

Construction of a Diversified Dispute Settlement Mechanism - A Case Study of Court Mediation

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Abstract

Currently the Chinese society is in transition with various social conflicts and disputes highlighted. A diversified dispute settlement mechanism should be explored. Based on the objective evaluation and rational analysis of our country’s court mediation mechanism, this article advocates to promote the institutionalization of mediation, play the positive function of court mediation, and promote the function transformation and mechanism construction of court mediation under the legal rules and legal order.

Key words: Diversified dispute settlement mechanism; Court mediation; Court annexed diversified mediation

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INTRODUCTION

Nowadays the Chinese society is in transition. On the one hand, as the economic and political reform continues to move forward, the pattern of communal interests

has changed and social conflicts and disputes have been increasingly prominent. On the other hand, in the process of building a socialist country governed by law, the masses have gradually increased awareness of their rights, which led to a lot of disputes flocking to litigation solution. The existing judicial dispute resolution procedures are sometimes difficult to meet the needs of society, which requires us to further explore a wide range of dispute resolution mechanisms in order to meet the needs of sustainable development of society and the rules of law. The innovation of court mediation mechanisms has emerged in judicial practices because of the conformity with these needs.

1. THE BACKGROUND FOR THE DIVERSIFIED DISPUTE SETTLEMENT MECHANISM

Firstly, the characteristics of China's current diverse contradictories. Modern pluralistic conflicts and disputes have these characteristics: Firstly, the diversified types of disputes. The reasons are the restructuring of state-owned enterprises, urban housing demolition and expropriation of rural lands, labor, wages and benefits disputes, real estate development, environmental pollution and other problems touching the vital interests of the people. Secondly, the profit-orientated subject of disputes. With the change of people's values, people pay more attention to pursuing the practical interests closely related with them, and utilitarian values have been increasingly prominent, which are the important causes of the contradictions and disputes due to the economic interest's contradictions and material interest's conflicts. Thirdly, the difficult disposal of disputes. In the planned economy era, most contradictions can be handled and resolved in the interior of various units. Now most of the people have been changed from the "unit people" into "social people". A lot of contradictions gather in the society. Fourthly, group of disputes. In the societal transition period, many conflicts of interest exist among different interest groups, an improper disposal would lead to mass incidents.

Secondly, causes for the diversified conflicts. Different from that of a single conflict, the main causes for the diversified conflicts are: The first is interest differentiation. The second is the dislocation of government functions. The third is ineffective legal adjustment. The fourth is the deviation of ideas in the transformation era.

Thirdly, the limitations of dispute resolution through legitimate channels. In modern society, the judiciary is the conventional way to resolve disputes, which own terminally, authority, universality and other advantages and features, but the judicial settlement for disputes is limited. Firstly, the judiciary cannot and is not inappropriate to resolve all disputes. The second is the number judicial programming and the high cost. Thirdly, the judiciary itself is difficult to achieve a unified entity

of the legal and social effects. In addition, due to the strong randomness and human effect factors, there is not a scientific, rational, stable and systematic settlement method for unconventional disputes, which leads to crisis lurking.

Fourthly, the establishment of a diversified dispute settlement mechanism has become the goal of system design. China is currently in the most diversified era throughout history. We should diversify the goal of system design, and take the concept of diversity as the basic concept. At the same time, we should fully mobilize the initiative of the parties, respect their autonomy, play the parties' leading role in the dispute resolution process, and implement the concept of autonomy. Faced with the growing number of disputes, while building a new settlement mechanism, we should increase the efficiency of dispute resolution, and focus on the efficiency concept. In addition, we should establish a fair, efficient and authoritative judicial system, adhere to the scientific concept of development, adhere to the concept of the rule of law and the concept of harmony, balance and coordination, and pay attention to balance the contradictions between efficiency and fairness, development and stability.

2. MARGINALIZATION AND REVIVAL OF COURT MEDIATION

Court mediation, refers to that under the presidency of the People's Court judicial officers, the interested parties carry out mediation voluntarily and equally over the dispute of civil rights and interests, so as to reach a resolution agreement (Jiang, 2000, p.195).

Court mediation is an important civil litigation system, which can be traced back to the "*Ma Xiwu Trial Mode*" promoted at the Shanxi, Gansu, and Ningxia border region and base during the anti- Japanese War. After the establishment of New China, "*Ma Xiwu Trial Mode*" is still to be implemented in the aspects of the civil trial, focusing and emphasizing court mediation. Legal reconstruction began in 1979, and "mediation-based" is still the keynote for Court civil trial work. The 1982 *Civil Procedure Law (Trial)* has amended "mediation-based" to "mediation-focused" in Article 6. "Mediation-focused" and "mediation based" differ in the wording, but "mediation-focused" still holds that conciliation and mediation are the priority. This change does not fundamentally reverse the problems of prioritizing mediation and disregarding judgment, mandatory mediation, and illegal mediation, etc., because during this period, an important indicator to assess the work of judges and courts is the achievements of the mediation settlement rate.

Since the late eighties of last century, court mediation system has been the object of certain questions, including its value, function and effect. In the nineties, the amended Civil Procedure Law (Trial) has changed "mediation-focused" into "voluntary and legal mediation." Since the late 1990s, courts have undermined the mediation function and gradually strengthened the trial function, promoting civil

lawsuits to change from “mediation” to “judgment” in the judicial reform. This change has been brought to the beginning of this century, along with the increase of total number of litigation cases. The court leading instance settlement rate continues to rise, and the mediation settlement rate is declining. This change indicates that the mediation role in the proceedings is often marginalized.

Until 2002, court mediation has gradually revived and returned in people’s sight, which has obtained attention. The first is suggested to strengthen the mediation, which is initially reflected in judicial files. Subsequently Supreme People’s Court has promulgated the judicial interpretations about the mediation system. The third is through propaganda guidance and typically reports showing the value and charm of court mediation system, which is able to adapt to the time in the new era, and applicable to all types of civil jurisdictions. As per some scholars, the “renaissance” of court mediation has been driven by the steering from “prioritizing judgment and disregarding mediation” into “combination of mediation and judgment”, and the new judicial concept (Li, 2009) of “case-closed and dispute-terminated”.

In new era the return of court mediation is not back to the obsolete mode of “prioritizing mediation and disregarding judgment”. In the new situation with the rise of pluralistic conflicts and disputes, the court mediation must be institutionally reformed, and get rid of the traditional mode which is in lack of rules of law and has institutional defects. Against this background, courts all over the country especially the basic-level courts have launched a new round of practical exploration and institutional innovation.

3. EXPLORATION OF COURT ANNEXED DIVERSIFIED MEDIATION MECHANISM

In our country’s judicial practices, the main approach of the courts at all levels is as follows: Firstly, to provide mediation services at the filing stage. Conciliation procedure is established at the filing stage, or court commissions collective forces to conduct mediation activity to the parties. Mediation activity requires the consent of the parties, and is chaired by the mediator who is commissioned by the court and not within the internal of the judicial system. Before the case is formally registered, if the two parties can reach conciliation or agree to sign a mediation agreement, it is not necessary to enter the filing procedure. Secondly, if mediation has been reached after the filing but before the end of the civil proceedings, the parties can voluntarily withdraw it. Thirdly, depending on the wishes of the parties, the pre-trial mediation and litigation mediation can be converged. Mediation recognized by the court or mediation agreement shall be considered as the mediation statement, having the force of law. Furthermore, it can be found in the judicial practices of the courts at different levels that the scope and stage of litigation mediation have been expanded to the filing, and litigation mediation and non-litigation mediation have been combined.

Court annexed diversified mediation mechanism has the following characteristics:

Firstly, the court annexed diversified mediation in essence is a non-litigation activity. Court annexed diversified mediation refers to that when a civil dispute arrives the court, before the official launch of the proceedings, diverse mediation methods are used to resolve the contradiction. From the term of the applicable stage, the dispute has not yet formally entered the trial proceedings. Court annexed diversified mediation, whose purpose is to avoid the occurrence of the proceedings, is a non-litigation activity in essence. As for court mediation, its aim is to conclude the proceedings and its nature is litigation activity.

Secondly, the mediation power relied on by court annexed mediation is multi-resourced. The body of court annexed multiple mediation is both from court internal resources and social external resources. The mediator of mediation activities includes a large number of non-judicial personnel. Mediation body is the professionals who accept the court commission including expert mediators, the people's mediators, legal volunteers and retired prosecutors and judges.

Thirdly, as a dispute resolution alternative to litigation, court annexed diversified mediation is on an independent role in the trial proceedings. On the one hand, court annexed diversified mediation and prosecution is the two tracks for the parties to request the court to defend his civil rights and interests. When application for mediation and prosecution is independent to each other, the parties can be afforded with a favorable platform of comparison, choice and decision based on which they can exercise their litigation rights as accurately as possible, including the procedural rights and substantive rights. If all kinds of information are fully disclosed, the parties can make a final optimized decision (Zhao, 2007). On the other hand, under this mode, the shortcomings of the converge of mediation and trial procedures can be avoided, and civil trial procedures can be standardized.

Fourthly, court annexed multiple mediation functionally diversifies, which can meet the needs of the current pluralistic dispute resolution. Court annexed multiple mediation integrates the trial forces of the court with the external social resources, so that prosecution and mediation can be connected and conflicts can be resolved in time. In a nationwide practice and explorations, the mass pattern of the multiple dispute resolution mechanism has been initially formed. A mechanism which is located on judicial mediation and connected with people's mediation, social organization mediation, administrative mediation and arbitration mediation has been gradually established.

4. PONDERING AFTER THE REVIVAL OF COURT MEDIATION

In the current judicial practice upsurge, it is necessary in order to reflect on the problems of court mediation.

Firstly, from the theoretical point of view, the innovation of court mediation mechanism lacks arguments and legal location. a) innovation of court mediation mechanisms should rely on judicial practices, gradually form a pilot and promote within a certain range. In this case, many basic theoretical problems still lack a clear understanding. b) concept use is in chaos, and a variety of titles are used confusedly. Such as concepts currently used: Pretrial court annexed mediation, court annexed non-litigation mediation, pretrial mediation, court annexed mediation, court assisted mediation, and ADR mediation mechanism, etc.. c) the legal location is not clear. Court annexed multiple mediation in essence is different from the court mediation in our country's Civil Procedure Law. It has to be clarified by way of legislation or judicial interpretation. d) for the mediation process and mediation measures, it has not formed a systematic mechanism integrating the operation mechanism with additional mediation modes.

Secondly, from a practical point of view, the stress on court mediation will strengthen the single function of courts. The sole emphasis on court mediation has made a certain impact on the functional diversification of courts. The function of the courts is not merely to resolve disputes, but also includes other aspects. In the Court of Appeal, judicial cases should be made, and the laws should be developed. Too much emphasis on court mediation will make the courts at all levels intend to strengthen mediation and its function, and thus damnify the diversification of court functions, and simplify court functions to be solely dispute settlement.

Thirdly, from a value point of view, court mediation could easily lead to the sacrifice of the legitimate rights of the parties. Although under the current civil procedure law, voluntariness and legitimacy are the basic principle for mediation. However, the judge acts as both a reference and a mediator. Mediation under the dual identity would lead to the possibility of repressive mediation in reality. In addition, mediation can be achieved, which often results in the assertion of illegal interests of a party, and the weakened legitimate interests of the other party. The weakening of judicial substantial justice requires our vigilance.

Fourthly, from the continuous extent point of view, it is sometimes difficult to maintain the innovation of court mediation based on the policy forward. Court mediation innovation which stays on the procedures, methods, and means can swiftly resolve a large number of diversified disputes, but from the long-term, we must upgrade the institutionalization of the innovation process to ensure its long-term development under the legal regulations.

The promulgation and implementation of China's *People's Mediation Law* and the revised *Civil Procedure Law* will guide and standardize court mediation activities. The positive function of court mediation should be fully applied, and the

function transformation and mechanism construction of court mediation should be promoted under the idea of rule of law and legal order.

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