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Comparative Study on Guarantee for the Efficiency of Administrative Litigation Mediation

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Abstract

Currently, the administrative litigation mediation system lacks an efficiency guarantee mechanism, which directly affects the efficiency of administrative dispute mediation. In light of the systemic pursuit for a perfect match between mechanism establishment and system function, the administrative litigation mediation system of our country demands for a strong efficiency guarantee mechanism. For this purpose, we may learn from relevant systems and practical experiences of foreign countries and Taiwan, China, plus our own norm system and real practice to set up a practical guarantee mechanism of the administrative litigation mediation efficiency so as to tackle and eliminate negative phenomena such as difficult inception, lengthy mediation and hard solution, etc. In so doing, we can regulate such procedures as "initiating the parties involved's rights and capacities", "obligations to mediate among the parties involved", "the mediation-trial coordination process", "the times of mediation applicable for one single case", etc., which will effectively fill up the loopholes of the existing norm system.

Key words: Administrative litigation mediation; Mediation efficiency guarantee; Resolution to administrative disputes; Comparative study

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1. PRESENTATION OF THE ISSUE

The so-called administrative litigation mediation refers to a non-trial system under which the judge presides over an administrative litigation process carried out by the two parties involved who negotiate over the rights and obligations in dispute according to law in a wish to solve the administrative dispute. The proviso clause in Article 60 in Administrative Procedures 2015 establishes a limited mediation system applicable for administrative litigation. Compared to civil litigation mediation, the emphasis of administrative litigation mediation is on the role of the judge to promote the development of litigation mediation activities according to his duty and power. The mainstream opinion believes that even when the two parties involved have discretion, the parties shall reach reconciliation through their free-will consensus under judiciary oversight (Zhou, 2008, pp.32-39) and the judge assumes an active role in the mediation process and can take necessary measures to prevent stagnation of the mediation activities so as to facilitate efficient resolution of administrative disputes. (Yang, 2008, pp.163-171)

However, big data shows that "the number of second-trial administrative cases in 2016 rose 34.43% compared to that of 2015 and rose 222.09% compared to that of 2012 year on year in China". (Cheng, 2017, pp.17-26) In addition, the ratio of resolution of administrative disputes in first trials between 2012 and 2016 declined gradually, among which the ratio of resolution of administrative disputes in first trials in 2016 declined 7% compared to that of the previous year and declined 21% compared to that of 2012. At meantime, the ratio of appeals to first trials of administrative cases rose gradually, among which the ratio of appeals to administrative cases in 2016 rose 7% compared to that of the previous years and rose 21% compared to that of 2012 year on year." (Cheng, 2017, pp. 17-26) These data truly reveals the status quo of resolution of administrative disputes in China which obviously fails to reach the objective of administrative litigation resolving administrative disputes in China. These data reveals the fact that people have an enhanced awareness

of defending their rights on one hand, and also reflects the fact that China's administrative litigation practice still has weaknesses on the other hand. Although the revised Administrative Procedures expand the remedial paths for the parties involved, especially the proviso clause[1] in Article 60 that is a breakthrough of Article 50 "mediation is not applicable for administrative litigation"[2] in Administrative Procedures 1989, there is still a not-so-small gap between the creation and establishment of the administrative litigation mediation system at the lawmaking level and the application of the administrative litigation mediation system "fairly, fully, and efficiently" in practice.

The proviso clause in Article 60 in Administrative Procedures 2015 establishes the limited mediation system for administrative litigation, responding to the widespread discussion over the creation and establishment of the administrative litigation mediation system from such perspectives as "the supplementary nature of trial and mediation" (Bai, 2006, pp.160-167), "the mediatable nature of some administrative behaviors" (Zou & Jia, 2012, pp.26-31), "the harmful nature of superficial withdrawal and essential mediation"(Huang, 2007, pp.43-49), and "the limits of the scope of administrative litigation mediation" (Fang, 2012, pp.62-67), etc., in the academic community at the lawmaking level. However, there is a long way to go between the amendment to a law and the practice of the amended law. How to make the mediation system a real helper to the resolution of administrative disputes is a question that must be answered so as to boost the efficiency of resolving administrative disputes. On one hand, efficiency shall not be enhanced at the expense of fairness and justice, and administrative litigation mediation must be carried out under the precondition of legal order and fairness, otherwise the legal institution will lose ground. On the other hand, the administrative litigation mediation system becomes empty to a large extent in the real environment of insufficient judiciary resources, if high efficiency of mediation is not achieved on the basis of justice. Obviously, it is imminent to establish a strong system guaranteeing the efficiency of administrative litigation.

Although the mediation system is widely used in civil litigation in China, it is still at the entry level in administrative litigation, and the lack of well-grounded experiences is evident at both the lawmaking level and the practical level. By comparison, some foreign countries and Taiwan, China, have been using the mediation method to resolve administrative disputes at both the institutional level and the practical level, which can provide pluralistic references for us. By studying the situations for which mediation is applicable in the administrative dispute-resolving process in Germany, Japan, USA, and Taiwan, China, we can find out that although these countries and regions have different dispute resolution mechanisms, they have all put in place efficiency guarantee mechanisms which are similar in function. If we could learn from their experiences in combination with our own conditions, it will be helpful to boost the efficiency of administrative dispute resolution in China.

2. STATUS QUO AND WEAKNESS OF CHINA'S ADMINISTRATIVE LITIGATION MEDIATION SYSTEM

2.1 China Has Established the Principle of Limited Mediation at the Lawmaking Level

Currently, China has the principle of limited application of administrative litigation mediation well in place. First, the proviso clause in Article 60 in Administrative Procedures 2015 explicitly establishes the limited mediation system as a fundamental component. A few years later, the Supreme People's Court of China made further explanation of the scope of administrative cases for which mediation is applicable in *Explanations of Administrative Procedures of the People's Republic of China* published in 2018. By then, China has established the limited mediation system at the lawmaking level. However, the settlement of such a system is not a smooth process but consumes the efforts of legal professionals for decades in China, from "mediation not applicable for administrative litigation" to "limited application of mediation for administrative litigation".

Article 50 in the previous Administrative Procedures 1989 explicitly stipulates the principle that "mediation is not applicable for administrative litigation" and Article 60 in the newly amended Administrative Procedures 2015 explicitly states the principle that "limited application of mediation for administrative litigation". During the period between the two articles, mediation restriction at the norm level and superficial withdrawal and essential mediation at the practical level coexisted for a long time. (Xie, 2010, pp.37-43) On one hand, legal norms ban the use of mediation explicitly while a great deal of superficial withdrawal and essential mediation exist in practice, which is at conflict with the legal norms. On the other hand, the two parties involved may find resolution to disputes more quickly through mediation, which saves judicial resources and does not impair fairness and justice, evidently beneficial for social stability and conducive to the revision of old norms.

[1] Article 60 in Administrative Procedures of the People's Republic of China 2015: mediation is applicable for administrative cases tried in people's courts. However, mediation is applicable for cases of administrative compensation and cases in which the administrative authority exercises discretion bestowed on by laws and rules. Mediation should be carried out under the principles of free will and lawfulness and shall not harm national interest, social and public interest and the interest of other people.

[2] Article 50 in Administrative Procedures of the People's Republic of China 1989: mediation is not applicable for administrative cases tried in people's courts.

As the rule of law in China develops, the number of administrative litigation rises. In view of this judicial fact, the Supreme Court has published a series of legal explanations[3] that encourage the use of mediation to resolve administrative disputes since 2007, sounding the horn of limited mediation in administrative litigation. Furthermore, the supreme court explicitly proposed to use mediation, reconciliation and coordination in administrative litigation cases in *Various opinions regarding further honoring the working principle of mediation first and mediation and trial combination* published in 2010, and further explicitly stated the idea of establishing an administrative litigation mediation system so as to set up an effective dispute resolution system featuring mediation and trial combination, which marked the arrival of the "big mediation" era at the norm level. (Su, 2010, pp.5-16)

The legal explanations issued by the supreme court are evidently at conflict with the statement regarding whether mediation is applicable for administrative litigation in Administrative Procedures 1989, resulting in the situation that the lower law drives the upper law in China's administrative litigation norm system. It is until the promulgation and implementation of the newly revised Administrative Procedures 2015 that China's administrative litigation system becomes a fully connected chain. By then, the improper phenomenon that "mediation is not applicable for administrative litigation" and "superficial withdrawal and essential mediation" (Huang, 2010, pp.36-47) in practice coexist for a long time and the conflict between legal explanations and high-level lawmaking are mitigated to a large extent.

Currently, Article 60 in Administrative Procedures of China, in the proviso form, explicitly incorporate cases involving "administrative compensation and the exercise of administrative discretion" into the scope of administrative cases for which mediation is applicable, thus establishes the new principle of limited mediation in administrative litigation, which not only mitigates the imbalance of practice and lawmaking and the conflict between the higher law and the lower law in administrative litigation and provides more options for resolution to administrative disputes, marking optimization of China's administrative litigation system.

[3] *Various opinions on providing judicial protection to the creation of a socialist harmonious society* published in 2007 explicitly states the idea of exploring and establishing an administrative litigation reconciliation system; *Various opinions on further playing the active role of litigation mediation in building a socialist harmonious society* supports the principles and procedures of civil litigation mediation to be applied in administrative cases so that the parties involved can reach reconciliation; Supreme People's Court published *Regulations on various issues relating to administrative litigation withdrawal* in 2008 which encourages the parties involved to solve the dispute through free-will consensus and withdraw the lawsuit on the basis of reconciliation; in addition, *Methods of assessing the administrative trial working performance (trial)* explicitly engages the mediation ratio with the working performance to encourage judges to use mediation to solve administrative disputes.

2.2 The Administrative Litigation Mediation System Lacks An Efficiency Guarantee Mechanism

Due to the principle that mediation is not applicable for administrative litigation in China in place over a long time period, the country's administrative litigation legal norm system lacks a normative architecture fit for the administrative litigation mediation system. Furthermore, the "lawsuit withdrawal + mediation" method under the cover of superficial withdrawal and essential mediation in past practice obviously violates the basic requirement for legal order in our country and is unable to provide benefits to the current administrative litigation mediation system of China, resulting in the situation that the country's administrative litigation mediation system is still in the trial and error phase. There are multiple problems awaiting resolution in this phase of China's young "administrative litigation mediation system", among which the most prominent is that our country's administrative litigation mediation system lacks a supervision and stimulation mechanism, making the system extremely weak in terms of efficiency guarantee.

First, there is the problem that it is difficult to initiate administrative litigation mediation in China. On one hand, the judge does not have the duty and power to independently initiate mediation in administrative litigation cases, which means the judge does not assume the leading role in the initiation procedure. To initiate litigation mediation, the judge shall make such a proposal and the two parties involved shall grant permission under the precondition that all objective conditions are met, no matter it is in the first trial, second trial, or re-trial. According to Article 84 in *Explanations of Administrative Procedures 2018*, both the presiding judge and the litigation parties involved are parties who have the right to initiate mediation, but neither possesses the qualification to independently initiate the mediation procedure which is initiated either in the "the parties involved's application + court's permission" mode or the "court proposal + the parties involved's permission" mode. Obviously, this is under influence from the civil litigation mediation system and weakens the controllability of initiating the litigation mediation procedure, resulting in unsmooth engagement of administrative litigation trial and mediation, and undermined efficiency of dispute resolution, which is seriously deviant from the lawmaking purpose of encouraging administrative litigation mediation and establishing and optimizing the administrative litigation mediation mechanism. On the other hand, the two parties involved entangle with and stifle each other, making it hard to initiate the administrative litigation mediation system. Although the existing system could guarantee the willingness and lawfulness of mediation to the greatest extent, it is difficult to for the two parties involved to form consensus because of the severe nature of the state-citizen conflict in administrative litigation. Therefore,

full dependence on the "parties involved's application + court's permission" mode or the "court's proposal + the parties involved's permission" mode to initiate administrative litigation mediation is excessively passive when the administrative litigation mediation system was newly established and citizens did not trust the system as an institution, which in the long run nullifies the litigation mediation system. In history, reforms were usually promoted either by reward or incentive or by force. Currently in our country, norms and systems don't have a reward or incentive mechanism, nor do they empower the judges with the duty and power to initiate administrative litigation mediation. As a result, administrative litigation mediation becomes a heterogeneous component of the litigation system and wanders outside the holistic administrative litigation architecture, which makes the parties involved unwilling to accept mediation due to distrust of the system and makes the judges embarrassed as they intend for mediation but cannot do it.

Second, there is the problem of "passive mediation" in the practice of administrative litigation mediation. On one hand, China's current administrative litigation mediation system is mainly based on the free-will consensus of the parties involved and the judge's role is rather passive in the mediation process, and an institutionalized efficiency supervision and guarantee mechanism is not in place yet. As a result, effective rules binding on the parties involved's mediation behaviors are hard to take shape in the administrative litigation mediation process, and passive mediation in the process becomes inevitable. On the other hand, the method of undisclosed mediation is adopted in principle in administrative litigation mediation, leading to the weakness that the party supervising the mediation is not sufficiently diverse which in turn may lead to weakness or even absence of supervision. This not only undermines the efficiency of administrative litigation mediation but also harms the fairness of mediation.

It is evident to see that such efforts as enhancing citizens' understanding of the administrative litigation mediation system, eliminating the rumor of "officials defending officials", strengthening supervision by the two parties involved, and empowering the judge with greater duty and power capacity, have become a compulsory course for the optimization of China's administrative litigation mediation system. China's own experiences and lawmaking practice are not rich enough to tackle these problems. It is necessary to learn from the experiences of foreign countries and Taiwan, China, in order to facilitate the development and consummation of our country's administrative litigation mediation system.

3. EXPERIENCES OF ADMINISTRATIVE LITIGATION MEDIATION IN FOREIGN COUNTRIES AND TAIWAN, CHINA

The complexity of real-world issues and the urgency of problem-solving require the academic community to not focus on research and thinking only. It is indeed necessary that we learn from richly experienced peers in the field of administrative litigation mediation practice. In the legal development process, China is under heavy influence from Germany, Japan, and Taiwan, China, thus making our administrative litigation mediation system comparable to the systems of those countries and regions, which makes it convenient for us to learn from their experiences.

3.1 The Efficiency Guarantee Mechanism for Administrative Litigation Mediation in Germany

In Germany, "administrative litigation mediation is both a litigation action and a public law contract". (Friedhelm, 2003, p.576) German scholar Hartmur Maurer believes that "there are only two kinds of reconciliation that are recognized in the public law. One is simple reconciliation carried out in accordance with Administrative Procedures of Federal Germany which essentially is not administrative litigation reconciliation but administrative reconciliation; the other is court reconciliation or litigation reconciliation reached in accordance with Administrative Court Law of Federal Germany for the purpose of fully or partially solves administrative disputes." (Hartmur, 2000, p.56) Therefore, we can precisely understand the efficiency guarantee mechanism in Germany's administrative litigation mediation system by identifying and differentiating the relevant normative content of Administrative Court Law of Federal Germany (hereinafter referred to as Administrative Court Law).

3.1.1 Administrative Court Law Empowers the Judge With the Duty and Power to Independently Initiate Mediation

Different from the definitive clause "limited application of mediation" in China's Administrative Procedures, Germany's Administrative Court Law not only requires the judge to "actively facilitate reconciliation" but also states in the "preparatory procedure clause" in Article 87[4] that the presiding judge or the report-making judge has the obligation to make the necessary order prior to the verbal trial to ensure the administrative dispute will be resolved in a single verbal trial as much as possible. And in Item 1

[4] Article 87 in *Administrative Court Law of Federal Germany* 1990 (preparatory procedures): 1. the presiding judge or the report-making judge shall make a necessary order before verbal trial to conclude the dispute in a verbal trial procedure as much as possible. He can resort to the following measures: (1) summon the parties involved to talk about the case and the dispute so as to facilitate dispute resolution and reach reconciliation; (2) ask the parties involved to supplement the documentary evidences provided or interpret the documentary evidences and other items that need to be exhibited in the court, especially the judge shall determine the term for clarifying all the doubts; (3) collect documents; (4) order the documentary evidences to be submitted; (5) order the parties to appear in court, Article 95 applicable here; (6) summon the witnesses and appraisers to take part in the verbal trial; (7) ask the administrative authority to rectify procedural or formal flaws in a period of no more than 3 months. As long as the judge trusts his discretional evidences, the supplementation will not postpone litigation conclusion as scheduled.

it proposes "to summon the parties involved to talk about the case and the dispute so as to facilitate reconciliation and settlement of the case". All these measures make Germany's administrative litigation reconciliation system delivers a strong effect of litigation facilitation.

In addition, Article 106 in Administrative Court Law 1990 stipulates[5] "court reconciliation can be reached in a way proposed by the court, the presiding judge or the report-making judge". If the litigation parties reach reconciliation on their own in an administrative lawsuit, they must make written records "in the court" or "in front of a designated or authorized judge". It is evident to see the judge can independently initiate mediation with his duty and power in administrative litigation.

3.1.2 The Parties Involved Have the Right to Mediation Through Free-Will Consensus in Administrative Litigation In Germany

As mentioned above, the Administrative Court Law empowers the judge with the duty and right to independently initiate mediation, but it does not mean the litigation parties are in a fully passive role in administrative litigation. Article 106 in *Administrative Court Law* 1990 stipulates not only the power of the court and the judge but also that the litigation parties have the right to settle the dispute through reconciliation. This clause guarantees the initiative of the litigation parties in administrative lawsuits that the parties involved can pursue reconciliation through legal procedures when they have the right to dispose of the object of action. (Hu,2017,pp.251-265) Although the litigation parties possessing the right to dispose of the object of action must reach final reconciliation in the form of making records in the court, the initiation of mediation efforts is not solely controlled by the judge with his duty and right and the litigation parties have the right to initiate mediation through free-will consensus, which is similar to the current lawmaking status in China. To summarize, the German administrative litigation reconciliation system possesses a dual-element initiation mode, comprised of "the judge with duty and power" and "the parties involved through free-will consensus".[6]

3.1.3 Administrative Litigation Mediation in Germany Does not Come at the Expense of Justice

At the norm level, Germany's administrative litigation reconciliation system does not harm justice in the process of boosting efficiency. Necessary procedural oversight is enhanced in the administrative litigation mediation procedures, especially when it comes to the recognition and confirmation of the reconciliation result. On one hand, the administrative litigation reconciliation system under the Administrative Court Law can be initiated by either the parties involved or the judge, which makes the system extremely practical and largely reduces resistance to mediation and consequently enhances the working efficiency of the administrative litigation mechanism. On the other hand, when the parties involved reach reconciliation under the administrative litigation mediation system, they must comply with procedural requirements that "the parties reach consensus by free will" and "the parties involved shall make written records in the court" or "the parties involved shall make written records in front of a designated or authorized judge". Thus, the litigation parties have greater option regarding whether they should reach reconciliation upon the judge's proposal, and there will be no unfavorable results even if the parties involved do not take the judge's mediation proposal. In addition, the judge must use the method of "disclosing discretional evidences" when the two parties involved are present so that the parties could have a rational understanding of the case and reach reconciliation based on free-will consensus. "Disclosure of discretional evidences means that the judge makes explanation or interpretation to the two parties involved regarding the confirmation of facts and legal opinions in the litigation process." (Xiong, 2003, pp.75-87) To summarize, administrative litigation reconciliation in Germany does not come at the expense of legal justice while pursuing efficiency.

3.2 The Efficiency Guarantee Mechanism for Administrative Litigation Mediation in Japan

Although Japan does not establish an administrative litigation mediation system at the norm level, like Germany does, it recognizes that mediation is applicable for administrative litigation in judicial practice. At the norm level, Article 7 in Procedures of Administrative Cases stipulates "Regarding administrative litigation cases, the rules and precedents of civil procedures shall apply over issues unregulated by law." which becomes the normative basis on which the theoretical community supports that mediation is applicable for administrative litigation. Thus it is necessary to study Japan's civil litigation mediation system. Article 89 in Civil Procedures of Japan stipulates "The court may order a designated or authorized judge to pursue reconciliation at any time, regardless of the litigation progress." From this clause we can infer three opinions, namely, "litigation mediation is not limited by litigation progress", "the judge can initiate

[5] Article 106 in *Administrative Court Law of Federal Germany* 1990 (court reconciliation): as long as the parties involved has the right to dispose of the object of reconciliation, they can make written records in the court or in front of a designated or authorized judge to reach reconciliation so as to fully or partially conclude the litigation. Court reconciliation can also be reached in the court in the written form in a verdict proposed by the court, the presiding judge or the report-making judge.

[6] Article 106 in *Administrative Court Law of Federal Germany* 1990 (court reconciliation); as long as the parties involved has the right to dispose of the object of reconciliation, they can make written records in the court or in front of a designated or authorized judge to reach reconciliation so as to fully or partially conclude the litigation. Court reconciliation can also be reached in the court in the written form in a verdict proposed by the court, the presiding judge or the report-making judge.

litigation mediation", and "the parties involved can entrust the judge to initiate mediation".

3.2.1 Fewer Restrictions on the Mediation Initiation Procedure in the Litigation Process

Fewer restrictions mean the impact of the litigation progress on mediation initiation is small. Article 89 in Civil Procedures of Japan stipulates that the designated judge or the authorized judge could initiate mediation in the full litigation process of an accepted case, which means litigation mediation is allowed before the court makes a verdict in the litigation process, say, "the debate preparation phase", "the evidence preservation procedure", and "the appellate trial procedure", etc., not limited to "the oral debate procedure". In so doing, the mediation method can be used to resolve an administrative dispute when the mediation opportunity arises in the administrative litigation process, which avoids the negative situation that mediation cannot be initiated due to litigation progress problems.

3.2.2 Both the Judge and the Parties Involved Have the Power to Initiate Mediation in the Litigation Process.

First, the judge can initiate mediation at any time with his duty and power. In order to promote mediation, the judge can persuade the parties involved to seek reconciliation with his duty and right at any time in the litigation process. The court may order the parties involved or their agents to appear in court to promote mediation. When the parties involved do appear in court, the court shall listen to their opinions and proceed with mediation based on their free-will consensus. If a party involved fail to appear in court after the court proposes mediation, the court can impose fines on the failing party in accordance with relevant laws.[7]

Second, either of the two parties involved in the litigation can apply for reconciliation. Clause 1, Article 275 in Civil Procedures of Japan stipulates that "in case of a civil dispute, a party involved may, after stating the purpose and reason of application and the fact of dispute, apply for reconciliation to the summary court that has the jurisdiction over the other party involved." In accordance with this clause and Article 89, the court can facilitate dispute resolution while ensuring justice in light of the real circumstances.

It is not hard to see that the court and the judge assume the predominate role in litigation mediation in Japan. On one hand, this greatly enhances the convenience that the judge initiates and promotes reconciliation with his duty and right, and reduces the circumstances that the judge and the parties involved entangle with and stifle each other, which is beneficial for guaranteeing mediation efficiency in administrative litigation. On the other hand, the lawmakers put in place mediation-facilitating measures and penalize the parties involved who maliciously breach litigation mediation, which fully guarantees the dignity and normality of administrative litigation mediation, greatly enhances the role of judicial oversight, and prevents such negative behaviors like "passive mediation", "malicious hindrance to mediation", and"illegal exchange of interest", etc. All these measures are beneficial for boosting mediation efficiency and ensuring the lawfulness of administrative litigation mediation.

3.2.3 The "Clause of Written Reconciliation Promise" as A Form of Guarantee for Litigation Mediation Efficiency

In order to reduce the litigation burden for the parties involved and boost litigation efficiency, Japan added "the clause of written reconciliation promise" (Bao, 2013, pp.59-66) in Article 264 at the time of amending Civil Procedures in 1996. The clause incorporates the content of Clause 2, Article 21 in Family Trial Law[8]. Article 264 in Civil Procedures of Japan stipulates "When the court believes it is difficult for one party involved to appear in court due to reasons like remote residence, etc., the court may remind that party of the reconciliation scheme in advance, and that party shall submit to the court a written statement expressing consent to the reconciliation scheme if the party agrees to such scheme. When the other party involved agrees on the same scheme on the day of verbal debate or any other dates, the reconciliation between the two parties involved shall be deemed valid and effective." The establishment of this clause dramatically reduces litigation costs and plays an extremely important role in optimizing Japan's litigation mediation system.

3.3 The Efficiency Guarantee Mechanism for Administrative Litigation Mediation in Taiwan

Compared to administrative litigation mediation systems of Germany and Japan, the system of Taiwan, China, has the most detailed basis at the norm level. At meantime, the academic community of Taiwan generally has a positive attitude toward the administrative litigation mediation system compared to the academic community of Japan, for example, Professor Weng Yuesheng believes "The disposition doctrine does not undermine the practice of the principle of lawful administration, under some kind of restriction." (Weng, 1998), and Justice Chen Chunsheng believes "Increased cooperation between the administrative authority and the parties involved can reduce legal instability caused by uncertainty in legal norms, and at the same time can avoid potential

[7] Article 27 in *Family Trial Law* of Japan stipulates "When a party involved in a case is summoned by the family court or the mediation commission and fails to appear in court without a justifiable cause, the family court shall impose a fine of less than 50,000 Yen on the failing party."

[8] Clause 2, Article 21 in *Family Trial Law* of Japan stipulates "In times of mediation of inheritance partition cases, any one party involved shall submit a written statement proposing mediation terms to the mediation commission or the family court in advance should the party is unable to appear in court due to reasons like remote residence, etc., and reconciliation shall be deemed achieved when the other party agrees to the mediation terms on the day of appearing in court."

conflicts and reduce the possibility of legal dispute in the aftermath." (Chen, 1996, p.33) Under this unified attitude of the professional community and the academic community, Taiwan's administrative litigation system is expressed as a special chapter in Administrative Procedures of Taiwan of in which reconciliation in administrative litigation is elaborately stipulated from Clause 219 to Clause 228. In terms of such parts as "initiation of reconciliation", "the parties involved's obligation to appear in court", "making written reconciliation records", and "efficacy of reconciliation", etc., the clauses are almost identical with those of Germany and Japan's administrative procedures, the Taiwan version has its own characteristics and progress in the establishment of such norms as "rejection to the request for trial continuation" and "a third party taking part in reconciliation".

3.3.1 Rejection to unlawful and unreasonable requests for trial resumption guarantees enhanced efficiency

Article 225 in Administrative Procedures of Taiwan stipulates explicitly that a court may reject the request for withdrawal from mediation and resumption of trial, in the form of a verdict or sentence, as "unlawful" or "unreasonable" regarding cases for which mediation is applicable.[9] This clause effectively prevents multiple actions that harm the administrative litigation efficiency such as "delayed litigation", "passive mediation", "playing fast and loose", etc., and at the same time suppresses actions that are not beneficial for litigation fairness such as "experimental proof", and "evasion of responsibility", etc. In addition, the application of reasons "unlawful" and "unreasonable" in litigation mediation as defined and stipulated in this clause guarantees that the parties involved have the right to lawfully resume litigation, which defends the fairness and lawfulness of administrative litigation while boosting the administrative litigation efficiency.

3.3.2 A Third Person Taking Part in Reconciliation Realizes Double Guarantee for Rights and Efficiency

Clause 2, Article 219 in Administrative Procedures of Taiwan explicitly stipulates "A third party, when allowed by the administrative court, may take part in reconciliation. And when the administrative court deems necessary, it may notify a third party to take part in reconciliation." In addition, Article 227 stipulates that after a third party takes part in reconciliation, the party has the right to bring up a lawsuit claiming "the verdict is invalid" or "the reconciliation result should be revoked" when it believes there are reasons that the reconciliation result is invalid or should be revoked. In this circumstance, the parties involved in mediation shall apply for trial of the same case.[10] This sort of mechanism design fully guarantees that the rights of third parties in administrative litigation mediation are not infringed. Meanwhile, as a third person has the right to take part in mediation by means of application in the mediation process, it greatly avoids such negative situation that the mediation result is revoked or declared invalid after mediation is done and trial is therefore resumed, which greatly reduces the burden of judicial practitioners.

4. THE REASONABLE LIMITATION PATHWAY TO THE SCOPE OF ADMINISTRATIVE LITIGATION MEDIATION IN CHINA

Both justice and efficiency should be taken care of when applying mediation in administrative litigation. Currently, only Article 60 in Administrative Procedures of China establishes the general principle of "limited application of mediation in administrative litigation" in the proviso form. The purpose of limited mediation is to prevent administrative litigation mediation from undermining the uniformity of the judicial order and prevent mediation from harming the interests of other people, the society, and the nation. Obviously, this intends to guarantee the fairness of administrative litigation mediation from the perspective of lawfulness of mediation. However, a more important function of the addition of the mediation system to the administrative litigation system is to reduce the burden of trial, reduce case backlog, mitigate difficulty of enforcement, and genuinely improve the status quo of "difficult trial and difficult enforcement" in light of the fact that China has pretty scarce judicial resources. Therefore, the administrative litigation mediation system must boost its efficiency while upholding justice, neither of the two elements should be overlooked. "Boosting efficiency and reducing costs" is an effective measure to realize the interests of the parties involved. By studying the mediation efficiency guarantee mechanisms in administrative litigation and judicial review in foreign countries and Taiwan, China, it is not hard to see that in order to achieve the efficiency guarantee for administrative litigation mediation activities, we need to make holistic and systemic design in such parts as "player of initiation", "time frame of initiation", "mediation-trial handover", "rights and obligations of the parties involved and the judge", and "efficacy of mediation", etc.

[9] Article 225 in Administrative Procedures of Taiwan: "The administrative court shall reject illegal request for trial continuation. In case of an unreasonable request for trial continuation, the court can reject it in a verdict without the verbal debate procedure."

[10] Article 227 in Administrative Procedures of Taiwan: "When a third person is valid to take part in reconciliation, he shall become a party to the reconciliation. When a cause of invalidity or revocation occurs after the parties and the third person carry out or reach reconciliation, the party involved shall bring up a lawsuit claiming reconciliation invalidity or revocation to the administrative court. In this case, the party involved may ask the court to try the new lawsuit and the original lawsuit in combination.

4.1 The Content of the Efficiency Guarantee Mechanism in China's Administrative Litigation Mediation System

First, it should be clarified that the judge can initiate mediation with his duty and power in administrative litigation. In accordance with the clauses of mediation scope restrictions, mediation can only be initiated when the facts of the case are clear and the legal relations are definite. In such a situation, the judge has command of the details of the case and can fully guarantee the interests of the two parties involved based on his own experiences considering the dual values of lawfulness and rationality, thus the court should have the right to dominate mediation initiation. Therefore, the judge should be empowered with the duty and power to initiate administrative litigation mediation, especially the judge should play the leading role in appeal trials and re-trials "featuring clear facts and accurate legal relations".

Second, mediation can be carried out at any time in the administrative litigation process. "Mediation" is a place where the two parties involved can communicate with each other, heal wounds, and eliminate conflict in the process. When the judge deems it necessary to carry out mediation based on his personal opinions or the two parties involved apply for mediation by free-will consensus in the administrative litigation process, the mediation request should be supported.

Third, "the open mediation principle" should be clarified. In the whole world, methods such as the people's jurors, supervision by social institutions, etc., are widely adopted in the administrative dispute trial process. Although the theoretical community in China loudly advocate establishing the administrative litigation mediation jury system, it is not accepted in the current lawmaking practice. "To defend the administrative authority lawfully exercising its administrative duty and power" is eliminated as a lawmaking purpose from Article 1 in Administrative Procedures. In this background, the administrative litigation mediation system of our country should uphold "open mediation" as the principle and treat "closed mediation" as the exception, so as to enhance supervision of the two parties involved in administrative litigation mediation and bring administrative litigation efficiency and fairness in China to the next level.

Fourth, the parties involved should be assigned with the obligations to appear in court and actively pursue mediation. The success of mediation must be achieved through free-will consensus between the parties involved. When any one party is absent, the mediation procedure should be directly judged a failure and the trial procedure must be resumed. In addition, if any one party involved refuses to fulfill its obligation to appear in court and actively pursue mediation in the mediation process in cases in which "the two parties involved apply for mediation through free-will consensus", and the result of refusal seriously affects the litigation progress and the judicial order, that refusing party shall be deemed seriously breaching its obligation and shall be claimed dishonest and be penalized accordingly. When any one party involved fails to appear in court to take part in mediation initiated by the judge with his duty and power, the failing party involved shall not assume the responsibility of breach and the judge shall immediately claim the mediation fails and resume the trial procedure.

Fifth, "unreasonable" or "unlawful" requests for withdrawal from mediation and resumption of trial shall not be supported. If there is a valid cause arising in the mediation process, the parties involved may apply for trial resumption, otherwise, the court shall not support such application. In addition, mediation can only be carried out once in the same case. In order to avoid abuse of the mediation right in case trial, the parties involved have the right to apply for mediation once only when there are no new facts, evidences, or material change in fact finding. Moreover, the judge can persuade the two parties involved to resume trial if mediation delay occurs in the mediation process. If mediation is not reached when the mediation term expires, the trial procedure shall be resumed immediately and the fact of mediation failure shall be recorded in the case file.

Sixth, the mediation efficacy and the remedy mechanism shall be clarified. When mediation is successful, the court shall make the mediation statement which shall take effect when the two parties involved receive and sign it. The relevant rules and regulations applicable for first trial cases in ordinary courts shall apply for cases end up with mediation.

4.2 Explanations of Administrative Litigation Mediation Can Be Tailored to Fill up Loopholes

Currently, the mainstream opinion in China is that "the costs of lawmaking are far greater than those of amending and interpreting existing laws." (Ying, 2010, pp.5-26), which is reasonable for the legal system has extremely high requirements on the lawmaking techniques when it comes to creation of law, and the time, human resources, and material resources required for lawmaking are tremendous. In addition, the administrative litigation mediation system, as an integral part of the administrative litigation system, should not exist independent of the administrative procedures. Although we could create special "litigation mediation procedures" to cover all mediation activities in all sorts of litigation, it is mere repetition of the existing litigation procedural lawmaking in China. Therefore, the methods of amending or interpreting laws are deemed as practical measures.

The reason for ruling out law amendment and adopting law interpretation is that Administrative Procedures of China confirm the stipulation "mediation is not applicable in principle", which is far away from the lawmaking environment in Taiwan that actively promotes mediation in administrative litigation. If we amend Administrative

Procedures and add relevant details of administrative litigation mediation in large format, it will obviously harm the lawmaking order. Therefore, it is in our best interest to adopt the method of legal interpretation.

5. CONCLUSION

It is a feasible pathway for us to optimize administrative litigation in China that we genuinely guarantee the efficiency of administrative litigation mediation, provide a high-quality and high-efficiency mediation environment for the two parties involved so as to help resolve the administrative dispute and truly achieve a model of "mediation-trial combination" and that we shall not treat administrative litigation mediation as a heterogeneous form of the litigation system superposing the holistic architecture of administrative litigation and thus put the judge in an embarrassing situation where he wants to mediate but cannot perform mediation in administrative litigation. At meantime, the judge's dominance will not cause harm to judicial fairness because the mediation process is led by the free-will consensus between the two parties involved. When the two parties could not reach free-will consensus, trial will be resumed. Thus, the initiation of the mediation procedure becomes another form of the trial procedure and does not undermine legal justice. It is not beneficial for the optimization of the rule of law in China to overly emphasize trial and marginalize mediation. In fact, the application of mediation is an expression of the self-developing rule of law as the parties involved and the judge communicate with each other and heal wounds, rectify mistakes, and reach reconciliation in so doing, which is a form of harmony and unification of the idea "peace is treasure" in the traditional Chinese culture and the notion "clarifying the right and the wrong and upholding and defending justice" in the rule of law in modern times.

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