



A Rational Thinking of the People's Mediation System of China

UNE PENSEE RATIONNELLE DU SYSTEME DE LA MEDIATION POPULAIRE DE CHINE

HUANG Yi^{1,*}

¹ Lecture, mainly engaged in Civil Procedure Law and Judicial System. School of Law, Southwest University, China; Doctoral student, School of Law, Southwest University of Political Science and Law, China.

*Corresponding author.

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Abstract

People's Mediation is a kind of dispute resolution mechanism with Chinese characteristics. In 2011, People's Mediation Law of the People's Republic of China has come into force. This law is formulated to solve disputes among people in a timely manner, to maintain social harmony and stability, to reduce litigation cost and to relieve the burden of involved parties and so on. However, there are various kinds of defects in system designs and legal practices, and it still needs efforts with rational thinking to improve and complement the legal system.

Key words: The People's Mediation; Dispute resolution; Judicial confirmation

Résumé

La médiation populaire est une sorte de mécanisme de règlement des différends avec des caractéristiques chinoises. En 2011, la loi de médiation populaire de la République populaire de Chine a entré en vigueur. Cette loi est formulée pour résoudre les différends entre les personnes en temps opportun, afin de maintenir l'harmonie sociale et la stabilité, à réduire les coûts des litiges et à alléger le fardeau des parties concernées et ainsi de suite. Cependant, il existe différents types de défauts de conception des systèmes et pratiques juridiques, et il faut encore des efforts avec la pensée rationnelle en vue d'améliorer et de compléter le système juridique.

Mots clés: Médiation du Peuple; Résolution des disputes; Confirmation judiciaire

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1. THE PEOPLE'S MEDIATION SYSTEM OF CHINA

Alternative Dispute Resolutions (ADR) is processes or systems used to resolve disputes and relieve the pressure of courts in international communities. Especially in the day of urbanization and industrialization, "Lawsuit Explosion" has become a problem which needs to be solved urgently in China. With the rise of ADR, most disputes are settled without litigation. The People's Mediation refers to a process that a people's mediation commission persuades the parties concerned to a dispute into reaching a mediation agreement on the basis of equal negotiation and free will, and thus, solving the dispute between them. As an important form of ADR, the role of maintaining social harmony and stability is irreplaceable, and it is called as "Eeastern Experience" within the national and international communities. The people's mediation system has experienced the rise and fall process since the middle of last century. Summing up historical experience, People's Mediation Law of the People's Republic of China(hereinafter referred to as The People's Mediation Law) has formally come into force in Jan. 1st. 2011, marking the people's mediation work begins the legalization and standardization path.

People's Mediation tries to mediate disputes among the people in a timely manner, at the grassroots and on the spot, so as to maintain social harmony and stability. However, as the country's first law for comprehensively regulating the people's mediation work, due to system designs and legal practices defects, the people's mediation

system needs improving in some aspects in practice.

2. RATIONAL ANALYSIS ON THE PEOPLE'S MEDIATION SYSTEM OF CHINA

2.1 The Typical Advantages of the People's Mediation is Reduced

The mass-based advantage of the people's mediation is reduced. "The People's Mediation law" article 5 provides, the people's mediation work shall be guided by the administrative department of justice. It might be a tendency of administrative mediation. At this stage, people's mediation work is in the period of transition from government dominating to government leading. Before the dispute resolution ability by society itself is formed, the development of people's mediation needs support from the state. We take it for granted that people's mediation has political tendency. However, the overemphasis on its political attribute would hurt its legal attributes and the massiveness.

The autonomous advantage of the people's mediation is reduced. Autonomy mainly embodied in: the people's mediation is an autonomous action entirely based on parties' equal and voluntary negotiations to resolve their conflicts and disputes, and the mediator shall not, against the will of the parties, force to reach an agreement. "The People's Mediation law" article 21 provides, "People's Mediators shall stick to principles, make legal reasoning and do justice to the parties concerned." This article implies that mediator might impose his will on the parties and ignore the parties' will. Additionally, most mediation cases pending in people's mediation are just occurred among individuals in their daily life, and these disputes are characterized by frequency and with the ethical, emotional aspects. If mediator always adhere to the principle, it might cause compulsory mediation and endless conciliation to occur. The outcome just might be that the disputes are just covered for the time being, and it would result in a greater one sooner or later.

The flexible advantage of the people's mediation is reduced. Flexibility refers to the mediation activities can be conducted in any manner, anywhere, anytime without any restrain. Some people's mediation organizations and some scholars have proposed to establish formal mediation rooms, and to provide seats and name tags for the plaintiff, defendant and chief mediator. It makes the mediator more and more like a impartial judge; therefore, it will increase mediation cost and weaken flexibility.

2.2 Problems on People's Mediator's Quality

First, there is a dilemma. On the whole, the knowledge and technical skills of people's mediator are far

from meeting the requirements of mediation work. However, in China's vast rural areas, because lots of people get into cities, those who still stay in their hometowns are rarely qualified for the work of mediation, and what's worse is that nobody can be chosen to be a qualified mediator in some areas. If the requirements for a qualified mediator are too high, it might make nobody qualified, while if too low, it might cause the mediation power to be abused, therefore, fail to achieve the goal of social stability and harmony.

Second, People's mediators must be decent and have social responsibility, because mediation work do not charge any fees, time-consuming, and lack of funds and material conditions. It is hard to attract talents, and even make the brain drain. Without a stable team, mediation cannot be implemented. And building professional mediators teams and chief mediators teams is out of the question.

Third, the concurrently positions holding situation is serious. The villagers or residents committee office holders concurrently served as people's mediators. Which might not ensure the mediation work run normally and in a timely manner, and even might make the mediation administrative, and difficult to maintain its impartiality and independence.

Finally, problems on mediation vocational training. In fact, most people's mediators just have short-term training courses throughout their careers, and it's very hard to well enhancing people's mediator's knowledge and skills in such a short term. In addition, due to the complexity, experience and professionalism of the law, even though mediators' legal knowledge can be improved, it doesn't mean they can accurately and easily put it into practice.

2.3 Problems on the Effect of People's Mediation Agreements

Although The People's Mediation Law has provided the effect of agreement and judicial confirmation, it still can't completely solve the limitation of the mediation agreement efficiency. The People's Mediation Law Article 31 provides a mediation agreement reached upon mediation by a people's mediation commission is binding to all parties concerned, and the parties concerned shall fulfill it as agreed. Although it emphasizes "legally binding", it makes no effort to complement the source and basis of "legally binding", and this clause has become a dead letter. On the other hand, mediation agreements are with the characteristics of the civil contracts, which can not be illegally executed by force without judicial confirmation. Article 32 provides, after a mediation agreement is reached upon mediation by a people's mediation commission, the parties concerned have a dispute regarding the fulfillment or contents of the mediation agreement, they may bring a lawsuit to the people's court.

Although The People's Mediation Law sets forth

specific conditions on renege, that is, "the parties concerned have a dispute regarding the fulfillment or contents of the mediation agreement". It is necessary that the mediation allows the parties to go back on their agreement, and it provides is a way of relief and protecting parties' legitimate rights and interests. However, since the parties can renege, it may bring the parties to the negotiating table again, and disputes go back to the state before the mediation. The result is likely to cause a dual waste of time and mediation resources.

As we see, The People's Mediation Law provides that the mediation agreement is binding to the parties but reneging is also allowed. Such mechanism designed by legislators is merely to decrease the possibility of the parties going back on their agreement. The people's mediation law provides the ideal way to improve mediation's success rate and avoid bringing the parties to the negotiating table again. The parties can apply to the people's court for judicial confirmation. After the people's court confirms the effect of the mediation agreement, it fundamentally resolves disputes between the parties, and overcomes the limitations of people's mediation agreement to some extent.

However, it should be noted that starting the process of judicial confirmation requires a condition. The people's mediation law Article 33 provides "when necessary, the parties concerned may jointly apply to the people's court for judicial confirmation within 30 days after the mediation agreement becomes effective." The precondition is "jointly apply" and "within 30 days". If one party concerned goes back on and refuses to apply for judicial confirmation or purposefully delays, the judicial confirmation procedure can not be initiated, and the compulsory execution effect of people's mediation agreements have no chance to be confirmed. Although it takes time and trouble, the disputes are still unsettled, and the mediation agreements are in a state of uncertainty. The people's mediation doesn't play a unique role in settling disputes and avoiding litigations. In fact, The people's mediation law provides the agreements can be judicially confirmed, which also limits the agreements to get the opportunity to be executed by judicial confirmation at the same time. Such a mechanism design is bound to buried the seed of destroying itself.

Additionally, with the restrictions of mediator's qualities, the mediators can rarely settle the parties' disputes based on the law successfully and thoroughly. If a mediator cannot appropriately guarantee the legality of mediation agreements between parties concerned, mediation will go back to the original point, and parties are unable to reach resolution through mediation. Mediation becomes ineffective and parties concerned are no more willing to solve disputes through mediation.

2.4 Problems on People's Mediation Publicity

First, mediation has ever been abused or misused for legislation and policy misleading. In the last few decades, one principle involves upholding was "mediation first" in law and people were encouraged to settle disputes out of the courts so as to avoid litigation. In policy, to dramatically improve mediation's success rate, the prominent mediators will be rewarded and promoted. Therefore, mediators would ignore the parties' will and adopt a conciliatory and appeasement attitude in the dispute resolution process, which makes mediation deviated from its original function. Because of Long-term understanding of mediation, people tend to think of the people's mediators as "peacemaker" and mediation as "try to smooth things over". Summing up the past experience and lessons, China has promulgated the people's mediation law which substantially improved and perfected the old system. The current priority of relevant government departments is to create a good impression of the people's mediation system in people's minds.

Second, every year, a large number of rural population have swarmed into cities for making a living in China, and the city expands rapidly. The city is very unlike the rural, and it is known as "the stranger society", which is not built on the basis of trust and consciousness of community among residents. It can be difficult or impossible for mediators to familiar with the affairs in designed region, and mediation work is getting harder and harder.

In addition, with the rising of public awareness of the right protection and privacy protection, the Chinese younger generation are not like their parents and willing to adopt litigation to settle disputes instead of turning to the residents' committee for help. And they dislike those "uninvited" mediators. It may influence the mediation work initiatively undertaken by mediators. So If the people's mediation loses the younger generation, it will not be able to gain a powerful impetus to further innovation and development.

3. A RATIONAL THOUGHT ABOUT IMPROVING THE PEOPLE'S MEDIATION

In view of the problems and limitations of the newly-issued people's mediation system, in order to make further improvement on the system, our Chinese should positively borrow the practices and experiences of other countries for reference on the basis of theoretical and empirical research, and make reforms concerning the mediation system design and innovation step by step.

3.1 Clearing the Status of the People's Mediation, and Taking Advantage of It

Under the context of the litigation explosion, it has some positive significance to emphasize the role of the people's mediation; however it must be correctly positioned. First of all, the people's mediation committees, as a mass

organizations, which should bring into full play their mass advantages, and the government is also asked not to intervene much in the mediation affairs. If the people's mediation work is undertaken by the government, it may tend to be administration.

Second, the people's mediation is only "the first line of defense" of ADR; therefore, we should properly apply it. If the nature and type of the dispute is not suitable for mediation, we can not stubbornly stick to conciliation, and make it play the function the mediation itself does not have, and accomplish the tasks which the mediation itself can properly complete or completely not. In order to make the mediation function have a full play, laws and regulations should clearly provide that which cases are suitable for the people's mediation and which is not.

3.2 Reflecting the Litigant Principle, and Protecting Their Interests

The people's mediation litigant principle is demonstrated in four aspects. First, in the mediation process, the mediator should fully respect the rights of parties' voluntary, autonomy and self determination. Mediators work as a third party of the mediation, helping to convey information, and making the parties concerned quickly enter the core of disputes, trading-off advantages and disadvantages, and reaching a satisfactory agreement on the principles of voluntary consultations by various techniques such as conversation or persuasion etc.. Second, the mediator should fully respect the rights of parties' freedom of choosing the dispute Resolution approaches. It refers to that if the parties concerned do not want to mediate, the mediator should respect the parties' right, even though the dispute is solvable by mediation. Third, the informal nature of the people's mediation emphasizes that the emotion, truth and law should be unified, and disputes should be dealt rapidly, flexibly and simply according to specific situations in stead of strictly following the procedural steps and fact investigation. Allusion to the setting of mediation rooms in some areas, this dissertation brings forward disputes among the people should be mediated on the spot. It not only helps reduce cost but also reflects litigant principle. The forth, mediation itself contains the meaning of compromise and negotiation, and it gives the parties opportunities to pursue material and procedure profits. Therefore, the parties have the right, in their sole discretion, to choose and guarantee the right to pursue material profits. Mediators should not "adhere to the principle" to damage the interests of the parties.

3.3 Strengthening the Construction of Mediator

The quality of people's mediators is the key factor determining whether the people's mediation activities are successful or not. Usually there are two main methods to improve the quality of people's mediator: one is an internal upgrade, the other is external introduction.

Internal upgrade means mediators should maintain or improve their mediation skills through ongoing professional training; external introduction refers to attracting talented mediation professionals such as retired judges, lawyers, and other professionals who are interested in dispute resolution by increasing funding.

Drawing on some foreign excellent mediation practices and experiences for reference, such as the mediator selection standard of the United States. The United States mediator selection adopts accreditation mechanism, which requires mediators not necessarily to have tertiary qualifications in law, but to have professional training qualifications in mediation, that is, mediation as a mean of dispute-resolution requires professional mediation skills and advanced theoretical knowledge. In some states of America, prominent lawyers also join in the mediation group and play an important role in dispute settlement. The court also provide list of good lawyers for the parties to select as their mediator.

This dissertation recommends that the people's mediation system should introduce the mediator accreditation system to improve the people's mediator's quality by undertaking adequate, suitable mediation-education or training-courses to further the adoption and practice of mediation every month; the people's mediation system should bring in the people's mediator information system, that is, to establish a panel of excellent mediator, and to notify the local grassroots people's courts; the people's mediation system should establish some professional or technical mediation organizations to enhance the credibility and authority of the people's mediation; we may take the operation of the Bar Association for reference and set up the People's Mediation Association to supervise or manage mediation works.

3.4 Improving the Agreement Effect of the People's Mediation

In allusion to the parties regret, which makes the reached mediation agreements go back to the original point, not only wasting mediation resources and time, but also damaging the mediation credibility and authority. Therefore The People's Mediation Law provides the judicial confirmation process. However, The People's Mediation Law provides that the parties may "jointly" apply to the people's court for judicial confirmation, that is, as long as one party concerned insists that there is no need or has the intention of regret and refuses to apply to the people's court, the judicial confirmation process will not start. As a matter of fact, generally speaking, the condition of applying for judicial confirmation usually is that one party think it's necessary, for fear of the other party concerned refusing to perform or failing to fully perform the agreement. Because if the parties adopt a positive attitude to perform the agreement they have reached, they seldom or never jointly apply for the

judicial confirmation. Therefore, the starting condition of the judicial confirmation process is irrational, and will damage the judicial confirmation process. The People's Mediation Law should allow unilateral application to start the judicial confirmation process.

3.5 Enhancing the Propaganda of the People's Mediation System

To create a good development environment, the state should strength the publicity efforts of the people's mediation in community and the youth generation by full using various media publicity means, such as broadcast, TV, newspaper, and network, and gradually expand the coverage and influence of the people's mediation through a way of establishing typical models, closing to the masses, and approaching the daily life so as to create conditions for the people's mediators to carry out work actively and positively, which will gradually lead the parties to understand, support and finally involve in the people's mediation, and make the people's mediation deeply rooted among the people. We

should take good practices of other countries and regions for references, such as specific types of cases must be compulsorily mediated before litigation, and the courts send out propaganda cards introducing the advantages of mediation.

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