *China's Turn Against the Law*, in *American Journal of Comparative Law*, Vol.59, IV, Fall 2011, pp.935-984. Let me acknowledge that the in-depth research done by Carl Minzner on the most recent trends of Chinese judicial work stands at the basis of several of the ideas expressed in this paper.

<sup>3</sup> This is the title of the English translation of a speech delivered by Jiang Ping in February 2010, available at [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html).

Prof. Jiang tackled the topic in several occasions and he was particularly explicit in the immediate aftermath of the arrest of the Nobel prize winner Liu Xiaobo's: [http://www.chinesepen.org/Article/201002/Article\\_20100223005941.shtml](http://www.chinesepen.org/Article/201002/Article_20100223005941.shtml). For another colorful expression of concern on the destiny of the rule of law in China see WILLY WO-LAP LAN, *The Rule of Law is Dead. Killed by the 'Harmonious Society'*, at <http://www.asianews.it/news-en/The-rule-of-law-is-dead.-Killed-by-the-harmonious-society-21920.html>. Recently, also some official media have reported similar expressions, albeit usually for criticizing the “Western” viewpoint. See for instance the English language newspaper *China Daily* of January 30, 2012 on [http://www.chinadaily.com.cn/cndy/2012-01/30/content\\_14502312.htm](http://www.chinadaily.com.cn/cndy/2012-01/30/content_14502312.htm).

This change in Chinese legal policy is perceivable in many sectors, not only in the most sensitive and notorious fields of criminal law - where practicing lawyers are often prosecuted just for their insistence in demanding a stricter enforcement of the law - but also in administrative, commercial and civil law and practice. Even in quite unexpected areas, like foreign investment operations, spaces of private autonomy are slowing down their expansion and the public administration regains room of discretion <sup>4</sup>.

The trend has a deep impact also - as we will observe later - in the institutional approach to dispute resolution. And it is especially evident in the language and tones of propaganda and political communication.

Let me try to better point out some of the features of this new course.

The coexistence between the *faḗbi* and a Leninist political system has never been easy. Conditioned by the weight of the party's leadership and democratic centralism, legal reforms introduced in the last three decades have only partially been able to respond to the growing demand of justice in Chinese society. The areas of discretion of governmental officials and agencies are still extremely wide, the judiciary has remained backward and crushed under political (and economic) powers and private legal professions have not been given room to develop, except in certain specific and limited areas of business law.

In a constitutional system based on the supremacy of the party's line and the principle of unity of state powers, where judges and procurators are subject to the formal control of the executive and to the informal control of the party, political interferences in the legal sphere create enormous difficulties in obtaining and enforcing fair judgments and undermine both the efficiency and the credibility of the legal system. And this is particularly true in less developed geographic areas and social sectors, where, unsurprisingly, there are also serious deficiencies concerning the people's legal consciousness and access to justice.

Uncertainties in the law and the gap between the 'law in the books' and 'law in action' have created an increasingly sharp divide between law and society. The people's courts, which in the past twenty years had seemed to be capable of eventually becoming a reliable and authoritative reference point for the protection of individual rights, have shown all their weakness, particularly in dealing with cases involving governmental agencies or officials.

People should be very careful in demanding too loudly the application of the law and the protection of their rights, because if their insistence is considered excessive the government does not hesitate to use barely legal and even illegal forms of repression to stop it. Recent reports of arrest of

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<sup>4</sup> Several examples of this trend can be found in recent central and local legislation as well in dispute resolution practice. See for instance the restrictive regulations on special-purpose vehicles for investing in joint ventures in China (<http://xbma.org/forum/chinese-update-the-most-recent-challenges-to-the-vie-structure-for-foreign-investment-in-china/>; [http://www.isinolaw.com/CMS/forum/Posted\\_en.jsp?forumid=100054](http://www.isinolaw.com/CMS/forum/Posted_en.jsp?forumid=100054)).

some of the most assertive ‘right-defending lawyers’ (weiquan lüshi) provide the clearest example of how strictly those limits are fixed and how flexibly the law may be interpreted for political ends <sup>5</sup>.

Citizens (and lawyers as well) are so driven to turn to look out of the legal sphere for the protection of their rights, and to make use of the traditional set of tools of recourse to the benevolence of officials, particularly, personal guanxi and - quite often - corruption. Also the system of informal petitions to the local “letters and visits” (xingfang) offices, the historical system of filing citizens’ complaints, is increasingly preferred to an untrustworthy administrative procedure <sup>6</sup>.

Then, in most extreme cases, people react to the loopholes and to the scarce or unfair enforcement of the law with riots, strikes and other forms of spontaneous and sometimes violent dissent <sup>7</sup>.

The communist leadership knows that the legal system’s capability to answer properly to the people’s need for justice is pivotal for maintaining social stability, but it is also well aware of the system’s loopholes. Many leaders are convinced that some legalistic excesses of the last decade – which, in their view, have been too often uncritically imitated from the West - should be abandoned for a more balanced, flexible and adaptable approach, where the rule of man - the dear old *renzhi* re-interpreted in a post-communist and patriotic fashion - plays a fundamental role.

Here, in the grey area between the rule of law and the rule of man, the institution of mediation (which for the purposes of this paper I consider to be the central component of the whole ADR system) stands as a perfect litmus test of the phenomenon under way.

In fact, also in the realm of dispute resolution the problems experienced in the first two decades of reform in the establishment and functioning of a modern adjudicatory system have prompted the Chinese authorities to revise their previous legalistic attitude, by downsizing the technical judicial recognition of rights in favour of a more informal conciliatory approach.

The latter indeed appears more consistent with the now prevailing Confucian and post-communist ideal of a social harmony induced from top to bottom. In this perspective, the trend to emphasize the positive aspects of mediation and push it as the most efficient and politically correct

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<sup>5</sup> In the last three years, dozens of cases of unjustified detention and conviction of most active criminal lawyers have been reported throughout China, particularly during the recurring anti-crime campaigns. Recently the case of a Chongqing lawyer, Li Zhuang, raised a massive wave of criticism both in China and abroad. Li was unjustly charged with fabricating testimony in favor of his client and his trial ended to become for many observers an indicator of where the rule of law is heading in China (see <http://www.nytimes.com/2011/04/20/world/asia/20china.html>). Several Chinese and foreign leading legal scholars like He Weifang ([http://blog.sina.com.cn/s/blog\\_4886632001017xy0.html](http://blog.sina.com.cn/s/blog_4886632001017xy0.html)), Jiang Ping (<http://cmp.hku.hk/2011/04/28/11898/>) and Jerome Alan Cohen (<http://www.usialaw.org/?p=4091>) have published frustrated comments on the case.

<sup>6</sup> On the figures of the competition between the ‘letters and visits’ system and the administrative procedure see B. LIEBMAN, “A Populist Threat to China’s Courts?”, in Margaret Y.K.Woo, Mary E. Gallagher, *Chinese Justice: Civil Dispute Resolution in Contemporary China*, Cambridge, Cambridge University Press, 2011, p.269-313, in particular at p.277.

<sup>7</sup> On the subject see e.g. K. O’BRIAN (ed.), *Popular Protest in China*, Cambridge (Mass.), Harvard University Press, 2008 and CAI YONGSHUN, *Collective Resistance in China: Why Popular Protests Succeed or Fail*, Stanford, Stanford University Press, 2010.

dispute resolution method must be considered just a part of a more general attitude of the government towards the establishment of what the present Chinese administration calls an “harmonious society” (hexie shehui) <sup>8</sup>.

As China’s Chief Justice Wang Shengjun pointed out in a recent seminar for senior judges: “Upholding the priority of mediation tallies fully with the original spirit behind China’s law-making; it is also a development of legal culture traditions such as ‘valuing harmony’ and ‘playing down litigation and ending conflict’” <sup>9</sup>.

Also the risk that a rigorous and formal adherence to the rule by law could end allowing too much room for political dissent - as it is partially happening - has certainly contributed to reduce the appeal that a strict implementation of the principle of legality and its corollaries exerts towards the communist leadership.

The first signs of this ideological revamping of mediation and the ADR after the legalistic exaltation of the Nineties had already been felt in the early 2000s, particularly since September 2002, with the party’s definition of the new pro-mediation policy <sup>10</sup> and the simultaneous issuance by the Supreme Court and the Ministry of Justice of a set of regulations commonly referred to as the “Three documents” <sup>11</sup>, with which mediation gained more effectiveness, particularly through a greater clarity about the nature and legal effects of the settlement agreement.

Since that time, the whole Chinese legal system has begun to be directed with strong determination and consistency towards the ADR through regulatory and policy documents, propaganda bombardment, judicial incentive policies and, if necessary, also by informal conditioning methods and coercion on individual cases.

By a normative viewpoint, the two peaks that deserve to be mentioned in this process are: the Opinion on Further Increasing the Positive Role of Judicial Mediation in Building up Socialism and a Harmonious Society (March 6, 2007) and the Opinion on Establishing and Improving a Dispute Resolution System and Linking Litigation and Alternative Dispute Resolution Mechanism (July 24,

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<sup>8</sup> The official position is that even a harmonious society shows contradictions (“within the people”, as in Mao’s theorization) and that the law should be considered a useful tool for the resolution of those contradictions which cannot be solved otherwise. Such position has been restated by the Chinese authorities in several occasions. See e.g. this article of the *Guangming Ribao*: “Hexie shehui shouxian shi minzhu fazhide shihui” (“The Harmonious Society is Primarily a Democratic Society Ruled by Law”), in [http://news.xinhuanet.com/misc/2006-03/14/content\\_4300015.htm](http://news.xinhuanet.com/misc/2006-03/14/content_4300015.htm).

<sup>9</sup> See W. LAM, *CCP Tightens Control over Courts, China Brief*, XI, 11, June 17, 2011, p.2.

<sup>10</sup> In particular with a top level meeting of officials of the Supreme Court and the Ministry of Justice which set out the guidelines of the reform of mediation: “Tiaojie: Yue lai yue zhuliu” (“Mediation: More and More Important”), in *Nanfang Zhoumo*, 2011-04-30, <http://www.infzm.com/content/58517>.

<sup>11</sup> The three documents were a Judicial Interpretation on Hearing Civil Cases Involving People’s Mediation Agreements of the Supreme Court, the Provisions Regarding the Work of People’s Mediation of the Ministry of Justice and a joint document of the two bodies called Opinions of the Supreme People’s Court and the Ministry of Justice on Further Enhancing People’s Mediation in the New Era. See A. HALEGUA, *Reforming the People’s Mediation System in Urban China*, in *Hong Kong Law Journal*, 35, 2005, p.724.

2009), both issued by the Supreme Court<sup>12</sup>. With these two documents the priority given to mediation among dispute resolution methods and the tightening of political control over the courts were officially sanctioned.

All the forms of mediation were affected by this political and legislative trend.

Above all, the system of civil mediation held by the People's mediation committees was substantially improved. A new law of August 28, 2010 - expressly enacted to the purpose of "maintaining social harmony and stability" (art.1)<sup>13</sup> - provides for a reassessment and an increase of the role of the mediation committees at various levels and contains the express invitation to judges to instruct the parties of the opportunity of solving their dispute through mediation (art.18). The law also provides for an unprecedented unambiguous recognition of the binding nature of the settlement agreement (art.32).

Given the absence of a true political dialogue and of a really reliable administrative litigation system, also administrative ad hoc mediation, informally managed by grassroots organizations and not formally regulated, became a favourite ADR tool, particularly for the resolution of most sensitive collective disputes. With these so called "big mediations", which often have the nature of political conferences of all the involved social players, the communist party attempts to reconcile conflicting social interests, particularly in cases of environmental litigation, major corporate restructuring, and urban planning dislocations.

But the form of ADR which in the last few years took an even greater importance than in the past is undoubtedly judicial mediation, with the whole system pushing the courts to mediate the largest possible number of cases, either directly or by delegating the resolution of the dispute to administrative authorities, people's mediation committees, civil and commercial mediation organisations and the like, "with the consent of the parties, or when the court thinks fit"<sup>14</sup>.

In this context, political pressure for mediation is supported by a massive use of incentive instruments - economic, political, professional - for the most appreciative judges. Among the most important goals that a civil judge must achieve there is the highest possible percentage of mediation in the cases submitted to him or her: since the achievement of these objectives has a direct impact on the career and income of the official, it is clear that this becomes a major factor in determining the policy of the courts.

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<sup>12</sup>Texts (in Chinese) on <http://www.chinabaike.com/law/zy/sf/fy/1338426.html> and [http://www.yczc.org.cn/NewsShow.asp?d\\_id=279](http://www.yczc.org.cn/NewsShow.asp?d_id=279).

<sup>13</sup> English and Chinese versions on [http://www.leggicinesi.it/view\\_doc.asp?docID=682](http://www.leggicinesi.it/view_doc.asp?docID=682).

<sup>14</sup> Art. 15, Supreme People's Court Opinion on Establishing and Improving a Dispute Resolution System and Linking Litigation and Alternative Dispute Resolution Mechanism (2009).

In the legislative documents as in all official propaganda, the professionalization of the judiciary is no longer considered the main priority: the techniques of conflict resolution change and a new (as well as old-styled) image of the judge-mediator, able to balance all the interests at stake, stands out<sup>15</sup>.

The trend of the leadership of over-emphasizing harmony and putting it even before the formality of the law raises many concerns. In several cases, the will to find a compromise between conflicting interests has led to unsustainable pressures on the judges or even to the denial of justice, often to the detriment of most vulnerable people, such as in a well-known case of mass poisoning of milk with melamine<sup>16</sup>. If a judge suggests a certain settlement to the parties, the party that does not accept it risks to find itself in a very unfavourable position.

On the other hand, those judges who dare not to follow the doctrine of harmony and do not get good results in the management of litigation in their jurisdictions are held personally responsible for such bad results and therefore usually prefer to direct their code of practice accordingly. Being the judiciary so sensitive to political influences, also the risk of what has been called a 'populist threat' (according to Ben Liebman's definition) to Chinese courts must be taken into account: there have been several examples of criminal investigations and trials where prosecutors and judges' work was substantially influenced by the public opinion and by the activism of the 'netizens', under the tacit approval of the party<sup>17</sup>.

As we all know, over the past twenty years the politics and rhetoric of ADR have grown fast also in the West, but in China it has been something slightly different. This trend was not the more or less spontaneous effect of the inefficiencies or delays of the civil trial, and it was not originated from

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<sup>15</sup> In his work Carl Minzner investigates the difference between the propaganda campaigns affecting the judiciary of the Nineties, which emphasised the adherence to the law by model-judges, and those in recent years, in which the capability to inspire harmony and prevent conflicts prevails, and tells us the instructive story of judge Chen Yanping, whose success in keeping order and harmony is grounded on the fact that "she relies not on law, but on morality and human sentiment". So much for a 'country ruled by law'. C. MINZNER (2011), p.951 note 61.

<sup>16</sup> In 2008 and 2009, in several provinces throughout China, thousands of infants fell sick for consuming powdered milk tainted with melamine produced by one of the country's largest dairy firms. Many needed hospitalization and at least a dozen of them died. All the attempts of their parents to obtain compensation through individual civil actions were unsuccessful: in the largest part of cases local courts refused to accept the claims. Some of the leading activists and lawyers of involved NGOs were even charged and sentenced for inciting social disorder. A strong pressure was put on claimants to mediate with manufacturers and distributors. Two years later, thousands of families had already accepted out of court settlements with producers and distributors, probably because they could not get a fair judgment in the courts. Western literature on the incident is extensive on the subject: for an overview see L. SEMPI, *ADR and Consumers between Europe and China*, in *Opinio Juris in Comparatione*, Vol.2/11, paper n.5, p.11.

<sup>17</sup> The most notorious case was probably the one of Deng Yujiao, a Hubei masseuse who, on May 10, 2009, killed a local party official attempting to rape her. Charged with voluntary murder, Deng was generally regarded – first by the bloggers and netizens and then also by the most independent mass media - as another victim of the power's arrogance. Under public pressure, prosecutors and judges withdrew from their position, recognized the legitimate defense and eventually released the girl. Greeted by many observers as a demonstration of the new role played by the civil society in scrutinizing judicial activity, it should instead be considered a substantial defeat of the rule of law in China. See R. CAVALIERI, *Germogli di legalità*, in R. Cavalieri and I. Franceschini (eds), *Germogli di società civile in Cina*, Milano, Francesco Brioschi Editore, 2010. On the influence of media on judicial independence in general see B. LIEBMAN, *The Media and the Courts: Toward Competitive Supervision*, in *China Quarterly*, 208/2011, p.833-850; see also the explicit words of prof. Shao Jian of Nanjing Xiaochuan University as quoted in [http://news.ifeng.com/opinion/200910/1024\\_23\\_1402864.shtml](http://news.ifeng.com/opinion/200910/1024_23_1402864.shtml).



the parties or their lawyers and from the growing presence of private, independent institutions for mediation in the legal market, but from a specific decision of the political leadership, followed by institutional reforms. This makes it similar to many other legal policies in China: from consumerism to environmental protection, from the corporate social responsibility to the right to privacy. In all these cases it has been a central political decision to trigger huge legal and social transformations.

This trend is accompanied by an ideological recovery of the national legal tradition, that throughout history has extensively experienced the flexibility and efficiency of mediation and other non judicial dispute resolution methods, assigned to a mediator whose role – unlike what happens in the Western tradition – is not only to facilitate the spontaneous settlement of the parties, but to play a quasi-adjudicative role.

However, by another viewpoint, the close link between social order, ADR and the weakening of the adversarial process in China is not likely to be judged so differently from how some law scholars and legal anthropologists consider the similar phenomenon in the West, namely a method of dispute resolution which structurally favours the strongest party and in which the need to find an harmonious settlement prevails on the will to assess the parties' rights.

I do not wish to enter into the merits of this debate here, as it is very complex as well as highly political, but again I can quote directly from Laura Nader and Ugo Mattei a sentence which I consider perfectly suitable to the Chinese present environment. They write: "ADR practices may be used to suppress people's resistance, by socializing them toward conformity by means of consensus, cooperation passivity and docility (...)"<sup>18</sup>.

In the Western legal tradition, a right is a subjective interest characterized by its justiciability: there could be no rights without the formal protection provided by an independent judge according to the law.

No doubt that ADR practices, especially if accompanied by the rhetorical use of vague notions like that of 'harmony', may be used by the government (by all governments) to weaken people's insistence on rights and to reduce the annoyances arising from a strict adherence to the principle of legality.

The strengthening of the ADR system in China can be seen as part of a new strategy of social control which, by slowing down the *fazhi* may also – more or less consciously - slow down the protection of rights of the weakest parts of Chinese society, so difficultly acquired in the last decades. And this is particularly true when the ADR is not at all 'alternative' nor 'amicable', but the only viable way of defending a citizen's rights and legitimate interests.

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<sup>18</sup> L. NADER, U. MATTEI, *Plunder: When the Rule of Law is Illegal*, Oxford UK, Blackwell Publishing, 2008, p.77. Talking about mediation and harmony, it is worth to mention the revealing coincidence between the title of one of Nader's most classic works (*Harmony Ideology: Justice and Control in a Zapotec Mountain Village*, Stanford, Stanford University Press, 1990) and the current Chinese rhetoric of the *hexie shehui*.