Mediation in Europe at the cross-road of different legal cultures

According to E.U. research project EMEDI@TE (www.emediate-justice.eu) an international group of specialists and academics produced this first book that, through comparative and multidisciplinary studies, tries to depict the "state of art" of the research on mediation and the know-how of professionals operating in the field of ADR. The added value of this book, indeed, consists in the contribution of so many different researchers each of them with their background and cultural and professional experience: the multidisciplinary approach means that we can read and immediately compare the different ideas of mediation and the different problems that mediation may meet, approaching the mediation not only from a narrow legal point of view but also from the point of view of the real society.

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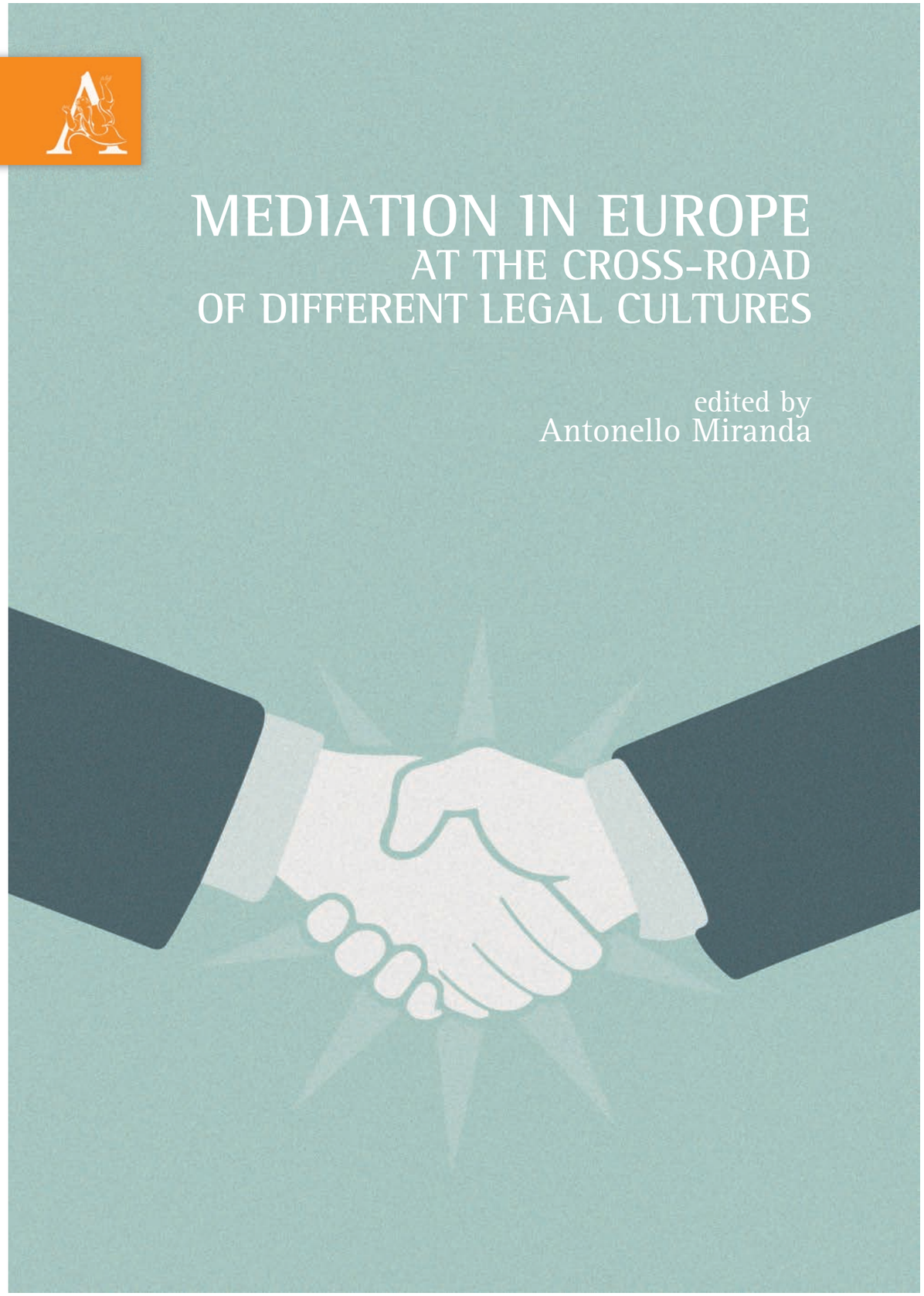

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Mediation in Taiwan

The ideology of harmony v. the ideology of justice

Salvatore Casabona

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1. Introduction

The attitude of the foreign observer to oversimplify what is the object of his observation, if understandable from a cognitive point of view (allowing to collect the fundamentals which are assumed to be connotative and denotative of the alien reality), it is not admissible from a scientific point of view.

From one side, the repeated western assumption that Asians, because of their Confucian traditions, mostly have been preferring mediation regimes over formal adversial proceedings has indeed rarely been examined and verified; from the other side, the ideology of social harmony through mediation processes that has been always presented as undisputable positive in itself, very seldom it was submitted to a serious scrutiny, deepening those aspects of mediation that could make itself as a mean of hegemonic control of the stronger social part over the weaker one[1].

Moreover, it goes to say that if it is undisputable that the Confucian tradition has to be assessed valuable as an important factor in understanding many East Asian societies[2], such as Taiwan; nevertheless it still remains uncertainness on which part of Confucian legacy plays a concrete role on the actual configuration of the legal systems, with particular attention to that part traditionally considered more sensitive to the Confucian philosophy: the conflicts' resolution[3].

1. L. Nader (2002); L. Nader (1990).
2. C. Hahm (2003), p. 270.
3. For insightful considerations at this respect, see A. Chen (2003), pp. 257–287.

Much has already been written on the subject of mediation, and on the Chinese mediation in particular[4], nevertheless it seems to me that something still flies out of radars of the scientific debate, in particular I wonder (a) whether the Asians' favour toward mediation has to be considered exclusively an attitude due to their Confucian tradition or whether it can be also explained in a more articulated social and institutional background of access to justice[5]; yet, I ask (b) whether the supposed Asians' mediation–attitude has mutated in consideration of the historical evolution of the societies and institutions or, on the contrary, whether it persists unchanged irrespective to the time passing (as it seems to appear from maybe too hasty Western reconstructions).

The above questions do not want express any disruptive approach toward mediation in itself, neither to unreasonably negate the historical and social importance of the harmony' ideology in some Asian countries (such as China and Taiwan); the only limited and humble purpose of this short essay is to try to better contextualize mediation from an historical and institutional point of view, seeking to take distance from too easy representations and conclusions about the Asian's mood and attitude toward compromise.

The geographical and political context in which the research has been conducted is Taiwan that appears particularly interesting from a comparative point of view at least for three main reasons: beside its social and cultural collocation into the Chinese tradition[6]that proudly and paradigmatically expresses the ideology of harmony, the development of the Taiwanese system of access to justice shows a interesting encroachment and overlapping between adjudication and mediation, formality and informality, *ideology of formal justice* and *ideology of social harmony*.

Furthermore, the formation of Taiwanese legal system has been conditioned by important processes of legal transplants[7] due the imposition of foreign models (mostly German) under the Japanese colonial rule; or due

4. Among others, see A.J. Cohen (1967), pp. 1 ff.; S. Lubman (1967), pp. 1284–1359; M. Palmer (1987), pp. 219–277; M. Palmer (1989), pp. 145–171; About "didactic conciliation", see also Hsiao Kung–Ch'uan (1979).

5. M. Cappelletti, J. Gordley, E. Johnson (1975); M. M. Cappelletti (1982), pp. 234–245; M. Cappelletti (1979), pp. 54–59.

6. Chen Tsung–fu (2003), p. 396: « Taiwan was ruled by Manchu for more than two hundred years and traditional Chinese legal culture had become prevalent throughout the island by the end of its rule. During Japanese colonial rule for fifty years, traditional customs and imperial Chinese law maintained their influence on the people to a considerable degree. During the first four decades of KMT control of island, [. . .], traditional Chinese legal culture was still dominant among public officials and judges ». See also Wang Tai–sheng (2000a), pp. 128–135; Wang Tay–Sheng (2000b), chapter four; T. Adrade (2008).

7. A. Watson (1976), pp. 79–84; A. Watson (1978), pp. 313 ff.; A. Watson (1995), pp. 469 ff.; A. Watson (1983), pp. 1121 ff.; D. Nelken (2001), pp. 349 ff.; E. Orucu (2002), pp. 205 ff.; E. Galinou (2003–2004), pp. 391 ff.

the spontaneous legal borrowings of alien solutions, as it happened during the Martial Law period[8] and, soon after, during the season of the reforms for democratization[9].

This circulation and spontaneous comparison of ideas, ideologies, and institutions has determined an extremely intriguing *equilibrium*, by definition unstable, between the Chinese legal tradition (with its Confucian legacies)[10] and the Western one[11].

2. The Chinese legal legacy in Taiwan

Some fundamental traits of the Confucian philosophy would express the rooted reasons of the mediation success.

Some of these features would pertain to the Confucian thought, such as 1) preference of the rituals as social regulatory instrument over the formal command: « The Master said, guide them with government orders, regulate them with penalties, and the people will seek to evade them and be without shame. Guide them with virtue, regulate them with ritual, and they will have a sense of shame and become upright »[12]; 2) respect of societal hierarchy: « Let the ruler be a ruler; the subject, a subject; the father, a father; the son, a son »[13]; 3) social disfavour towards the judicial and adjudicative resolution of conflicts regarded as a disturbance of the harmony of society: « In hearing lawsuits, I'm not different from other people. What we need is for there to be no lawsuits! »[14].

Some other lingering characteristics would belong more to the societal and institutional translation of the Confucianism: from the prevalence of local informal mediation systems historically driven by the leaders of the communities of advanced age and of moral uprightness (*niangao youde*) or

8. On the martial law period in Taiwan, see A. Croissant, D. Kuehn, P. Lorenz, P.W. Chambers (2013), chapter IV; J. Manthorpe (2005), chapter XVII.

9. M.A. Rubinstein (1994), 1994; A.M. Wachman (1994).

10. On the *confucianization* of Chinese law, see Ren Xin (1997), pp. 19–36; Chen Jianfu (2008), pp. 8–22; J.W. Head (2008), pp. 3 ff.

11. J.M. Merryman (1969); P.G. Monateri (2000), pp. 479 ff.

12. Confucius, Book II, n. 3. See for more insights Gardner D.K., Zhu Xi's (2003); T.W. Selover (2005); F.M. Flanagan (2011).

13. Confucius, Book XII, n. 11.

14. Confucius, Book XII, n 13. Interestingly, P.C. Huang (2010), p. 193 oberved: « [...] Qing ideology regarding *civil* disputes among the people has as its foremost concern the resolution of disputes, not the protection of rights. [...] the ideal moral society is characterized by harmony and absence of conflict; no disputes, much less lawsuits, would exist. The moral Confucian Gentleman was someone who would not stoop to disputes; he would rise above them by conciliation (rang) and forbearance (ren). The truly cultivated gentleman would not allow himself to be drawn into a dispute or lawsuit; such involvement was itself a sign of moral failure ».

particularly trustworthy (*you xinyong*); to the centrality of the compromise as the main principle–method governing mediations[15] with the specific objective to resolve problems, keep peace (*xishi ningren*) and avoid long–term enmity[16], in other words, to turn big problems into small ones, and small problems into non–problems (*dashi hua xiao, xiaoshi hua liao*)[17].

Conflicts resolution in Taiwan during the Ch'ing period (1644–1912)[18] was substantially in line with the mainland China's legal tradition[19]: the unofficial resolution for civil disputes was driven by a well routed system of clan mediation and of local mediation (*shiang pao*), respectively presided over by the elders and virtuous and by local notables, and settled in accordance with the local customs. Generally, the mediation was considered socially preferable to official adjudication[20] and bringing disputes to court was deemed to be a *loss of face*, as it proved the inability of the parties to maintain a harmonious relationship[21].

Even in cases where private conciliation had failed and thus official settlement had been required, the Taiwanese magistrates often operated a form of *didactic mediation* and — if the case — redirecting the parties to solicit mediation from local notables[22].

However, as pointed out[23], the didactic mediation in the imperial Chinese justice system was a process of humiliation and disempowerment,

> (t)he magistrate–judge acted as fathers to the parties [...]. Thus, he handled disputed as if parents handled quarrel between kids. [...]. The judge was not bound by the law. Since the judge's authority was basically unlimited, he could use any approach to elicit facts. During the process, if a party appeared to be disobedient, or the judge believed a party was lying, the judge had the authority to discipline

15. Based on considerations of human relation (qing) first, and following of the law (fa), and of moral rights and wrong (li).

16. At this regard, see diffusely P.C. Huang (2010), pp. 21–61; P.C. Huang (1996), pp. 58–75.

17. P.C. Huang (1996), pp. 58–59.

18. See Ho Ping–ti (1967), p. 189: « The general significance of the Ch'ing period is that chronologically it falls between what is traditional and what is modern. However, much the new China changes in the future, The Ch'ing period, , the last phase China's *ancient regime*, has left important legacies ».

19. See in particular P.C. Huang (1996), chapters III and V. At this regard, extremely interesting is the analysis of the Tan–Hsin Archives (a collection of case files that preserve the records of over one thousand proceedings during the years between 1789 and 1895) conducted by Allee, M.A. (1987).

20. Lin Yun–Hsien Diana (2011), p. 200: « Hiang pao were themselves responsible for the behaviour of the local populace and provided local resolution to disputes which erupted within the district. This network of clan leaders and *shiang pao* often overlapped, working hand in hand to ensure social order and harmony ».

21. J.A. Cohen (1966), pp. 1206–8.

22. On the historical evolution of mediation in Taiwan, see Lin Yun–Hsien Diana Lin (2011); Chang–fa Lo (2006), pp. 172–173; Chou I–Hsun, Mandatory Divorce Mediation in Taiwan: legal regime, judicial attitudes and public opinions, PhD Dissertation, University of Chicago, 2008.

23. Wang Tay–Sheng (2000), p. 90–91.

the party which was seen equivalent to the discipline by parents of their child.

Thus, until the Japanese colonization, mediation in Taiwan, not dissimilarly to what happened in mainland China[24], did represent more than an *alternative* mechanism of dispute resolution, the *sole mode* of access to justice because the lack of district courts and — in the case of Taiwan — because of the widespread corruption and incompetence of the officials who were supposed to maintain law[25].

As Hsu Tsung–kan, Taiwan Intendant (1848–1854), said, « In the empire, the Fukien government is the worst, within Fukien Province, the Taiwan government is the worst ».

All this lead to a profound popular disrespect for the *formal* system of law with a consequent confinement of the justice' requests into the borders of the informal mediation, managed at village or clan level on the basis of the locals' customs.

3. The *administrative mediation* under the Japanese rule and the growing of the *adversial mood* of Taiwanese

Recent studies concerning Taiwan legal system under the Japanese colonial rule (1895–1945)[26] have underlined the profoundly interesting relation between legal modernization and access to justice trough mediation.

Notably, the special legal institution of *administrative mediation*, introduced by Japanese colonial government with the Civil Disputes Mediation Law (1904), was examined either in relation to its impact on the locals in terms of access to justice either in relation to the new system of judiciary apparatus gradually established by the colonizers.

The *administrative mediation* empowered the local administrative officials in Taiwan to personally mediate civil disputes[27] or to direct disputants to reach a voluntarily settlement agreement.

The summons to appear in the mediation process was an administrative order (compulsory for the recipient) so that the party summoned in a filed mediation case could not easily refuse to participate in the mediation.

24. K.B. Pissler (2012), p. 961: « Jurisdiction was exercised on the basic level by the district official, who had his office — the *Yamen* — in the district's main capital, which meant that the majority of the Chinese population had no contact with state authorities. Most disputes were settled by mediation simply because the district official was too far away and it was in the interest of the village elders and leaders to settle disputes locally in order to avoid attracting the negative attention of state authorities with unnecessary complaints ». See also Ch'u T'ung–tsu (1988).

25. Hsu Wen–hsiung (1975).

26. Wang Tay–Sheng (2000), p. 24.

27. Any disputes involving status law or property law, irrespective of their monetary value.

Yosaburo Takekoshi, in official visit as member of the Japanese Imperial Diet in that time, commented in such a way the introduction of the administrative mediation in Formosa:

> The Formosans, like the Chinese, being very fond of litigation, to lessen the work of the regular courts it has recently been ordered that all petty cases be settled by arbitration by the local authorities. Though called an Arbitration Court, it is really a kind of public law court. When it was first introduced much anxiety was felt as to how it would be regarded by the natives, but the results have been unexpectedly satisfactory and the people seem to welcome it[28].

Having said that, beside the reduction of the judicial expenditure of the colonial government, the new colonial institution, on one hand, allowed to restore the Imperial China mediation to which locals were already accustomed, on the other hand, progressively channelled locals' customs in the conflicts resolution arena.

Once again the voyage diary of Yosaburo Takekoshi does result precious, reporting the confidence of a Japanese judge in Taiwan:

> Since I first came here, I have given decision in a large number of cases; but the more I see of Formosan usages and customs, the more I realize how extremely inappropriate many of my decisions have been, and this grieves me sadly[29].

So that, the administrative mediation, not dissimilarly to what happened in other colonial experiences, appeared to be employed as an instrument of social control[30]: lowering the social tension with the new colonial power, bridging with the locals' legal tradition, filtering local customs at the light of the specific interests of Japanese rulers[31].

Nevertheless, the role of mediator was pretty far from the common imagine of a person who merely tries to persuade the parties involved to settle the dispute voluntarily:

28. Takekoshi Yosaburo (1996), p. 193.

29. Takekoshi Yosaburo (1996), p. 192.

30. M. Chanock (1985); E. Capulong (2012). Lin Yun–Hsien Diana (2011), p. 212: « Since traditional Chinese legal culture was so deeply rooted in the minds of the Han Chinese populace, the preservation of certain customs helped to uphold the legitimacy of the Japanese rule and reduced resistance to it from the ruled class ». At this regard, from a political history perspective, it is extremely interesting the working hypothesis, formulated by Wakabayashi Masahiro, who assessed political negotiation and interests' mediation between the Japanese rulers and the Taiwanese upper class as *an indispensable expedient in order to maintain the power*, see Wakabayashi Masahiro (2006), pp. 19–36.

31. Wang Tay–sheng (2002), p. 554: « Civil and commercial matters involving only Taiwanese were to be regulated by the *old Taiwanese custom* influenced by Chinese legal traditions. However, these old customs were likely modified by Japanese jurists with the training of Western jurisprudence when they were accepted as *customary law*. Moreover, some special civil statutes further superseded customary laws ».

> The mediator, [...], who was a general administrative official without any professional training, frequently coerced the parties to accede to his official authority and agree with his decision of the disputes [...][32].

Thus, it is no wonder that the majority of mediation cases reached the compromise: the administrative mediator exercised the power of adjudication without the application of positive civil law.

However, statistics from 1920s onward about the access to justice in Taiwan reveal not only how the importance of administrative mediation in colonial Taiwan must not be exaggerated[33]; but also that the attitude of the Taiwanese toward litigation over administrative mediation[34] became gradually significant and even prevalent.

Reasons of such development towards the increasing of litigation could be found in several factors from the process of gradual urbanization that lead to the lost of *social foundation values* of the informal machinery of mediation, to a better founded and structured judicial systems with the establishment of district courts and well trained judges, that surely contributed to the increasing of familiarity with the Western style procedure and legal categories.

> The more Taiwanese who successfully employed the court to protect their interests, the more Taiwanese brought suits to modern courts. A person who observes that in many instances other people have, without much difficulty, acquired benefits by filling proceeding in court will also be willing to resort to the courts when he or she is involved in a dispute[35].

32. Wang Tay–Sheng (2000), p. 90. See also Wang Tay–Sheng (2002), p. 557.

33. See in particular data (period 1897–1942) on the hortatory suits, the objected hortatory suits, the civil lawsuits in court and administrative mediation cases reported by Wang Tay–Sheng (2000), pp. 92–93. Nevertheless, see for the opposite conclusion M. Moser (1982), p. 29. Lin Yun–Hsien Diana (2011), p. 201: « [...] there were also other reasons which served to discourage people from accessing the courts. From their own local perspective, Taiwanese worried about Japanese officials' unfamiliarity with native languages and customs; while from the viewpoint of the Japanese colonial authorities, they were reluctant to increase their monetary investment into the judicial system of the colony and therefore sought to promote mediation as a means of reducing the caseload of the courts ».

34. Wang Tay–Sheng (2000), p. 91: « In the first half of Japanese rule, the administrative mediation was prevalent: because the Taiwanese were not familiar with the Western style procedure in the courts and because the mediation was much more cheaper than the formal dispute resolution. Nevertheless, in the last half of Japanese rule the Courts' summons became dominant ».

35. Wang Tay–Sheng (2000), p. 98.

4. Taiwanese mediation today at the crossroad between spontaneous and coercive harmony

Over the past few decades, the Taiwanese judiciary has suffered — not dissimilarly from many countries in the world — an increase of litigation[36].

Furthermore, the boost of complexity of the juridical relations, due to the profound process of industrialization of the country (specially since 1960s), co–determined a deluge of judicial controversies[37].

The system tried to decrease the burden on courts' overflowing turning to alternative dispute resolution methods and providing for an articulated system of mediation mechanisms.

Two kind of mediation do exist in Taiwan.

a. The first one is a in–court mediation, a form of judicial mandatory mediation, that does mean that for the cases ordained by the Civil Procedure Code is obligatory to undergo mediation before proceeding to litigation.

Originally provided only for small value claims, the range of civil disputes subjected to mandatory mediation were gradually broadened, including a variety of cases from neighbourhood and real property controversies to traffic accident and medical treatment ones[38].

36. Wang Tay–Sheng (2002), p. 598: « During the KMT period, the number of lawsuits in courts continued to grow, and the effect of the Western–style positive law on people's behaviour was stronger than before. In the face of the urbanization of Taiwan, when a dispute occurs, the parties often have difficulty in finding a well–respected mediator [. . .] ».

37. At this respect, with particular reference to the Korean system, see Kwon Youngjoon (2010), p. 1: « In the past, based on the Confucian heritage, a great number of disputes were settled by *de facto*, informal mediators like elder members of the community or family without making their way to the courts. Yet, with western cultures and thoughts gradually gaining ground in Korean society and a modern legal system standing firm as a central mechanism of dispute resolution, more and more disputes are resolved by law, instead of informal reconciliation ». See also Blomgren Bingham L. *et al.* (2007), pp. 381–2.

38. Taiwan Civil Procedure Code, art. 403: « Except in cases provided in the subparagraphs of the first paragraph of Article 406, the following matters shall be subject to mediation by the court before the relevant action is initiated: 1. Disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property; 2. Disputes arising from the determination of boundaries or demarcation of real property; 3. Disputes among co–owners of real property arising from the management, disposition, or partition of a real property held in undivided condition; 4. Disputes arising from the management of a building or of a common part thereof among the owners of the dividedly–shared title or persons using the building; 5. Disputes arising from an increment or reduction/exemption of the rental of real property; 6. Disputes arising from the determination of the term, scope and rental of a superficies; 7. Disputes arising from a traffic accident or medical treatment; 8. Disputes arising from an employment contract between an employer and an employee; 9. Disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator; 10. Disputes arising from proprietary rights between spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house; 11. Other disputes arising from proprietary rights where the price or value of the object in dispute is less than NTD 100, 000. The Judicial Yuan may, where necessary,

The pre–trial court mediation is not usually conducted directly by the judge but by a committee of three mediators appointed by him, nevertheless he is allowed to conduct personally the mediation where he considers it appropriate to do so[39], proposing — if the case — a resolution on its own initiative[40]. Furthermore, the judge has the authority to summon the parties, who can be fined if they fail to appear at mediation session without just cause[41].

The place of the session is usually the courtroom, although the judge can permit to conduct the mediation proceeding at another appropriate place suggested by the mediator[42]. Mediation « shall be conducted peacefully and sincerely » and « (a)n appropriate proposal should be recommended with a view to a fair and amicable resolution acceptable to the parties »[43].

A successful mediation has the same effect of a settlement in litigation[44], while in case of an unsuccessful mediation, after both parties have appeared at the mediation session[45], the judicial litigation will take place.

Having said that, statistics have proven the modest impact of the mandatory mediation in respect to the adjudicative proceedings: although the law on mandatory mediation has determined an increasing of the number of sustained mediations from almost 6274 (successfully rate around 15% of total) in 2001 to 30.000 in 2010 (successfully rate almost 50% of total)[46]; however, the number of lawsuits handled by Courts are far higher, amounting to 2.246.271 million cases in 2010[47].

In 2013, for example, the number of successful mediations (amounting to 101.579) does represent barely 4, 2 % of the total amount of procedures for

order the amount provided in the eleventh subparagraph of the preceding paragraph to be reduced to NTD 50, 000 or increased to NTD 150, 000 ».

39. Taiwan Civil Procedure Code, art. 406–1.

40. Taiwan Civil Procedure Code, art. 417. See also art. 415–1.

41. Taiwan Civil Procedure Code, art. 409: « In cases where a party has failed to appear at the mediation session without just cause, the court may by a ruling impose a fine not exceeding NTD 30, 000 on such party. The same principle shall apply even if the agent of a party has appeared but the party disobeys the order provided in the preceding article without giving a justifiable reason. An appeal may be taken from the ruling provided in the preceding paragraph; the execution of the ruling shall be stayed pending such appeal ».

42. Taiwan Civil Procedure Code, art. 410.

43. Taiwan Civil Procedure Code, art. 414.

44. Taiwan Civil Procedure Code, art. 416.

45. Taiwan Civil Procedure Code, art. 419. See also art. 420.

46. See State of Civil Mediation Cases Terminated in the First Instance by the District Courts — by Year (2001–2010), with reference to the *ratio* of the number of successful mediation cases to the number of successful and unsuccessful mediation cases, available at *www.judicial.gov.tw/juds/year99/09/027.pdf*.

47. See Procedures for Civil Cases Terminated by the District courts, available at *www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07*.

the civil cases terminated by the district courts (amounting to 2.405.047)[48].

Similarly, the recent statistic data (January 2014) regarding the state of filings and dispositions of debt discharge civil cases by the district courts[49], reveals that on the total amount of cases lodged (4.651), only 41 are qualified as mediation sustained, less than 1% of the total (0, 88%)[50].

Maybe the historical memory of traditional didactic mediation, as well as of the Japanese administrative mediation, still haunts the Taiwanese public, fearing of being coerced to agree during the mediation process; or maybe and more simply, the court are not regarded as the most appropriate place for mediation. A sociological analysis would reveal more information and insights at this regard, nevertheless it does remain the modest impact of mandatory mediation proven by official statistics.

b. The second kind of mediation is managed *outside* the court and it is an entirely voluntary process. Originally established during the Martial Law[51], several times emended until 2009[52], the Township and County–Administered City Mediation has in charge civil and criminal case as well[53]. Mediators are appointed by the mayor of township and county–administered city « from the men of eminent fairness, within the administrative district, who have legal knowledge or other expertise and good reputation »[54].

Mediation has to be iniziated with the jointly application of the parties with a written or verbal statement to the mediation committee[55]. There is not any authority to summon the parties who can fail to appear at the mediation session also without just causes: in this case the mediation shall be deemed unsuccessful[56].

48. See Procedures for Civil Cases Terminated by the District courts, available at *www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07*.

49. See State of Filings and Dispositions of Debt Discharge Civil Cases by the District Courts, available at *www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07*.

50. I–Hsun Chou (2008), p. 50: « These figures suggest that, over time, Taiwanese are less willing to settle either during court–connected mediation or during trial. If the Taiwanese disputants are uncooperative with the mediators and resist reaching settlement during the mediation, the mandatory mediation regime would not be useful in cutting down the number of cases proceeding to trial. Observing the low settlement rate during mediation, more and more Taiwanese scholars began to question the legitimacy of the mandatory mediation regime. The first issue is whether the mandatory mediation regime is an appropriate answer to the court docket problem. The second issue is whether the Taiwanese public always prefers mediation over trial. A third issue is whether even if the Taiwanese disputants do prefer mediation over trial, the court should replicate the mediation process in courts ».

51. The first Statute for County Mediation was promulgated in 1955.

52. The Township and County–Administered City Mediation Act, 30 December 2009.

53. The Township and County–Administered City Mediation Act, art. 1.

54. The Township and County–Administered City Mediation Act, art. 3. See also art. 4 with regard to the situations for which it is not possible to be qualified as the member of the committee.

55. The Township and County–Administered City Mediation Act, artt. 10–11.

56. The Township and County–Administered City Mediation Act, art. 20.

Usually the mediation sessions take place in the city hall of townships or county–administered cities and are not public[57]:

> The members (of mediation committee) shall conduct the mediation peacefully and sincerely, provide appropriate advices to the parties, and propose a fair and reasonable solution based on the opinions from the persons, sitting in on the meeting of the mediation, helping with the party, and working in coordination with the members, for seeking the amicable result acceptable to the parties[58].

When the mediation achieves success, the mediation committee shall conduct the mediation agreement that has no legal enforceability in itself: within ten days as the mediation has been accomplished, the mediation agreement shall be submitted to the court within its jurisdiction for further review[59] and for the formal approval in force of which the mediation agreement will have the same effect as a binding judgment under the civil litigation[60].

Looking — through public statistics — at the efficacy and efficiency of the mediation scheme provided by The Township and County–Administered City Mediation Act, some data deserve attention and consideration.

Although also in this case the total amount of mediation cases approved does still result extremely lower than the cases yearly handled by the Courts, nevertheless it appears relevant underlining the extremely high rate of success of this kind of mediation: in 2010, the percentage of cases approved by the Courts (102.848) among cases terminated (106.899) amounted to 96, 21%[61]; yet in 2013, according to the data provided by the Ministry of Interior (sources: Counties and Cities)[62], on the total of 138.785 mediation proceedings, 108.060 were settled with a percentage of 77, 86%. Interestingly, the analysis of the comparison between civil and criminal mediation statistics reveals that not only the total amount of mediations — both settled and not — regarding civil matters (50.371) did result inferior to the that one regarding criminal matters (88.414); but that, more significantly, the percentage of success of these last one (81, 89 %) surpassed the percentage of success of the civil mediations (70, 78%).

Many could be the explanations of this relative success: from the total absence of expenses for the parties who could induce them to give it a

57. The Township and County–Administered City Mediation Act, art. 19.

58. The Township and County–Administered City Mediation Act, art. 22.

59. The Township and County–Administered City Mediation Act, art. 26.

60. The Township and County–Administered City Mediation Act, art. 27.

61. See State of Examination and verification of Township/Town Mediation Cases Handled by the District Courts — by Year, 2001–2010, available at *www.judicial.gov.tw/juds/year99/09/048.pdf*.

62. Statistical Yearbook of Interior, available at *sowf.moi.gov.tw/stat/year/elist.htm*.

try first before requesting a trial[63], to a closer proximity to the traditional Taiwanese custom, sometimes even an obsolete custom[64].

5. Concluding remarks: from the myth to the reality

At this stage, an attempt shall be made to point out certain basic factors which appears to me of primary significance in assessing mediation in Taiwan and inducing some reason of reflections into the pro–mediation mainstream.

1. The relevance of mediation regimes — and overall of the underlying ideology of harmony — has to be pondered over at the light of the modernization of Taiwan.

Several factors lead me to this conclusion.

First of all, the process of urbanization, begun under the Japanese rule and progressively evolved since 1960 onward, has profoundly changed the societal community ties, stretching and blurring them in the sense of a more pronounced individualism: this, if not compromised, modified to some extent the traditional and foundational values of social harmony.

Secondly, Taiwanese history shows that the more the system of courts is efficient, independent and fair, the more people prefer adjudication over mediation, and this not — it is a my opinion — because they became litigious or have *contra*–social harmony mood, but simply because the progressive marketization and modernization of the economy seem to find into the formal justice of the courts' system a more appropriate and developed environment to protect interests and uphold rights than mediation proceedings.

Analogous valuations have been argued with regard to the mainland China, in which the role of the courts has greatly expanded in the last decades and citizens express a « widespread belief that courts are more effective and fair than pre–existing alternatives, such as mediation »[65].

63. The Township and County–Administered City Mediation Act, art. 3 and 34 (according to which the expenses for the mediation committee shall be compiled by townships and county–administered cities).

64. At this regard, as reported by Chou I–Hsun (2008), pp. 57–58: « [. . .] in the traditional Taiwanese society, there is a custom that sons get inheritance, and daughters get dowry. This custom is in conflict with the legal intestacy rule which provides that all heirs should have an equal share of heritance. The mediators at the Neighborhood Mediation Center sometimes apply the traditional custom to the inheritance disputes where a married daughter tries to claim her share of inheritance. In some cases it is clear that a married daughter receives an amount of dowry with an implicit understanding that the dowry is her share of the inheritance (based on the amount of dowry, the type of estate, etc.) ».

65. Pierre Landry F. *et al.* (2010), pp. 57–58.

Despite mediation has been long recognized as a successful dispute resolution mechanism representing the value of traditional Confucianism, however

> the importance of mediation may inevitably be reduced to give way to judicial efficiency and dispute settlement in strict accordance with the law when the legal infrastructure has significantly improved, with the rule of law being the goal of the national reorientation and professionalism as the direction of modernization of the judicial system[66].

2. The development of legal systems in the direction either of a more organized and reliable access to justice through the courts, either through a more accessible, understandable and effective apparatus of laws, not only — as argued above — *dampen the enthusiasm* toward mediation, but also it seems to lead toward a process of its formalization and institutionalization.

In Taiwan, the institution of administered mediation entailed a sort of ghettoization of the former mechanisms of informal mediation and, on the other side, the in–court mandatory mediation seems to be a tentative to monopolize the mediation approach.

Analogously, it may be possible to say about mediation in China with the post–revolutionary process of cadre–ization of the mediation personnel that brought changes in the way mediation worked:

> When matters of state policy (or policy) were involved, the mediators were in truth more administrative resolution (tiaochu) employing coercive methods than simply mediated compromises (tiaojie)[67].

The evolution from an informal and traditional societal mediation to a court–based mediation, not only — it seems to me — has involved a less degree of confidentiality (as it was proven by the success of township and county–administered city mediation), but also and even worst has provoked a process of *dehumanization* of mediation, in the sense of its progressive detaching from the foundational societal values that legitimated it in front

66. Yu Guanghua (ed.) (2011), p. 259. See also Randall P. Peerenboom, He Xin (2011), p. 339: « [. . .] There were many reasons for the decline. Most fundamentally, mediation came to be seen as inconsistent with the rule of law People's mediators often lacked legal training. Even in the judicial mediation, many cases were decided based on factors other than law, with judges pressuring parties to accept settlements, thus depriving them of their legal rights. In addition, as noted, the increased professionalization of judges and lawyers and the streamlining of the litigation process, made litigation more attractive ».

67. P.C. Huang (2010), p. 39. Ibidem, at p. 48: « In the triad of qing, li, and fa, its primary enphasis was on state law–policy (fa or guofa), and only secondarily on human relations (qing, or renqing), and moral right and wrong (li or daoli), unlike the traditional system, which made *renqing* primary, and *guofa* and *daoli* secondary »; Ibidem, at p. 218.

of the community and justified its existence and persistence as conflicts resolution mechanism.

3. It is not news that the Maoist propaganda put enormous emphasis on mediatory justice, on uniqueness of mediation in China, on the superiority of harmony–based Chinese justice over adversial Western justice[68]. It is maybe arguable that the western approach to the mediation regulatory strategy still be deeply conditioned by the Maoist ideology of harmony and pushed on by evocative slogans such as: « mediation first, litigation second »[69].

The hypothesis becomes more than a suspect after the reading of some opinions on Chinese mediation written by Western observers in '80. Paradigmatic seem to me the words of Kenneth Cloke:

> In mediation also, a loving kindness, a care for others' feelings, a sense of refusal to quit or give up on anyone–all these were abundant in China, producing profoundly effective and popularly accepted social intervention. The values of social cooperation, of individual responsibility for social improvement, of denigrating the selfish advancement of one at the expense of all, of unity and harmony, of mutual respect and trust were not just words but real elements in China's dispute resolution system. At a time when values and ethics in the United States seem in eclipse, when hypocrisy and pretense appear endemic, when me first [...] values defeat the sense that each of us is responsible not only for our own lives but for those of others–this sense that China has created something different is intriguing. The direction is right, the sentiment is positive, and the result is one we might do well to examine with an eye to how we might encourage similar processes here[70].

With the due respect, maybe the Author did not pay enough attention to

68. P.C. Huang (2010), p. 221: « [...] Chinese figures on mediation are greatly exaggerated. In the Mao Zedong era, mediation was supposed to constitute the main approach of the entire civil legal system, and the courts tried their best to categorize all but the most strictly and narrowly adjudicatory cases as mediations in order to maximise the proportion of supposedly mediated cases ». A. Halegua (2005), p. 716: « [...] unlike mediation in traditional China, the People Mediation Committee formally established in 1954 were not intended to simply preserve harmony by encouraging mutual yielding and compromise. Rather, Maoists saw mediation as "essentially a political endeavour ».

69. S.B. Lubman (1999), p. 218–219: « The latter (the mediation committees) were invariably exhibited as embodiments of a uniquely Chinese Communist approach to handling minor disputes. [...] After the Cultural Revolution ended, the Ministry of Justice, re–established in 1979, not only revived mediation but emphasized that it was to be the primary avenue for resolving civil disputes. The formulation of that policy has changed somewhat over the years. Before 1982, the policy was expressed as mediation first, litigation second [...] ». With regard to the modern rhetoric of mediation in Western countries Laura Nader (2002, p. 140) noted: « the rhetoric claimed that ADR was associated with peace; judicial processes were associated with war; the law and rules of law were complicated and created uncertainties that stimulated feeling of anxiety; law was confrontational, whereas ADR gently and sensitively healed human conflicts and produced only winners and modern, civilized citizens ».

70. K. Cloke (1987), p. 79.

the Chinese political situation at that time, and so to the context in which this « unity and harmony », « mutual respect and trust » took place.

However, it remains the fact that this kind of *mythological* approach about the superiority and the undisputable benefits of mediation over adjudication still seems to pervade the public discourse and the scholars' reconstructions.

If it is true, it remains to wonder what is so wrong with adjudication in which rights come first and compromise second?[71]

References

Adrade T., (2008), *How Taiwan became Chinese*, New York, Columbia University Press;

Allee M., (1987), *Law and local society in late Imperial China: Tan–Shui subprefecture and Hsin–Chu County, Taiwan, 1840–1895*, Phd Dissertation, University of Pennsylvania;

Blomgren Bingham L., *et al.*, (2007), *Participatory governance in South Korea: legal infrastructure, economic development, and dispute resolution*, in « Pacific McGeorge Global Business and Development Law Journal », n. 19, pp. 375–400;

Cappelletti M., Gordley J., Johnson E., (1975) *Toward equal justice: A comparative study of legal aid in modern societies*, Milano, Giuffrè / Oceana;

Cappelletti M., (1979), *Accesso alla giustizia: conclusione di un progetto di ricerca giuridico–sociologica*, in « Foro Italiano », n. 2, pp. 54–59;

——, (1982), *Accesso alla giustizia come programma di riforma e come metodo di pensiero*, in « Rivista di diritto processuale », n. 2, pp. 234–245;

Chen A.H.Y., (2003), *Mediation, litigation and justice: Confucian reflections in a modern liberal society*, in: Daniel A. Bell, Hahm Chaibong, *Confucianism for the modern world*, Cambridge, Cambridge University Press, pp. 257–287;

Chen J., (2008), *Chinese law: context and transformation*, London, Martinus Nijhoff Publishers;

Chen T–F., (2003), *The rule of law in Taiwan — Culture, ideology and social change*, in Stephen Hsu (ed.), *Understanding China's legal system*, New York University Press, New York, pp. 107–122;

Capulong E., (2012), *Mediation and neo–colonial legal order: access to justice and self–determination in the Philippines*, in « Ohio State Journal on Dispute Resolution », n. 27, pp. 641–681

71. L. Nader (2002), p. 151: « Nineteenth–century legal scholars considered the existence of law courts to be a sign of a people's social complexity and modernity. [. . .] The popularity of ADR as policy in the 1980s and 1990s signified a paradoxical switch from the more civilized processes of dispute resolution to *softer*, non–adversarial means such as mediation and negotiation ».

Chanock M., (1985), *Law, custom and social order: the colonial experience in Malawi and Zambia*, Cambridge, Cambridge University Press;

Chou I.–H., (2008), *Mandatory Divorce Mediation in Taiwan: legal regime, judicial attitudes and public opinions*, PhD Dissertation, University of Chicago;

Ch'u T.–T., (1988), *Local government in China under the Ch'ing*, Cambridge, Harvard University Press;

Cloke K., (1987), *Politics and values in mediation. The Chinese Experience*, in: J.A. Lemmon (ed.), *Developing family mediation*, Mediation Quarterly, no. 17, San Francisco, Jossey–Bass, pp. 69–82;

Cohen A.J., (1967) *Chinese Mediation on the eve of modernization*, in « Journal of Asian and African Studies », n. 2, pp. 1–18;

Confucius, *The Analects*, in the translation of B. Watson (2007), *The Analects of Confucius* (translation), New York, Columbia University Press;

Croissant A., Kuehn D., Lorenz P., Chambers P., (2013), *Democratization and civilian control in Asia*, Palgrave, New York, Palgrave;

Galinou E., (2003–2004), *Legal Borrowing: Why Some Legal Transplants Take Root and Others Fail,* in « Comparative Labour Law & Policy Journal », n 25, pp. 391–422;

Gardner D., (2003), *Zhu Xi's Reading of the Analects: Canon, Commentary and the Classical Tradition*, New York, Columbia University Press;

Hahm C., (2003), *Law, Culture and the Politics of Confucianism,* in « Columbia Journal of Asian Law », n. 16, pp. 253–285;

Halegua A., (2005), *Reforming the people's mediation system in urban China*, in « Hong Kong Law Journal », pp. 715–750;

Ho P.–T., (1967), *The Significance of the Ch'ing Period in Chinese History*, in « The Journal of Asian Studies », n. 26, pp. 189–195;

Huang P., (1996), *Civil justice in China: representation and practice in the Qing*, Stanford, Stanford University Press;

Flanagan F., (2011), *Confucius, the Analects and Western Education*, London, Continuum;

Halegua A., (2005), *Reforming the people's mediation system in urban China*, in « Hong Kong Law Journal », pp. 715–750;

Head J.W., (2008), *China's legal soul*, Dirham, Carolina Academic Press, Durham;

Hsiao K–C., (1979), *Compromise in Imperial China*, Seattle, University of Washington Press;

Hsu W–H., (1975), *Chinese colonization of Taiwan,* Phd dissertation, University of Chicago;

Huang P., (1996), *Civil justice in China: representation and practice in the Qing*, Stanford, Stanford University Press;

——, (2010), *Chinese Civil Justice, past and presence*, Lanham, Rowman&Littlefield Publishers;

Kwon Y., (2010), *Litigation in Korea: a general overview of Korean civil procedure*, in: Kuk Cho (ed.), *Litigation in Korea*, Edward Elgar, Cheltenham, 2010, pp. 1–30;

Landry P. *et al.*, (2009), *Introduction: markets, courts, and Leninism*, in « The China Review », n. 9, pp. 1–16;

Lin Y.–H., Diana L., (2011), *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernizatio*n, « East Asia Law Review », n. 6, pp. 191–215;

Lo C.–F., (2006), *The legal culture and system of Taiwan*, Alphen aan den Rijn, Kluwer Law International;

Lubman S., (1967), *Mao and mediation: politics and dispute resolution in Communist China*, in « California Law Review », n. 55, pp. 1284–1359;

——, (1999), *Bird in a Cage — Legal reform in China after Mao*, Stanford, Stanford University Press;

Manthorpe J., (2005), *Forbidden nation: a history of Taiwan*, New York, Palgrave Macmillan;

Merryman J.M., (1969), *The civil law tradition. An introduction to the legal systems of western Europe and Latin America*, Standford, Standford University Press;

Monateri P.G., (2000), *Black Gaius. A quest for the multicultural origins of the western legal tradition*, in « Hastings Law Journal », 51, pp. 479–555;

Moser M., (1982), *Law and social change in a Chinese Community: a case study from rural Taiwan*, New York, Dobbs Ferry;

Nader L., (1990), *Harmony Ideology: justice and control in Mountain Zapotec Village*, Stanford, Standard University Press;

——, (2002), *The life of the law: anthropological projects, Berkeley*, University of California Press;

Nelken D., (2001), *The Meaning of Success in Transnational Legal Transfers,* in « Windsor Yearbook of Access to Justice », n. 19, pp. 349–366;

Orucu E., (2002), *Law as Transposition,* in « International & Comparative Law Quarterly », n. 51, pp. 205–223;

Palmer M., (1987), *The revival of mediation in the People's Republic of China: Extra judicial mediation (1)*, in « Yearbook on socialist legal systems », pp. 219–277;

——, (1989), *The revival of mediation in the People's Republic of China (2): judicial mediation*, in « Yearbook on socialist legal systems », pp. 145–171;

Peerenboom R., He X., (2011), *Dispute Resolution in China: Patterns, Causes and Prognosis*, in « East Asia Law Review », 2009, n. 4, pp. 1–61;

Pissler K., (2012), *Mediation in China: Threat to the rule of law?*, in: Klaus J. Hopt, Felix Steffek, *Mediation: principles and regulation in comparative perspective*, Oxford, Oxford University Press, pp. 960–1010;

Ren X., (1997), *Tradition of the law and law of the tradition*, London, Greenwood Press;

Rubinstein M., (1994), *The Other Taiwan — 1945 to the present*, London, An East Gate Book;

Selover T., (2005), *Hsieh Liang–tso and the Analects of Confucius: Humane learning as a religious quest*, New York, Oxford University Press;

Takekoshi Y., (1907), *Japanese Rule in Formosa*, London–New York–Calcutta, Longmans, Green and Co., reprinted by SMC Publishing Inc. (1996);

Wachman A., (1994), *Taiwan — National identity and democratization*, London, An East Gate Book;

Wakabayashi M., (2006), *A perspective on studies of Taiwanese political history*, in: Liao Ping–Hui, David Der–Wei Wang (eds.), *Taiwan under Japanese colonial rule, 1895–1945*, New York, Columbia University Press, pp. 19–36;

Wang T.–S., (2000 a), *The prevalence of traditional Chinese legal civilization*, in « Yuedan Law Journal », n. 63, pp. 128–135;

——, (2000 b), *Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945 — The reception of western law*, Seattle, University of Washington Press;

——, (2002), *The legal development of Taiwan in the 20th century: toward a liberal and democratic country*, « Pacific Rim Law & Policy Journal », n. 11, pp. 531–559;

Watson A., (1976), *Legal Transplants and Law Reform,* in « Law Quarterly Review », n. 92, pp. 79–84.

——, (1978), *Comparative law and legal change,* in « Cambridge Law Journal », n. 37, pp. 313–336.

——, (1983), *Legal change: sources of law and legal culture,* in « University of Pennsylvania Law Review », pp. 1121–1157;

——, (1995), *From legal transplants to legal formants,* in « Administrative Journal of Comparative Law », n. 43, pp. 469–476;

Yu G., (ed.) (2011), *The development of the Chinese Legal system*, London, Routledge.