

Understanding People's Mediation in Post-Mao China

FU HUALING*

The belief that the Chinese are generally nonlitigious people has been remarkably popular in the English literature.¹ It is argued that, due to cultural preferences and organizational arrangements, the Chinese are socialized to perceive and solve social conflict in a particularly "Chinese way." One organization that has received special attention is the people's mediation committee, a so-called "mass organization" that is organized by the local residents to resolve their own daily disputes. For critics of the system, the mediation committee represents the omnipotent state penetrating into people's everyday lives. For its sympathizers, it provides an ideal model for community justice. Regardless of whether observers condone or condemn China's mediation system, it is generally agreed that, as an alternative to state law, the committee profoundly influences order in Chinese society.²

Ironically, just when the West is searching for an alternative dispute resolution and heralding the value of community justice,³ China is following the path of Western legal order by moving to institutionalize popular justice and formalize public participation. The purpose of this paper is to examine how mediation committees have changed or remained the same in post-Mao China. Part I identifies conditions central to the success of people's mediation in Mao's China; Part II discusses the cultural and structural changes in Chinese society since the late 1970s and how these changes have impacted the mediation committee; Part III introduces a debate among Chinese legal academics

* Graduate student, Osgoode Hall Law School, York University, Toronto, Canada.

1. See, e.g., Jerome Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Cal. L. Rev. 1201 (1966); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 Cal. L. Rev. 1284 (1967); Robert F. Utter, *Dispute Resolution in China*, 62 Wash. L. Rev. 383 (1987); Wen-yen Tsao, *Equity in Chinese Customary Law*, in *Essays in Jurisprudence in Honour of Rosco Pound* (Ralph A. Newman ed., 1962).

2. The Communist government set up mediation committees throughout the nation in the early 1950s. See Lubman, *supra* note 1; Jerome Cohen, *The Criminal Process in the People's Republic of China: 1949-1963* (1968); Victor Li, *Law without Lawyers* (1975).

3. See *Neighborhood Justice: Assessment of an Emerging Idea* (Roman Tomasic & Malcolm M. Feeley eds., 1982); for a more critical view, see Richard Abel, *The Contradiction of Informal Justice*, in 1 *Politics of Informal Justice* 267 (Abel ed., 1982).

and practitioners regarding the position of people's mediation in the new political order; finally, Part IV examines a new system of dispute resolution introduced by the government — private contract.

I. MEDIATION IN MAO'S CHINA

A. Politicization of Conflict Resolution

Central to the Maoist theory of social contradiction is the view that social conflict is inevitable. For Mao, social conflict has the nature of "absoluteness" and "exists in and runs through all processes from beginning to end; motion, things, processes, thinking — all are contradictions. To deny contradiction is to deny anything."⁴ The absoluteness of contradiction warrants a continuous revolution.

Social conflict is the generator of Maoist social progress. As Starr notes, for Mao, "each resolution of conflict, each synthesis, marked a forward step in development, incorporating as it did only the positive elements of the conflicting forces that had given rise to it."⁵ Maoist promotion of rebellion is antithetical to the traditional fear of disorder and represents a fundamental change in Chinese political culture.⁶

Treating social conflicts as basically beneficial and asserting that conflict resolution can contribute to progressive development, Maoism proposes that conflict not be suppressed. Instead, disputants are encouraged to air grievances and register complaints. In so doing, the parties' positions are publicized, their demands displayed, and the root problem of the grievance made clear. In this way, possible solutions emerge. In addition, at each stage, both the disputants and society as a whole can be educated and consciousness raised. A disruptive dispute is thus transformed into a social good. As Christie, in his pursuit of alternative justice, states, conflicts could be used, and made useful.⁷

However, conflict resolution is essentially a political endeavor for Maoists. The criterion to evaluate its success is the extent to which congruence between the individual's ideological stand and the Party's political goal is achieved. Moody asserts that "in totalitarianism all things are potentially matters for political concern."⁸ Accordingly,

4. Mao Tse-tung, *On Contradiction* in 1 Selected Works of Mao Tse-tung 330 (1966).

5. John Bryan Starr, *Continuing the Revolution: The Political Thought of Mao* 30 (1979).

6. Richard Solomon, *Mao's Revolution and the Chinese Political Culture* 179 (1971).

7. Neil Christie, *Conflicts as Property*, 17 *Brit. J. Crim.* 1 (1977).

8. P. Moody, Jr., *Chinese Politics After Mao* 68 (1983).

mediation in Mao's China served another function that overshadowed dispute settlement. It articulated and applied the ideological principles of the Party and mobilized the people to enhance their commitment to Party policies and goals.⁹

Thus mediation represented the practical manifestation of Party ideology. "Mediation . . . [was] developed as a mobilization instrument to link dispute settlement with Communist attempts at reordering society and to conform dispute settlement policy to the need of socialist construction."¹⁰ As Johnson writes, the ultimate goal of mediation in China has been to mobilize the masses to maintain order by raising the political consciousness of the disputants.¹¹

People's mediation was given a totally different political interpretation than mediation prior to Communist rule.¹² As Lubman

9. One can easily identify the highly politicized views of informal justice with the discourse of community justice movement in Western democracies. The mainstream interpretation is the politics of informal justice and the net-widening thesis, according to which the informal mechanism of conflict resolution has been used to legitimate the dominant political order and to extend the scope of state control. According to the critical observers, informal justice "solves the state's problems of legitimacy by deleting potential criticism and opposition; it neutralizes and individualizes conflict; it disguises coercion; it extends the net of state social order." Stanley Cohen, *Taking Decentralization Seriously: Values, Visions, and Politics, in Transcarceration: Essays in the Sociology of Social Control* 358 (John Lowan et al. eds., 1987).

From a different perspective, Cain finds a squeak of hope in the state-dominated informal justice, which can be used to expand the interest of the working class as a whole. The disputants can be constituted as a collective subject through identification and the individual problem can be made one of the class. M. Cain, *Beyond Informal Justice*, 9 *Contemporary Crisis* 335 (1988).

Through the politicization, personal disputes are taken beyond their individual domain and given a new political ramification. The process of conflict resolution is either regarded as the velvet hand of the state or the engineer of class identity and class struggle.

10. Lubman, *supra* note 1, at 1339.

11. Elmer Johnson, *Mediation in People's Republic of China*, in *Comparative Criminology* (Barak-Glantz & Johnson eds., 1982).

12. Mediation in communist China is *people's mediation*, which differs from its traditional form in several aspects. First, the nature is different. In traditional mediation, the mediators were selected, or controlled, by the landlords or other local elites. Although traditional mediation could provide more convenient services to the local people than the magistrate's justice, it was still only an extension of the "feudal" justice system. In people's mediation, the mediators are selected democratically by the masses and are controlled by the masses. People's mediation is a socialist form of direct participation and self-government.

Second, the source of authority is different. In traditional mediation, the mediators could resolve a dispute by using their charismatic power, their position in a family or a clan, their wealth, or their age. The source of the mediators' authority came from "feudal" morality. In people's mediation, the source shifts from the mediators' "face" to their revolutionary activism and loyalty to the communist course. Furthermore, mediation in Communist China is systematized and institutionalized, and carried out in accordance with the new political standard.

has pointed out, “the Communists have consciously opposed the use of a traditional mediation style. The old style was passive in emphasizing yielding, the new style demands activism.”¹³ Thus, the traditional value of peace and harmony was deliberately sacrificed to create a revolutionary political culture.¹⁴

B. Police and Community

In Mao’s China, the mediation committee was part of the state. Reliance on the local government, the court, and the police was central to its operation. The involvement of neighborhood police in mediation committees’ work illustrates the linkage between the state and the mediation process.

The success of community justice in Mao’s China depended upon the support and participation of the police. The neighborhood police station was based in a particular neighborhood as a semi-autonomous unit — a team responsible for most of the police services and certain civil matters in the community. The theory was that assigning the police

Third, the purpose is different. In traditional mediation, harmony was achieved by the suppression of disputes and litigation was suppressed in the name of social harmony. The “civil triviality” was pushed back to the locality and people’s right to litigate was restricted. Consequently, mediation was imposed by the elites and the interests of the disputants were sacrificed for the interests of the state, the village, the clan and the family. In people’s mediation, the right to litigate is protected by law and disputants can bypass the mediation and bring their cases directly to the court.

Fourth, the method is different. As the purpose of traditional mediation is to suppress the dispute in order to keep the harmony, the wrong was not distinguished from the right. Both sides of a dispute were guilty because both were involved in the dispute and each of them “should receive 50 lashes of a bamboo stick.” The mediators, who were concerned more with the bickering than solving the dispute, often imposed their own solution upon the disputants. In people’s mediation, the mediators do not compromise the dispute. They are the ones with principles and are able to distinguish right from wrong. They protect the right and also educate the wrong. It is through conflict resolution that harmony at a higher level is achieved.

Finally, the consequence is different. By suppressing disputes, traditional mediation served the interests of the minority of elites at the price of poor disputants. It helped to maintain the *status quo* and protect social inequality. Moreover, as it solved the dispute only at the surface, it therefore could not cure the root of the problem. The harmony it created was superficial. People’s mediation, by seeking the root of the conflicts, is able to unite the people and integrate the society.

13. Lubman, *supra* note 1, at 1350-1351.

14. Solomon, *supra* note 6, at 521.

to work as generalists in certain neighborhoods could stabilize police/community relations and thereby optimally secure order.¹⁵

It was further assumed that if the police officers were familiar with the neighborhood and its residents, then policing could be done more efficiently. As Bracey observes: "Chinese police officers see themselves as being responsible for the safety and well-being of a certain number of people and households, rather than a certain number of streets."¹⁶ The fundamental requirements of household registration, the "four acknowledgements" of local residents above the age of 14, included one's political status, economic situation, practical performance, and acquaintances.¹⁷ Accordingly, the local police had a clear idea of the political, economic, and social life of the local residents. The essence of police work was to make the neighborhood "transparent" and to enhance its "see-through" quality while developing the officers' personal profile of the community, and making each officer a "living dossier," or in a more recent term, a "living computer."¹⁸

A stable social environment aided the preservation of order through community-oriented policing. Social stability was a key feature of the urban community, which was both geographically and socially visible.¹⁹ At the same time, the public was highly mobilized to participate actively in community management. With guidance and support from the police, the community could mobilize its political and economic resources to deal with its own problems. State power,

15. Elmer Johnson, *Neighborhood and the Police: The People's Republic of China*, 7 *Int'l J. Comp. & Applied Crim. Just.* 209, 210-211 (1983); *Neighborhood Police in People's Republic of China*, 6 *Police Stud.* 8, 10-11 (1983-1984).

16. Dorothy H. Bracey, *Policing the People's Republic*, in *Social Control in the People's Republic of China* 132 (Ronald J. Troyer et al. eds., 1989).

17. Gu Zhaosen, *Lun Jianchi Hukou Guanli de Jiben Yaoqiu* [On the Basic Requirements of Household Registration], *Renmin Gong'an Bao* [Police News], Sept. 27, 1991, at 3.

18. Hualing Fu, *Police Reform and Its Implication for Chinese Social Control*, 14 *Int'l J. Comp. & Applied Crim. Just.* 41, 41-42 (1990).

19. According to Whyte and Parish:

The stability of residence, multifaceted involvement of neighbors with one another and the common joining of work and residence create the potential for high levels of social solidarity and cooperation, crime control, and social order, as well as a rapid remoulding of the marriage customs, family patterns, fertility behaviour, and other social and intellectual habits of the citizenry.

personalized by the neighborhood police, provided support for local mediators.²⁰

II. PEOPLE'S MEDIATION IN THE NEW ERA

A. Redefining People's Mediation

The diminishing importance of Maoist values led to a spontaneous rejuvenation of suppressed traditional values. Palmer points out that what emerged from the depoliticization of post-Mao China is the re-discovery of the traditional value of "yielding" and a social order of "no litigations." As Palmer observes:

In recent years, however, the traditional Confucian emphasis on yielding has been officially resurrected and, in keeping with the current concern to stress the value of mediation as a Chinese tradition, the legal press explicitly identifies *Rang* as a salient feature of mediation in pre-socialist times that has an important role to play in the post-Mao era.²¹

Increasingly, people's mediation is identified with the traditional preference for social harmony. It is now claimed that people's mediation is based upon, and developed from, tradition, and the historical and cultural link between the traditional and modern forms of conflict resolution is officially recognized. Thus, the focus of official discourse has shifted from treating mediation as a Communist innovation to crowning it as "a flower from the East."²²

The emphasis in the new era is no longer on the transformation of disputes and the education of disputants. The government has prioritized dispute prevention. Disputes are regarded as fundamentally disruptive to the modernization program. It is thought that in this new era a chaotic

20. In the North American context, community justice is successful only when it becomes an integral part of the state and functions in the shadow of law. See Abel, *supra* note 3; Christine Harrington, *Shadow Justice* (1985).

21. Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation*, Y.B. *Socialist Legal Systems* 233 (1987).

22. Fazhi Ribao [Legal Daily], Oct. 19, 1989, at 1; see generally Wang Guiwu, Fayang Sandao Fangxian De Fazhi Sixiang, Weihe Nongcun Zhian [Developing the Legal Theory of 'Three Defense Lines' and Protecting Rural Social Order], in Zonghe Zhili De Lilun Yu Shijian [The Theory and Practice of Comprehensive Treatment] (Guo Xiang & Xu Qiancheng eds., 1985).

social order would shake people's confidence in the government and endanger the Party's political stability. The official guidelines for people's mediation set by the Ministry of Justice seek "to give primacy to prevention," with the code word being peace and stability. Mediation is the first battle line of social defense.²³

Post-Mao reforms are further characterized by a shift away from Mao's charismatic leadership toward a more rational and law-based leadership, which runs counter to the traditional value on hierarchical social structure. The post-Mao government may use traditional values and unofficial social organizations to nip disputes in the bud, but once a dispute escalates, it tends to encourage the disputants to resort to legal mechanisms. Therefore, the daughter who sues her mother-in-law becomes a heroine who knows how to use legal weapons to protect her own lawful interests; factory managers who battle each other in the courtroom are regarded as models of new economic leadership. Popular legal magazines have special columns to teach people "how to sue your neighbors." The Communists may not sincerely believe in the rule of law, but they are even less trusting of traditional values and "private government." The courtroom may not be the Party's ideal forum for social dispute resolution, but when compared with unofficial social organizations, legal mechanisms have the benefit of being amenable to direct Party control.

The restoration of the legal system has been accompanied by the stirrings of rights consciousness among the Chinese public. With gradual economic modernization and political emancipation, people are starting to assert their rights. Scholarly attention has been focused on the impact of social institutions on rights rather than the influence of culture or traditional attitudes toward law.²⁴ Intending to demystify the myth of Chinese non-litigiousness and cultural aversion to formal mechanisms of

23. See the speech by Cai Cheng, the Minister of Justice, at a National Conference on preventing the intensification of civil disputes. Zuohao Fangzhi Minjian Jiufen Gongzuo, Wei Chuangzao Yige Wending de Shehui Nuli [Improving the Work of Dispute Prevention, Creating a Stable Society], Fazhi Ribao [Legal Daily], July 15, 1988, at 2.

24. There were high expectations for legal reform. Especially in the late 1970's when legal reforms were first set in motion, the reformers' language was nearly evangelistic, which in turn generated high emotions and expectations, especially among intellectuals and Party and government officials. For the ideology of legal reform in post-Mao China, see Hua Guofeng, Report on the Work of Government, in Main Documents of the Second Session of the Fifth National People's Congress of the People's Republic of China 62-63 (1979). See also Zhang Zimou, The Year of Strengthening the Socialist Legal System, in [1980] Zhongguo Baike Nianjian [Chinese Encyclopedia Yearbook].

adjudication, scholars argue that the behavior of Chinese cannot be explained by culture alone. Like any one else, Chinese actively use culture to their advantage rather than passively obeying it.²⁵ If traditionally one preferred to solve problems within the "informal community," it is because there were no other alternatives. As Ann Kent notes, Chinese are no longer waiting for their rights as they did before.²⁶ Indeed, James Seymour concludes: "the Chinese are fully inclined to assert their rights when institutions are available for the purpose."²⁷

Post-Mao Chinese reformers have successfully presented their case for the cultural superiority of Western law and legal order, which many now take to be almost self-evident.²⁸ As China is "progressing" along the Western path, the phases through which the West had already passed will be replicated. Because the West has seen it all before, with hindsight it can help those countries go through the unhappy years of modernization. As William Clifford contends, at a time when "all light comes from the West," indigenous values lose their appeal for generating social reform.²⁹

The ideology of "the rule of law" assumes formal and substantive superiority when the West is generally perceived as the model to follow. In a period when "democracy" is generally hailed as a panacea and cure

25. See Martin Shapiro, *Courts* (1981); see also William P. Alford, *On the Limits of 'Grand Theory' in Comparative Law*, 61 *Wash. L. Rev.* 945 (1986); Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 *Cal. L. Rev.* 1180 (1984).

26. Ann Kent, *Waiting for Right: China's Human Rights and China's Constitutions, 1949-1989*, 13 *Hum. Rts. Q.* 170, 210 (1991).

27. James D. Seymour, *Cadre Accountability to the Law*, 21 *Austl. J. Chinese Aff.* 1, 18 (1989). For studies on the increasing use of legal mechanism in conflict resolution in post-Mao China, see David Zweig et al., *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 *Stan. J. Int'l L.* 319 (1987); Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: the Case of Zouping County, Shandong*, 26 *Stan. J. Int'l L.* 15 (1989); R. W. MacNeil, *Contract in China: Law, Practice and Dispute Resolution*, 38 *Stan. L. Rev.* 303 (1986).

28. As Schnell has vividly documented, the "open door" policies have transformed the discussion of democracy and human rights from a matter of expediency into a central issue in popular culture. Orville Schnell, *Discos and Democracy: China in the Throes of Reform* (1989).

A decade of economic and cultural liberalization in post-Mao China created a generation who realized the advantage of courtroom litigation and who embodied a willingness to use legal resources to fight for their own interests. For a study of legal remedies for neighborhood disputes, see Family Legal Issues, 10 *Minzhu Fazhi [Democratic Legal System]* 37-38 (1984).

29. William Clifford, *Science, Culture, and Criminal Justice in Asia*, 2 *Int'l J. Comp. & Applied Crim. Just.* 191 (1978). For the implications of Western crime control models for the Third World, see Stanley Cohen, *Western Crime Control Models in the Third World*, 2 *Res. L., Deviance & Soc. Control* 85 (1982).

for China's problems, positive law has symbolic superiority over informal community justice. Community justice has lost its privileged status in China and is too ill-equipped to foster effective social control. After all, post-Mao China emerged from a radical period of which most Chinese are not proud.

B. Mediation First?

The principle of "mediation first, litigation second" or "emphasizing mediation" has been the essence of popular justice in China. However, this principle is now criticized as theoretically dangerous and practically harmful.

The implicit connection between popular justice and lawlessness invokes a strong and emotional resistance to any effort to socialize justice. During the Cultural Revolution, Leftists claimed that popular justice was capable of reconciling substantive inequality and formal legal equality in capitalist societies. Socialist justice was not only for the destruction of bourgeois legal forms but also for the creation of a new legality, a new rule of justice and positive freedom.

The ideology was attractive. Popular justice during the Cultural Revolution was cast as an example of participatory democracy and means for promoting positive freedom. Given the ideology of the withering away of law and the socialization of state duties, each individual was expected to become an organic part of social control, and to serve as the eye of the revolution. The socialization of social control seemed to encourage autonomy in both lawmaking and law enforcement.

However, the participatory democracy of Mao's period was fictive. Johnson has criticized the fictional characteristics of decentralization in Chinese mediation:

Mediation in the PRC does not qualify as an example of the decentralization of authoritative decision making. Public participation in dispute settlement is strongly encouraged but in execution rather than in the formulation and control of policy. . . . [M]ediation is a means of propagating the policies and laws of the state, of maintaining a stable order, and of strengthening the unity of the PRC. The ultimate purpose is

“to mobilize the masses of the people” by raising the political consciousness of those persons in disputes.³⁰

Grass roots political participation and positive freedom could not be realized because the radical leaders “failed to make a break with the structural and normative logic of the Leninist form of state socialism; they used hierarchical means to bring equality; authoritarian means to bring democracy; the invocation of obedience to encourage initiative.”³¹ Accordingly, mass participation became only an expression of emotions. When these emotions were ritualized, they became a form of public pretense; as a result, mass participation essentially reverted to traditional popular justice in which participation was limited to the well-defined confines of the hierarchical moral order.³² The Communists might have advocated egalitarianism and simple equality, but they promoted little genuine socialism. The Party’s orchestrated participation created a tyranny of the majority that “tends to aggravate the problems . . . by too easily becoming a tool of either repression or subversion.”³³ To certain social groups, popular justice “had become a mixture of feudalism and fascism: feudal because it was tyrannical rule masquerading as a reign of virtue, and fascist because it employed the modern techniques of political manipulation, including the mass media and mass organizations, to ensure control.”³⁴ Revolutionary justice creates exactly that which it fears and attempts to eliminate.

In practice, people’s mediation was just as coercive as its traditional counterpart. The politicization of conflict resolution tended to suppress rather than transform conflicts. Supported by local police officers, self righteous mediators presented a threat to the residents rather than serving as peace-makers. Their long and painful “heart-to-heart talks” and small group education were more harassment than an opportunity for settlement: the disputants feared the mediators more than

30. Elmer Johnson, *Mediation in the People’s Republic of China: Participation and Social Control*, in *Comparative Criminology* 64 (Barak-Glantz & Elmer Johnson eds., 1983).

31. Gordon White, *The New Course in Chinese Development Strategy: Context, Problems and Prospects*, in *China’s New Development Strategy* 6 (J. Gray & G. White eds., 1984).

32. Lucian Pye, *Mass Participation in Communist China: Its Limitations and the Continuity of Culture*, in *China: Management of a Revolutionary Society* 31 (J. Linbeck ed., 1971).

33. Austin Turk, *Political Deviance and Popular Justice*, in *Social Control in People’s Republic of China*, *supra* note 16, at 41.

34. Harry Harding, *China’s Second Revolution: Reform After Mao* 38 (1987).

they feared their opponents. Consequently, the residents, especially those from the less privileged social groups, preferred to suffer their grievances or seek out other private alternatives.³⁵

Increasingly, people's mediation has been criticized in the post-Mao era for the reasons given above. This excerpt from an article criticizing the mediation mechanism in divorce claims is representative: "Currently, many mediation committees take the restoration of a husband/wife relation as the only criterion of a successful mediation. . . . As a result, the mediators work blindly. Many of them do not analyze the particular condition of each couple and do not examine whether there is any affection left between them. What they do is put pressure on the couple and force them to rejuvenate their relationship."³⁶ Because the principle of "emphasizing mediation" provides no legal guarantees, mediation is often coercive, unprincipled and illegal.

Judicial mediation has been attacked even more furiously. For example, Zhang argues that mediation is a barrier to the long term strategy to make China a country ruled by law. Mediation is a unique product of the Chinese "feudal" society, where the despotic "feudal" state uses the penal method to dispose civil disputes. The feudal consciousness of "no litigation" and civil law nihilism, still alive in China today, has to be replaced by a new culture of "the rule of law."³⁷

Mediation is also a barrier to economic development. Mediation has become a synonym for stalling tactics in China; often, disputes cannot be solved quickly through mediation. As Zhang argues: "[A]t the present time, when our economy is in chaos, a legal mechanism is especially needed for its adjustment. The primitive, unlimited, and repeated mediation slows down the capital turnover, wastes energy and damages the economy."³⁸ In China, litigation in courtrooms may provide a quicker and more effective alternative.

Further, mediation hinders the development of legal professionalism. Chinese judges normally start at civil tribunals where mediation is the main mechanism. But, Zhang argues, mediation is only ideological work, which needs no professional training. When "emphasizing mediation" is taken as the guiding principle, judges do not

35. See Lubman, *supra* note 1, at 1347.

36. *Zhongguo Fazhi Bao* [China Law News], Apr. 23, 1987.

37. Zhang Xingzhong, *Zhuozhong Tiajie Yuanze zhi Wojian* [My Opinion about the Principle of Emphasizing Mediation], *Fazhi Ribao* [Legal Daily], May 22, 1989.

38. *Id.*

think it useful to study the law, and thus their professional skills cannot be enhanced.³⁹

C. Police and Mediation

Generally, modern and professional police forces base their legitimacy on criminal law, and consequently limit their function to crime control. August Volmer notes that "domestic disputes may encroach seriously upon the time at the disposal of the police. Real police work is crime prevention and control, not keeping the peace."⁴⁰ Chinese police are following Volmer's ideas.

Police complain they do too much community work. "People always turn their trivial disputes over to the police without first considering whether or not they belong to the police's jurisdiction. As a result, solving customer/peddler disputes and bicycle incidents become police business; even the estranged wife and husband go to the police station for help."⁴¹ Police point out that they are spending 60-70% of their time in resolving people's disputes.⁴²

According to Yuan Zhongbuo, an official from the Ministry of Public Security, mediating small claims disputes has never been an official duty of the police. Nevertheless, "customarily" this work was included in the police mandate and police performed this duty "voluntarily," reflecting their good will toward the community.⁴³

However, the situation has changed in post-Mao China. On the one hand, the police are increasingly occupied combating crime; as a result, more resources are being diverted to crime fighting. On the other hand, the once paramount police power has diminished. Disputants no longer listen to the police and police mediation is no longer binding. As Yuan states: "Because mediation is only a mechanism of criticism, persuasion, and education, the police can rarely satisfy both parties. . . . Mediation

39. *Id.*

40. August Volmer, *The Police and Modern Society* 155-56 (1936).

41. Tian Jun & Zhang Xiaomei, *Zhifa Kunjing Zhong de Paichusuo* [The Predicament of Law Enforcement and Local Police Stations], *Renmin Gong'an Bao* [Police News], Dec. 28, 1990, at 3.

42. *Id.*, Jan. 8, 1988.

43. Yuan Zhongbo, *Minshi Jiufen de Tiaojie Chuli bu Yinggai shu Paichusuo de Zhize Fanwei* [Mediation of Civil Disputes Should Not Belong to Police Jurisdiction], *Renmin Gong'an Bao* [Police News], Dec. 23, 1988.

by the police does not have any legal effect and has no binding authority over the parties."⁴⁴

Accordingly, many police now propose that civil disputes be excluded from police mediation. For example, Yuan suggests that police should only mediate petty criminal cases. Serious civil cases should be referred to the courts, and trivial disputes to the mediation committees. For Yuan, there should be a scientific classification of social conflicts and a rational division of labor among the different control mechanisms. The court and mediation committees should claim their own areas of responsibility. The police, according to Yuan, should be "liberated" from mediation work and should divert more resources to crime control.⁴⁵

In addition, several measures have been suggested to limit access to police mediation, including that both disputants consent to police mediation. If one disputant refuses to accept police mediation, the police should either ignore the dispute or directly issue a sanction. In addition, some recommend a time limit for police mediation. Others argue that when a mediation session fails, a sanction should be imposed without further delay. An official referral system could also be developed, so that police can refer trivial cases to other organizations.

A more interesting suggestion is that the police charge service fees for mediation. The argument is that many people turn their problems over to the police rather than to the court and judicial departments mainly because only police services are free. A service fee could keep a large number of disputants away from police stations.⁴⁶

D. The Residents' Committee

Post-Mao reforms have changed "social system features" and challenged neighborhood organizations.⁴⁷ The all-powerful residents' committee, which impressed Westerners as being a powerful local state,

44. Id.

45. Id.

46. Zhao Yihou, *Dao Gonganju Qujianqu* [Let's Go to the Police], *Renmin Gong'an Bao* [People's Police], Sept. 30, 1988, at 3.

47. Charles R. Fenwick, *Crime in Post-Mao China: Toward the Construction of an Integrated Social System Theory*, 11 *Int'l J. Comp. & Applied Crim. Just.* 177, 178 (1987).

is on the torturous road of reform.⁴⁸ The quality and quantity of committee members have declined while the population per committee has doubled. A survey conducted in Wuchang district in Wuhan in 1981 showed that 33.2% of the 2,798 committee members were over 60 years old, and only 3-4 persons worked in each committee.⁴⁹ A 1990 survey of 20 residents' committees in one city showed that the average age of the committee member was 55 years old.⁵⁰ In Beijing, "a fairly large part" of the committee members are housewives who have been members since the early 1950s. Most of them are "illiterate or only semi-literate" and thus "cannot deal with the problems in the new situation." Many of them are now expected to do more housework, or to find another more profitable job.⁵¹

The allowance provided to committee members is another reason for personnel shortages. In some cities, the payments for committee members and office expenses have remained the same for 40 years. Committee members are still paid only 15 *yuan* a month and the committee only receives 5 *yuan* each month for office expenses.⁵² In Beijing, only the directors and deputy directors of residents' committees were paid 35 *yuan* a month in the mid-1980s; other members received no payment at all. Little wonder only the directors showed up at work. To keep the committee running, each of the directors had to give 10 *yuan* each month to the other members.⁵³

Uncertainty about pensions has also caused problems. Many members are at the age of retirement but, because of their semi-official status, the status of their pension claims remains unclear. As a result, these members remain in their positions, waiting for their pension despite their inability to perform their duties. The financial problems not

48. The residents' committee is "mass organization," which was set up in 1954, and composed of up to five work committees, including security defense, social welfare, women's work, and people's mediation. See Cohen, *supra* note 2; James R. Townsend, *Political Participation in Communist China* (1968).

49. Political and Legal Committee of Wuhan Municipal Committee, All the Party Pays Attention to the Comprehensive Treatment and Realize the Steady Improvement of Social Order, in *The Theory and Practice of Comprehensive Treatment*, *supra* note 22, at 346-347.

50. Fazhi Ribao [Legal Daily], Aug. 20, 1990.

51. *Id.*

52. Bai Yihua & Tang Jinsu, Guanyu Xiugai Chengshi Jumin Weiyuanhui Zuzhi Tiaoli de Jige Wenti [Several Problems on the Amendment of the Law for the Organization of Residents' Committee], 6 Faxue Zazhi [Law Magazine] 3 (1987).

53. Zhang, *supra* note 37, at 70.

only "hurt the feelings" of the neighborhood activists but also send a negative message to society.⁵⁴

Weak leadership from the street office is another factor in the decline of the residents' committee.⁵⁵ Few cadres are assigned to supervise the residents' committees and their quality is generally low. While the "capable cadres" in the street office are used to manage the street economy, the "incapable cadres" are diverted to manage the residents' committees. Like most members in the residents' committees, the cadres are often old and in bad health. Others are young and inexperienced cadres who are not willing to do community work.⁵⁶

Most importantly, the heart of the committee, the small group, has long been ignored, and no longer exists in most places. The 1989 *Law for the Organization of the City Residents' Committee* made the resident small group optional.⁵⁷ The method of electing members of the residents' committees has also changed. Instead of being indirectly elected by the small group leaders, the director of the residents' committee is now directly elected by all the residents.⁵⁸ With the increase in social mobility and cultural liberation, the residents can no longer be confined to small group politics.

Even in residents' committees that are well supported and maintained, the focus is turning to more profitable areas. Some have complained that making a profit has become the main priority of the residents' committee, with keeping social order regarded as secondary and dispensable. Even were the residents' committees to take local security seriously, the great amount of substantive street work, such as sanitation and birth control, would foil such attempts.⁵⁹

54. Bai & Tang, *supra* note 52, at 4.

55. The numbers of residents' committees within a street office has increased. The largest street office in Beijing has 65 residents' committees. In Tianjin, the largest street office includes 33 residents' committees. In Shanghai, each street office has an average of 12 residents' committees. The supervision from street offices on the residents' committee is weakened as a result. See Jie Gao, Lun Woguo Zhixiashi Jiceng Zhengquan Tizhi de Gaige [On the Reform of the Basic Government Structure in the Municipalities Directly Under Central Control], 5 Faxue Yanjiu [Studies in Law] 1 (1988).

56. Zhang, *supra* note 37, at 70.

57. For the content of the new law, see Zhonghua Renmin Gongheguo Chengshi Jumin Weiyuanhui Zuzhi Fa [Law for the Organization of City Residents' Committee], Fazhi Ribao [Legal Daily], Dec. 27, 1989, at 2.

58. Bai & Tang, *supra* note 52, at 4.

59. Zhang, *supra* note 37; Bai & Tang, *supra* note 52.

The disorganization of residents' committees is exacerbated by the committee's inability to fulfill its original agenda and adapt to new social problems. For example, take the case of community correction. Despite an attractive rehabilitative ideology and the imposition of a tight organization,⁶⁰ community control of juvenile delinquency exists largely in name only. A 1988 survey in the two main districts in Changsha municipality showed that only half of the newly released ex-offenders were put under some kind of community supervision.⁶¹ In Tianjin city, delinquent education was well-established in the residential areas, but only 13-14% of them did a satisfactory job, as its Mayor pointed out.⁶² The Reform Through Labor Bureau of Hunan province also noted in a 1988 report that, although a form of education had been set up in the province, the method and the content of education had been too simple to have any effect.⁶³

E. The Lay Mediators

Mediators' initial enthusiasm faded after the revolution. Without a supportive political environment, mediation is no longer considered glorious work. It is a hard and thankless task, which people tend to avoid.

Richard Madsen's discussion of the moral basis of political activism in Mao's China has direct implications for the study of voluntarism among Chinese mediators. According to Madsen, Mao's appeal to "serve the people, to achieve the ultimate meaning in life, and to adhere to certain revolutionary principles rather than 'vulgar interests' " represents a kind of "inner-worldly asceticism" that Max Weber terms a "moral life . . . based uncompromisingly on principle and

60. Bong-ho Mok, *Community Care for Delinquent Youth: The Chinese Approach of Rehabilitating the Young Offenders*, 15 *J. Offender Counselling Service & Rehab.* 5, 6 (1990).

61. Huang Zhide, *The Setback in the Work of Education and Assistance*, *Guanjiao Gongzuo Luntan* [Forum of Re-education through Labor], 35 (n.d.).

62. Li Rihuan, Jiaqiang Zonghe Zhili, Zhengqu Shehui Zhian de Genben Haozhuan [Strengthening the Comprehensive Treatment and Achieving a Basic Improvement of Social Order], in *Tianjin Fanzui Wenti Lunwen Ji* [Essays on the Crime Problems in Tianjin] 13 (Tianjin Government ed., 1984).

63. Investigation Group, Bureau of Reform Through Labor, Hunan Province, Guanyu dui Yueyang Xian Xingman Shifang Renyuan Qingkuang de Diaocha Baogao [Report on the Situation of the Ex-convicts in Yueyang County], *Guanjiao Gongzuo Luntan*, *supra* note 61, at 13.

[constituting] the expression of an individual's personal integrity."⁶⁴ In dispute resolution, this "inner-worldly asceticism" is manifest in the "model mediators" of Mao's China. Because the purpose of mediation was not simply to solve the dispute but also to change the disputants' wrong ideas and to mobilize their energy for socialist building, the mediators were more than just a go-between. They were the political commissars who built the dominance of a socialist culture. Thus, enthusiasm for mediation became the essential qualification.

Mao's moral ideology fused with the internal passions of the mediators, creating what Madsen calls the "individuated ascetic." According to Madsen, the "individuated ascetic" is one whose "quest for a fundamental meaning and purpose in life can be fulfilled in a commitment to grand, abstractly-conceived visions of the world and history, and the vision might be grasped with special intensity if they are supported by a political system in such a way that the person perceives that commitment to the vision might not only provide an ultimate meaning for life, but might also lead to personal social mobility."⁶⁵ For the mediators who responded to Mao's appeal to "serve the people wholeheartedly," engagement in seeking the ultimate led to complete dedication to their work. Maoist mediators, who would have done poorly under the old meritocratic or feudocratic rules, could take advantage of virtuocracy.⁶⁶

However, Madsen predicted, "The fervent dedication of the individuated ascetic may be intensive for a while, but [would] not likely . . . be long lasting in China".⁶⁷ In fact, activism among mediators has faded over time, with many withdrawing from active participation. The village youths Madsen studied were enthusiastic about leading the struggle to link village history with the national political movement. But after a decade of activism, most of them became middle aged and started

64. Richard P. Madsen, *The Maoist Ethic and the Moral Basis of Political Activism in Rural China*, in *Moral Behaviour in Chinese Society* 153 (Richard W. Wilson et al. eds., 1981).

65. *Id.* at 170.

66. For a discussion of virtuocracy in Mao's and post-Mao China, see Susan Shirk, *The Decline of Virtuocracy in China*, in *Class and Social Stratification in Post-Revolution China* (James L. Watson ed., 1984).

67. *Id.* at 171.

families. They soon felt the need "to practice the adaptive social ritual of compromise and accommodation."⁶⁸

Their reluctance to pursue mediation with the fervency of the earlier Mao years is all the more apparent in the post-Mao period. Most of the mediators, who joined the ranks in the early 1950s in response to the Party's call, are no longer able to perform their duty. Among the 42 mediators who appeared in the series of reports "The Mediators Behind Us," only two are veterans who started the work in the early 1950s. Most mediators began their careers in the late 1970s or the early 1980s. The new generation of mediators joined the ranks less because of a passion for the revolution (as was the case for the older generation) and more through rational economic calculation.⁶⁹

An "individuated ascetic" tends to become skeptical and egocentric when the quest for the meaning of life is no longer highly valued. Deprived of political meaning, mediation became a dead-end job with no chance for the mediators to advance their social and political status. No longer considered a means to political or material success, mediation is now regarded as a hard and thankless job that attracts only those who have no other alternatives. All revolutions naturally exhaust themselves over time, and people's mediation died a natural death when the older generation of dedicated mediators passed away.

To deal with the crisis caused by increased social conflict and the disorganization of the Maoist social control system, the government has taken measures to rejuvenate the mediation networks and to stimulate lay mediators. One such effort has been vaguely referred to as "legalizing mediation." As Glassman observes, the major characteristics of people's mediation in the new era "are the preeminence of law and the resulting

68. Richard Madsen, *Harnessing the Political Potential of Peasant Youth, in State and Society in Contemporary China* 263 (Victor Nee & David Mozingo eds., 1983). Susan Shirk also argues that "virtuocracy is inherently unstable because it produces opportunism, sycophancy, patronage, avoidance of activists and privatization within social organizations, and thereby alienates people from one another and from the regime." See Susan Shirk, *The Decline of Virtuocracy in China, in Class and Social Stratification in Post-Revolution China* 58 (James Watson ed., 1984).

69. Many veteran mediators were targets of criticism and abuse in the Cultural Revolution because of their work style of compromise. After the painful experiences, many of the mediators are now reluctant to continue their work, or only work in a perfunctory manner. See Palmer, *supra* note 21; see also Hualing Fu, *Lay Mediators*, 15 *Int'l J. Comp. & Applied Crim. Just.* 81 (1991).

need for accountability to the law."⁷⁰ Accordingly, mediators are now required to know and enforce the law.⁷¹

Symbolically, legalization of mediation empowers the mediators. The argument is that the law can be mobilized as a source of power that can make up for the mediators' low social status in post-Mao China. When mediators tell disputants that "we should behave ourselves according to the law," they are invoking state power. Where Mao's words were often referred to as having superior value in solving conflicts during the Cultural Revolution, law now replaces Mao's directives as the guiding force used by mediators to win over disputants. By alluding to a higher authority, the mediators disempower their opponents because they speak not from personal judgment but as representatives of the law.⁷²

However, the impact of legalization is seriously limited. Although mediators can cite the law and apply it to various situations, they have no substantive authority to enforce it. Law stops functioning when the wayward disputants are not swayed by the mediators' persuasion. In that sense, law can only perform a limited symbolic function for the mediators, who use the law either to illustrate an argument, or show the disputants some negative examples. Without enforcement mechanisms, law fails to empower mediators.⁷³

III. DEBATES ON THE PEOPLE'S MEDIATION COMMITTEE

A. The Status of Mediation Committees

The autonomous status of the mediation committees in relation to state justice represents a central problem in reorganizing people's

70. Eric J. Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees*, 10 *Pac. Basin L. J.* 460, 478 (1992).

71. The requirement of mediators' legal knowledge is explicitly stated in the 1989 Organic Rules for the People's Mediation Committees, see *id.*; see also Fu, *supra* note 69.

72. *Id.*

73. Another effort has been to professionalize and institutionalize people's mediation. It has been popular among the government organizations and economic entities to set up a Legal Department to take charge in legal education and dispute resolution. The staff are full time cadres who often work closely with the factory's security department. I interviewed one of the national model mediators in Hunan province. She was a factory worker actively involved in dispute resolution in her leisure time. After the factory set up its legal department in response to government decree, she was promoted by the factory party committee to the department and became a professional mediator in the factory. However, such efforts are limited to those organizations which can afford, and are willing, to set up a formal department.

mediation in the post-Mao era.⁷⁴ According to Article 111 of the 1982 Constitution, residents' committees are organizations of self-management at the grass-roots level.⁷⁵ By implication, the mediation committee, as one of its work committees, also enjoys the right of autonomy and self-management. However, the "legalists" and the "populists" have given different interpretations to the meaning of autonomy and self-management.

The legalists use the ideology of autonomy to distinguish the "legal" from the "extra-legal" and to curtail the power of people's mediation. Shi Fengyi has argued at length that people's mediation is independent of the legal system, and autonomy means "leaving it alone."⁷⁶ According to Liu Jiaxing, people's mediation is a constituent of popular justice. Thus the state should not exert any administrative leadership, except for some general guidance.⁷⁷

Most importantly, for legalists autonomy means to keep people's mediation within the framework of the state legal system. Such an argument is often accompanied by an anti-popular justice sentiment among the academics who suffered under the "lawlessness" of the Cultural Revolution. For example, in criticizing the populist slogans of "breaking a new path for mediation," "authorizing mediation committees to take disciplinary measures," or "making mediators' words hold," Shi raises the warning that: "In the period of the Great Leap Forward, mediation was abused. The mediation committee was changed into an adjustment or arbitration committee which in fact became a 'small court.' The disaster resulting from the abuse still remains fresh in people's minds." Therefore, Shi argues, mediation can only be understood within the historical context of its development in China.⁷⁸

74. Lin Yiquan, *Xin Zhongguo Renmin Tiaojie Yanjiu Zongshu* [Introduction to Research on People's Mediation in New China], 1 *Faxue Yanjiu* [Studies in Law] 91 (1988).

75. *Zhonghua Renmin Gongheguo Xianfa* [The Constitution of the People's Republic of China] (1982).

76. Shi Fengyi, *Tantan Renmin Tiaojie de Jige Renshi Wenti* [Discussion of Several Understood Problems of People's Mediation], 4 *Faxue Yanjiu* [Studies in Law] 75, 76-77 (1988).

77. Liu Jiaxing, *Guanyu Renmin Tiaojie de Jige Lilun Wenti* [Several Theoretical Problems in People's Mediation], 6 *Faxue Yanjiu* [Studies in Law] 64 (1987).

78. Shi Fengyi, *supra* note 76, at 76-77. See also Sun Pizhi, *Renmin Tiaojie Xuyao Zhiduhua Faluhua* [People's Mediation Needs to Be Institutionalized and Legalized], 4 *Faxue* [Science of Law] 16, 18 (1987).

In contrast, the populists argue that people's mediation committees, which are now "paralyzed and semi-paralyzed,"⁷⁹ cannot afford the autonomous status. The legalistic conception of autonomy implies the withdrawal of state support, especially urgently needed financial support. Populists feel that the state must intervene to keep people's mediation alive.⁸⁰ Mediation and state law represent two equally important but different kinds of thought and action. Mediation may be seen as a parallel structure to state law, which requires a formal and structured distinction between them.

The populists realize that the potential for abuse of popular justice exists in the absence of sufficient restraints. But they argue that the empowerment of people's mediation can be accompanied by sufficient administrative control. Pan and Huang suggest that the mediation committee and its members be "scientifically" managed and guided. With effective Party and government control, they argue, abuse can be avoided.⁸¹

B. Jurisdiction of Mediation

Closely related to the relationship between mediation committees and the state is the jurisdictional scope of mediation. The debate on the scope of mediation involves two questions: first, how to divide jurisdiction between people's mediation and formal legal justice; and second, whether people's mediation should be politicized and its task changed according to different political trends.⁸²

Legalists argue that the mediation committee should no longer be authorized to mediate minor criminal cases. China is now a country with laws, and the laws should be enforced strictly. Disputes belonging to the jurisdiction of civil law should be handed over to the people's court; offenses calling for criminal sanction must be disposed of by the police. Criminal cases, no matter how petty they are, concern the serious issue of social security, and thus should not be handled by mediation

79. Wang Hongyan & Yang Yuanzhong, *Shilun Renmin Tiaojie Zhidu de Fazhan* [On the Development of the People's Mediation System], 2 *Faxue Yanjiu* [Studies in Law] 72 (1988).

80. Lin, *supra* note 74, at 92.

81. Pan Shuchen & Huang Changjiu, *Shilun Renmin Tiaojie de Kexue Guanli* [On the Scientific Administration of People's Mediation], 3 *Faxue Yanjiu* [Studies in Law] 59, 59-60 (1987).

82. See Lin, *supra* note 74, at 91-93; see also Shi, *supra* note 76, at 78.

committees.⁸³ Reflecting the view of the legalists, the new mediation rules promulgated in 1989 withdrew the authority of the committee to mediate petty criminal offenses.⁸⁴

The proactive work style of mediators has also been criticized as contrary to individual rights and the principle of socialist legality. Because mediation should be conducted with the consent of the disputants, it would be inappropriate for a mediator to walk into a disputant's house uninvited to mediate a domestic conflict.⁸⁵ Accordingly, it is strongly suggested that family disputes should be excluded from the jurisdiction of the mediation committee. At a minimum, mediators should not intervene in family disputes unless they are invited by a family member to do so. Even when the dispute is serious enough to merit criminal sanction, mediators should inform the police rather than get involved directly.⁸⁶ In disputes involving overseas Chinese, the proactive style is explicitly prohibited, and no mediation is allowed unless requested by the disputants.⁸⁷

The legalists claim that the task of people's mediation is determined and limited by its nature: mediation is a mechanism to solve disputes that have already occurred. Any other tasks, such as preventing disputes, would only increase the burden on the mediators and violate the autonomous nature of the committee. Were the task of preventing disputes imposed, the secondary role of prevention would supersede the primary role of mediation. Further, it is neither scientific nor fair to evaluate mediation according to how many disputes have occurred in one place.⁸⁸

According to Zhang Youyu, the leading legalist official/intellectual,⁸⁹ the central message of the legalists is that one should not expect too much from the mediation committee. One should

83. Wang Hongyan & Yang Yuanzhong, *supra* note 79.

84. See, e.g., Glassman, *supra* note 70, at 480.

85. Li Zhaoyuan, *Lun Renmin Tiaojie xue de Chuangli* [On the Creation of a Science of People's Mediation], 4 *Faxue* [Science of Law] 37 (1987).

86. Zhang Youyu, *Tantan Renmin Tiaojie Gongzuo de Jige Wenti* [Discussions on Several Problems of People's Mediation], 2 *Faxue Yanjiu* [Studies in Law] 69, 70 (1987).

87. See Sifabu Guanyu Renmin Tiaojie Zuzhi Jiedai Laizuguo Dalu Tanqin de Taiwan Tongbao Sheji Jiating, Hunyin, Caichan Jiufen de Chuli Yijian de Taongzhi [Announcement of the Ministry of Justice on People's Mediation Organizations' Handling of Family, Marriage and Property Disputes Concerning Taiwanese Who Are Visiting Mainland of the Country] in [1988] *Zhongguo Fayu Nianjian* [Yearbook of Chinese Law] 89.

88. Shi, *supra* note 76, at 78.

89. Zhang Youyu was Honorary President of the China Law Society and deputy director of the Legislative Affairs Commission of the Standing Committee, the National People's Congress.

neither expect mediation to reduce crime nor relieve the courts' overburdened dockets. If one relies on mediation for these results, one will be disappointed. Further, to overburden the mediators and then blame them for not accomplishing everything assigned is unfair.⁹⁰

C. The Mediation Agreement

Section 14 of the Chinese *Law of Civil Procedure* states: "The People's Mediation Committee conduct mediation by means of persuasion and education under the principle of voluntariness according to law. Litigants shall honor the agreement reached through mediation;"⁹¹ But what happens when disputants refuse to honor the agreement is not clear. The Law does not state how the agreement is to be enforced.

The populists want to give the mediation agreement binding effect, and argue that the function of people's mediation will be severely damaged if the agreement is unenforceable. Pan and Huang point out that mediators have to spend considerable time and energy helping the disputants reach an agreement. But because people's mediation has no binding legal effect, the agreement is often "a mere scrap of paper."⁹² As a result, disputants end up not only exhausted by the mediation but disappointed with the mediation committee.⁹³

The problem in enforcing mediation agreements has been attributed mainly to deficient leadership by legal organs. Wang and Yang note that fulfillment of mediation agreements had depended on enforcement by the court. But since 1979, leadership of mediation has been transferred to judicial assistants, with the courts no longer responsible for guiding and assisting the mediation committees. Moreover, because of the dramatic increase in the number of economic and civil cases before the courts, the courts can no longer be involved directly in extra-judicial mediation.⁹⁴

The newly created system of judicial assistants, intended to reaffirm the position of the mediation committees, is essentially powerless and inefficient. Many judicial assistants are former mediators working on a

90. Zhang, *supra* note 86, at 70-71.

91. Law of Civil Procedure, in Ralph Folsom & John Minan, *Law in the People's Republic of China* 1024 (1989).

92. Pan & Huang, *supra* note 81, at 61-62.

93. Wang & Yang, *supra* note 79.

94. *Id.* at 76.

part-time basis. Lacking substantial authority, all they can do is hear the disputes turned over by the mediation committees.⁹⁵

Because of the weak ties between mediation committees and courts, judges often ignore the outcome of a mediation when litigation is brought after mediation failure. They handle the case without considering the efforts made by the mediation committees and the progress achieved by the mediators.⁹⁶

Populists point to the fact that there is a contractual duty for the parties to perform a mediated agreement because the agreement created by a mediation committee is recognized by the Constitution; the content of the agreement is in accordance with the state law and Party policy; and the agreement is consented to by the disputants.⁹⁷ Taking a contrary position, legalists claim that the formality of reaching an agreement should not be emphasized. According to Liu, when mediators focus too much attention on reaching a mediation agreement, they see only form and ignore the substance of justice. A consensus may be imposed by mediators but the legitimacy of people's mediation would be damaged. Sometimes, a case may be mediated but cannot be resolved, or an agreement may be signed that cannot be fulfilled.⁹⁸

According to some legalists, the fulfillment of a mediation agreement depends entirely on the disputants' good will and cannot be enforced by any means.⁹⁹ The authority of a mediation agreement flows from the masses themselves rather than through the state. As Zhang Youyu asserts: "People's mediation is an autonomous organ of people's self-government. It is not a state apparatus. Its job is to mediate rather than enforce. Its authority comes only from the legitimacy and fairness of mediation and the consent of the disputants."¹⁰⁰

Some legal scholars prefer a middle course, and suggest an appeals process to enforce the mediation agreement. For example, Wang and Yang propose a time limit be set for disputants who want to repudiate a mediated agreement. That is, after the final agreement is reached, disputants who intend to repudiate it would have to appeal to the court

95. *Id.* For a discussion of the Judicial Assistant system, see Donald C. Clarke, *Dispute Resolution in China*, 5 *J. Chinese. L.* 245 (1992); see also Hualing Fu, *The Judicial Assistant System in Rural China*, 28 *Issues & Stud.* 23 (1992).

96. Wang & Yang, *supra* note 79, at 77.

97. Lin, *supra* note 74, at 95; Pan & Huang, *supra* note 81, at 61.

98. Liu, *supra* note 77.

99. *Id.*

100. Zhang, *supra* note 86, at 71.

within a certain period of time (the authors suggest 20 days). Otherwise, the agreement would be enforced automatically.¹⁰¹

According to the authors, a time limit can work as a buffer between mediation and litigation. There are two benefits to this approach. First, it does not violate the principle that a disputant may bring an action in court with or without mediation. Second, an appeals process puts pressure both on mediators, who then have a greater sense of responsibility, and disputants, who would have to give more serious consideration to repudiating an agreement. Moreover, the appeal process involves the court in actual cases of extra-judicial mediation, so that it can supervise the daily work of the mediation committee.¹⁰²

D. 100% effort for 1% Hope?

The debate on the implications of the slogan "100% effort for 1% hope" in judicial mediation of divorce claims is illustrative of the more general controversy surrounding mediation. Xing E has attacked the slogan, arguing that a 1% hope is not worth a 100% effort.¹⁰³ She asserts that "those who are making a 100% effort for a 1% possibility may have willing hearts, but they do not know that mediation also needs a scientific analysis and correct evaluation. For many years, this insincere attitude has resulted in many human tragedies."¹⁰⁴ She criticizes those mediators who conduct mediation blindly:

101. Wang & Yang, *supra* note 79, at 77.

102. *Id.* In 1990, the Ministry of Justice passed a regulation entitled *Methods of Handling Civil Disputes*, which gives the mediation committees and judicial assistants teeth and claws in enforcing a mediation agreement. According to the *Methods*, disputants should be "persuaded" to have their disputes mediated by the mediation committee before the cases are brought to court (§ 10); the government is authorized to dispose a dispute if the parties fail to reach a agreement after the mediation (§ 17); if one party intends to repudiate a mediation agreement, it should bring an application in court within 15 days after the agreement is signed, and after the expiry of the 15 day waiting period, the government could "take necessary measures" to enforce the agreement (§ 21). For the content of the *Methods*, see Fazhi Ribao [Legal Daily], July 31, 1990, at 3.

The *Methods* shifted the burden of people's mediation from the judicial bureau to the local government. However, it should be remembered that in the pre-1954 period, the government was in charge of mediation. But the volume of small claims disputes disturbed the normal work of the government and, as a result, the people's mediation committees were created to relieve the government from the burden. See Jerome Cohen, *Drafting The Mediation Rules, in The City in Communist China* (John Lewis ed., 1971).

103. Xing E, *Yige zhide shangque de kouhao* [A Slogan that Is Worth Discussing], *Zhongguo Fazhi Bao* [China Law News], July 10, 1986.

104. *Id.*

Whenever one wanted a divorce, some people would desperately try to mediate no matter what the possibility of restoration was. . . . Because mediation has no time constraints, some divorce claims have been under mediation for a long time. Mediation has become a synonym of stalling and ignorance. The fashionable slogan has led to many a disaster . . . and it is time now to put an end to its historical mission and abolish the slogan that has a revolutionary appearance but a backward and unscientific nature.¹⁰⁵

Xing's critics argue that it is extremely difficult to know whether there is any possibility for restoration of a relationship in a divorce claim, and mediation is a process to determine if the possibility exists and how much affection a couple has for each other. In practice, the critics say, a large amount of divorce applications (about 46.8%) were withdrawn by the disputants after mediation. Mediation therefore should be a compulsory step for every divorce claim.¹⁰⁶

Two judges from the Intermediate People's Court of Cangzhou city, Hebei province, argue that making a 100% effort to 1% hope is a responsible attitude toward the disputants and society. "Although a 1% possibility is very small, there is still hope for the marriage. . . . How can the judges and society ignore such hope and let the marriage break up without doing anything?" The percentage can be changed, they argue, and a 1% possibility can develop into a 10% or 50% possibility, perhaps becoming 100% with the efforts of mediation.¹⁰⁷

Furthermore, there can be mediation for divorce as well as for restoration. When a couple is able to reach a peaceful settlement, both the parties and society benefit. Emphasizing mediation cannot be equated to a stalling tactic because if mediation fails and there is no possibility to save the marriage, a divorce can be granted immediately.¹⁰⁸

105. *Id.*

106. Yuan Quan, Lihun, Tiaojie, Ganqing yu Baifenbi [Divorce, Mediation, Affection and Percentage], *Zhongguo Fazhi Bao* [China Law News], Oct. 2, 1986.

107. Li Yunzhi & Yu Renfa, A Further Discussion on One Percent and One Hundred Percent, *Zhongguo Fazhi Bao* [China Law News], July 31, 1986.

108. Yuan, *supra* note 106.

IV. CONTRACT SECURITY

Since the early 1980s, the government has taken various measures to reform the people's mediation committee with the hope of restoring its former glory. However, increasing social and economic mobility together with cultural and political liberalization make this reorganization impossible. Facing increasing crime and incivility,¹⁰⁹ the government resorted to private initiatives, and in the mid-1980s implemented a system of contract security throughout China. In effect, the government used the mediation mechanism as an excuse to contract out the judicial power of the state.

The contract security system may be seen as part of the larger privatization trend in post-Mao economic reforms, which invigorated the decaying economy through various forms of responsibility-based systems. Contract is regarded as a panacea, which, through the specification of responsibility and the relating of execution to personal benefit, is able to tackle the problems of irresponsibility, indifference and stagnation.

This type of contract-based theory has been readily applied to conflict resolution, education of juvenile delinquents, and crime control. The hope is that by contracting out the state's power to resolve conflicts to individual mediators, and connecting the mediator's performance directly to compensation, the government can make mediators hardworking and responsible. In Henan province, contract security originated in late 1984 when a peasant named Li proposed to contract with the government to resolve all disputes in his village. This form of social control attracted the attention of the provincial leadership and was regarded as a good way to improve social order. It was soon imposed throughout the province. By 1985, more than 50% of mediation organizations in the province were contracted to specific individuals, covering an area more than 75% of the province. By 1986, more than 75% of the mediation committees' jurisdictions in the province were placed in the hands of private contractors.¹¹⁰

109. Hualing Fu, *Juvenile Delinquency in Post-Mao China*, 16 *Int'l J. Comp. & Applied Crim. Just.* 263, 265 (1992).

110. [1986] *Henan Nianjian* [Y.B. Henan Province] 189; [1987] *Henan Nianjian* [Y.B. Henan Province] 241. For a study of the more institutionalized form of contract security in post-Mao China, the Security Service Company, see Hualing Fu, *China's Security Service Company*, 16 *J. Sec. Admin.* (forthcoming) (on file with author).

In practice, the government normally sets a price for the completion of a contract, and the contractors are paid according to the execution of that contract. The contractors in the cities are normally retired workers, local mediators or other members of neighborhood organizations. In the rural areas, they are generally current village leaders. The contractors may be elected by the residents, appointed by government officials or self-appointed by the contractors themselves. A contract may be drafted by the government or the contractor, but it must be consented to by the residents concerned, and approved by the police.

The contents of a contract vary according to local priorities. Some contracts are extremely simple. For example, a residents' pact for "five goods" includes "good morality, harmonious family life, frugality, good relations with neighbors, and good education." These pacts have been criticized as simply "slogan and scripts."¹¹¹ Others are more detailed. A security contract in some villages in Henan province provided:

- No serious theft or other criminal cases, and no fire or poisoning incidents.
- 95% success rate of civil mediation.
- No small claim disputes resulting in serious security or criminal offenses.
- Systematic legal propaganda and education.¹¹²

There are a variety of financial resources available to pay for the contractors' services. Collecting from the beneficiaries is a common

111. Malcolm W. Klein & Margaret Gatz, *Professing the Uncertain: Problems of Lecturing on Chinese Social Control*, in *Social Control in the People's Republic of China*, *supra* note 16, at 177.

112. A "ten items security responsibility contract" reads:

- Obey the state law and policy;
- Do not damage other's interests, steal or rob;
- Do not set up clan organizations and conduct superstitious activities;
- Do not make trouble and fight;
- Do not destroy forests;
- Prevent disasters;
- Do not conduct smuggling and profiteering activities;
- Educate and reform law-violating individuals;
- Confiscate weapons prepared for criminal purposes and pornographic pictures and books.

In Wang Weiguo, *Responsibility System in Public Security* (1982) (on file with author).

practice in urban areas, where the government collects "security fees" from beneficiary households, state organizations, and private businesses for hiring security personnel.

The government also subsidizes community programs. Some cities transfer special funds to support contract security. For example, 30,000 *yuan* in Suzhou city was transferred to support the residents' committees and reward the mediators and other security contractors.¹¹³

Profits from the street economy may also be partially transferred to fund contract security. Nanhu Police Station in Nanjing set up a bicycle parking lot in a downtown area and hired 130 retired workers as part-time employees. The retirees were required to look after the bicycles, and at the same time to conduct regular patrols of the area.¹¹⁴ In other places, the residents' committees were allowed to open recycling stores or small grocery stores to finance contract security.¹¹⁵

More frequently, the police use fines as an alternative sanction, and transfer some of the fines collected to a contract security fund. In Yuchi city, Hebei province, one third of the fines issued by the police are used to pay mediation contractors. The contractors themselves are also allowed to issue fines and keep a portion of the fine as a bonus.¹¹⁶

Property insurance is another source. According to the agreement between the police and industrial entities in Maanshan city, each factory is required to pay property insurance for its employees. Half of the premium is paid to the city's insurance company, and the other half to the police to pay for contract security.¹¹⁷ In Yuchi city, an insurance company also "voluntarily" contributed money to the city's contract security.¹¹⁸

Contractor are measured according to concrete standards. In Wu county of Jiangsu province, the contract contains the following standards: no serious criminal offenses; systematic legal education to the local residents; an above 90% success rate of civil mediation; less than 3% recidivism rate among local ex-convicts; and no less than two legal

113. See Cai Cheng, *supra* note 23; Jain De & Yu Xongxiang, *Quan Shehui de Canyu* [The Total Participation of Society], *Fazhi Ribao* [Legal Daily], May 25, 1989, at 1.

114. *Fazhi Ribao* [Legal Daily], Aug. 20, 1988, at 3.

115. *Yucishi Gonganju Yindizhiyi Jiejue Zhibao Renyuan Jingji Baochou*, *Renmin Gongan Bao* [Police News], July 15, 1988.

116. *Id.* at 1.

117. *Fazhi Ribao* [Legal Daily], Feb. 22, 1988, at 2.

118. Some have argued that the cooperation among the police, insurance companies, and residents' committees in securing local order is mutually beneficial. *Renmin Gongan Bao* [Police News], July 15, 1988 at 1.

study meetings for juvenile delinquents per week.¹¹⁹ The contractors receive compensation only if the above quotas are reached.

Each of the items in the contract can be divided into several sub-items. A crime control contract has a 10-point evaluation scale:

- 5 points if no criminal cases arise.
- 3.5 to 4.5 points for more than 20% reduction in rate of crime compared to that of the same period the previous year.
- 3 points for 20% reduction.
- 1 to 2 points for less than 20% reduction.
- No points if no reduction.¹²⁰

The contract for mediation services is more specific and extensive, and this specificity has been a priority in the contract security movement. There are normally two criteria for evaluation. The first is a jurisdictional limit that details what kind of disputes should be solved and at what level. Factories often require that "small disputes" be solved by contractors inside the workshops. The other criterion is a time limit, such as "do not let the disputes that happen this month be carried over to the next" or "small disputes should be solved within a week and larger disputes within a month."¹²¹

The extent to which contract security has stimulated Chinese lay mediators and changed the landscape of dispute resolution in China is unknown. Skimming through reports from China, one can make several preliminary conclusions.

First, the system simply does not work as planned in most areas, especially in cities, because it has not changed the fundamental cultural and structural barriers facing the people's mediation system. The material incentive is not attractive enough to draw active participation because the reward is often small and not guaranteed. Further, by assigning dispute resolution to particular individuals, community involvement on a broader scale is discouraged. Finally, except for issuing small fines, the contractors have no other authority. In short, contract security inherited the same problems that paralyzed people's mediation. One consequence is that small claims disputes in the

119. Sang Liuqi & Zhao Weidong, Zhian Chengbao Zerenzhi [Responsibility System in Public Security], Renmin Gong'an Bao [Police News], Oct. 11, 1991, at 3.

120. *Id.* at 3.

121. Guo & Xu, *supra* note 22.

community are ignored, with the result being that many civil disputes escalate into criminal offenses.¹²²

Second, contract security symbolizes the privatization of justice and a retreat by the state from its sphere of authority. Although one might argue that the drive toward self-government initiated by the post-Mao government may never result in the emergence of a real civil society in China, and that contract is only another mechanism used by the Party to re-gain control,¹²³ local actors have gained authority through this redistribution of power. Lacking sufficient political and economic capacity, the government has been obliged to relinquish some of its authority to certain individuals and to ask them to police on its behalf.

Due to the heavy presence of police and other state organs, contract security is confined within the legal framework in cities. However, in rural areas it is vulnerable to abuse by village elites, where government supervision of the drafting and implementation of contracts has been seriously deficient. Further, rural policing is left to the discretion of village elites, which has led to routine abuse of power.

The abuse of fines provides a ready example. Although moral and administrative mechanisms have been employed to regulate contractors, material incentives play the central role. Because money is the key to the contractors' willingness to implement the contract, how much work they do depends on how much they can earn. The amount of contractual compensation determines the quality of security and justice. Like Western private security, "policing for profit" becomes central to the enterprise of contract security.¹²⁴

Lacking other mechanisms, security contractors are forced to rely excessively on fines regardless of the nature of the dispute.¹²⁵ Contractors have even created their own charts that assign different crimes different prices. As a result, thieves, robbers, and rapists are all

122. A 1987 study in 30 Chinese counties, prefectures and cities showed that 55.7% of five serious crimes (murder, arson, poisoning, explosion, and aggravated assault) began as small claims disputes. See Cai Cheng, *supra* note 23.

123. See Ann Anagnost, *Socialist Ethics and the Legal System*, in *Popular Protest & Political Culture in Modern China: Learning from 1989*, at 177 (Jeffrey N. Wasserstrom & Elizabeth J. Perry eds., 1992).

124. Nigel South, *Policing for Profit: The Private Security Sector* (1989).

125. For the abuse of fines in rural areas, see the report from Li Jianfang, Huguang County Communist Party Committee, Shanxi province, *Fa zai Nongcun de Yousi* [Considerations on Role of Law in Rural Areas], *Fazhi Ribao* [Legal Daily], July 10, 1989, at 1.

processed by the contractors through an ad-hoc system of fines.¹²⁶ When a fine is unreasonably high and cannot be paid by a poor peasant, violence may easily result. Anagnost notes that many of the local cadres have used the contract "for arbitrarily seizing or imprisoning people, searching their homes, and confiscating their property."¹²⁷

In the end, contract security is creating local law which is parallel to, and often in conflict with, state law. The police have warned that many of the contracts, which had been hailed as models of direct democracy, are in direct conflict with the criminal law, and many of the contractors have overstepped their bounds and entered into police jurisdiction.¹²⁸

In many instances the contract security system has been hijacked by clan organizations that play an active role in rural politics. The police have acknowledged the "surprising power" of the newly emerged village strong men: "[A]fter the rural economic reform, the religious passions of the peasants were reinforced. Gradually, the peasants transferred their trust from the Party and government to the 'strong men' of their clans."¹²⁹ As the forum for conflict resolution has shifted from government-sponsored mass organization to private actors, village leaders have become loyal to the clan rather than to the Party.

The locus of power in conflict resolution has shifted away from the state toward society. The village elites now not only settle disputes among village residents and negotiate intra-clan conflicts but also make peace between the state and peasants. When conflicts arise between state law and local contract, they often find themselves fighting with government authorities to protect local interests, and justifying their rebellion as mere reliance on village pacts. Occasionally, these village

126. Even more worrisome is a report from Hunan province, where a 17 year old girl was raped by a fellow villager and became pregnant. She went to the village leaders for help. But upon the request of the rapist and his family, and with the consent of the girl's relatives, the village's Party secretary imposed a marriage between the rapist and his victim. Feng Jianhua & Lin Qinqun, *Lingren Zashu de Feifa Tiaojie*, *Fazhi Ribao* [Legal Daily], June 23, 1988.

Wang and Yang also point out that the phenomenon of mediating criminal offenses privately is especially serious in rural areas. See Wang and Yang, *supra* note 79, at 73; Palmer, *supra* note 21; and Clarke, *supra* note 95.

127. Anagnost, *supra* note 123, at 187.

128. For instance, one village pact provides: "Those who commit robbery will be fined 200 *yuan*." *Renmin Gonggan Bao* [Police News], Sept. 2, 1988.

129. Hu Yanmu, *Qunzhongxing Jiufen Xiedou Yinqi de Sikao* [Considerations on Mass Fighting], *Renmin Gonggan Bao* [Police News], Mar. 29, 1991, at 2.

elites incite their fellow villagers to beat the tax collectors, chase away the township police, and disrupt the county court.¹³⁰

V. CONCLUSION

Conflict in a revolutionary society is reflected in the tension between the Marxist vision of a society where laws have withered away and the reality of a legal order that cannot be abolished.¹³¹ Social and economic progress appears to require a legal order consisting of laws, bureaucratic commands and a hierarchical form of organization. In contrast, the ideological objectives of an egalitarian and self-regulating society require political mobilization to achieve substantive justice.¹³² Consequently, "society has two kinds of law. There is a law of bureaucratic commands, and a law of autonomous self-regulation. Each law represents one of the two faces of consciousness and organization under revolutionary socialism."¹³³ Chinese Communists have been searching for a balance between popular justice and state law, and between the law of "self-education" and "government control."¹³⁴

The post-Mao reform of people's mediation is another episode in this ongoing fluctuation. With the fading of the Maoist ideology of conflict resolution and the formalization of the Chinese legal system, people's mediation has been depoliticized and the legitimacy of mediation committees challenged. The reform has created a cultural and structural imperative that makes mediators powerless and their job meaningless.

The legalization and professionalization of people's mediation itself remains mainly rhetoric. In the cities, the heavy presence of state law can provide easy access to justice. Consequently, mediation committees become dispensable. The mediation system, although armed with millions of mediators, is a superfluous paper tiger, which will not perform a meaningful role in securing urban social order in the near

130. For analysis of the increasing rural violence against the state, see the reports by Yangxing County Communist Party Committee in *Fazhi Ribao* [Legal Daily], Jan. 10, 1989; and by Wang Zhongyu, Secretary of Zhong Xiang County Communist Party Committee, *Fazhi Ribao* [Legal Daily], May 23, 1989, both from Hubei province.

131. See Steven Spitzer, *The Dialects of Formal and Informal Control*, in *Politics of Informal Justice*, *supra* note 3, at 191; see generally Roberto M. Unger, *Law in Modern Society* (1976).

132. James Brady, *Justice and Politics in People's China: Legal Order or Continuing Revolution* (1982).

133. Unger, *supra* note 131, at 233.

134. *Id.* at 232-233.

future. The system could play a positive role in resolving small claims disputes only if the disputants know mediators have the enforceable authority to dispose their cases. One alternative would be to rebuild the link between the mediation committee and the formal legal system, thus creating a referral system between the law and the community. Just as traditional *paojia* chiefs had no authority in the community because they were not officials, modern community justice can only work in the shadow of law.

The effort to contract out community justice has not solved the essential problem facing people's mediation in the cities. In the rural areas, however, contract security is privatizing justice and creating a type of legal anarchy. In the absence of legal restraints, self-regulating villages bound to their own special interests have emerged, raising a fear of syndicalism.

In conceptualizing social order in Chinese society, one is often given a political choice between rights and duties, conflict and consensus, due process and popular justice. This hydraulic conceptualization traps us in our attempt to search for justice. Either one favors formal law or informal justice. However, by taking an all-or-nothing position, we are left without a solution: justice cannot be achieved without law, but neither can it be achieved through formal law alone.¹³⁵

Braithwaite has suggested that in making a good society, "we should avoid the trap of assuming we must make a choice between a society of consensus and a society with conflict, between a culture oriented to duties and one oriented to rights, between crime and freedom."¹³⁶ While advocating so-called communitarianism, he also notices the danger of the "romantic and potentially oppressive notions of the 'people's courts' " and emphasizes the need for a legal framework and a system based on due process.¹³⁷ While we should not surrender passively to the "progress" of the rule of law, we also should not encourage a Luddite-like rejection,¹³⁸ and "romanticize the supposedly harmonious life of poor countries," thus blindly replacing governmental control with "nostalgic calls for a revival of voluntarism and a vaguely defined community spirit."¹³⁹

135. Steven Spitzer, *supra* note 131.

136. John Braithwaite, *Crime, Shame, and Reintegration* 185 (1989).

137. *Id.* at 180.

138. Cohen, *supra* note 29.

139. Elliott Currie, *Confronting Crime: An American Challenge* 187 (1985).

In criticizing the rural policies of the Chinese Communists, Zweig argues that the peasant class "perceives the world and pursues life in line with its own rational economic interests,"¹⁴⁰ and maintains an attachment to the private sector and their family unit. According to Zweig, the radicals "had erred in their belief that ideological transformations could occur separate from social reality or that peasant mentality could be transformed into proletarian consciousness amidst poverty."¹⁴¹ The government must learn that it cannot "arbitrarily decide the future path of rural China and expect the peasants willy-nilly to follow suit."¹⁴²

At the same time, society should not be left to self-regulation by the market alone. The empowerment of localized community and "popular justice" without a confining legal framework is not only an impractical utopian ideal but also potentially dangerous. Mohr argues that pluralism has to be understood in its dialectic tension with an integrative form.¹⁴³ Nonet and Selznick also discuss this risk:

There is the spectre of a multitude of narrow-ended, self-regulating institutions, working at cross-purposes and bound to special interests; of a system impervious to direction and leadership, incapable of setting priorities; of a fragmented and impotent polity in which the very idea of public interest is emptied of meaning.¹⁴⁴

We may appreciate Zweig's concern that the revolutionaries or reformers take into consideration the social context in which reform is carried out. But a balance must be struck between the "engineering role" of the state and local spontaneity: China must find a middle path between legalism and popularism. Due to the cultural and physical distance between the state-supported law and the peasants, rural societies are different from cities, and should be treated as such. Accordingly, local features should be considered, local customs and regulations respected, and local elites given authority to resolve certain civil and criminal matters within their communities. At the same time, however,

140. David Zweig, *Agrarian Radicalism* 191 (1991).

141. *Id.* at 192.

142. *Id.* at 199.

143. J. W. Mohr, *Criminal Law: Is There a Legal or a Social Logic Left for Its Renewal?* in *Crime, Justice and Codification* (Patrick Fitzgerald ed., 1986).

144. Philippe Nonet and Philip Selznick, *Law and Society in Transition* 103 (1987).

the basic principles of criminal law should be upheld. Rapists must be prosecuted, murderers punished, and behaviors that induce fears and inflict pains stopped no matter how traditional they are.