

The Dilemma and Solution of China's Judicial Mediation

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Abstract

Ever since the mid 1990s, the trial session at the people's court has undergone a development from complete reliance on the sentence to a combination of mediation and sentence employed in proper cases and then to a combination of priority given to mediation. Current judicial mediation is beset with both internal and external troubles, confronted with condemnation from the academic field as well as doubts about the court system itself. We should conduct a rational analysis on judicial mediation by considering possible challenges as well as affirming its responsibility. Accordingly, proper adjustment should be done to regulate and perfect the principles, case types and supervision of mediation.

Key words: Civil suit; Combination of mediation and sentence; Fairness and justice; Improvement

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INTRODUCTION

Judicial mediation, as an indispensable means employed by the people's court to eliminate social conflicts and maintain social justice, has drawn debates and doubts

as well as particular attention from the public due to its apparently different role compared with other medication forms. This article attempts to conduct a reasonable analysis on the people's court's judicial mediation institution by taking judicial practice into account. We try to face up to the practical dilemma and hold a rational attitude towards its validity and finally come up with perfect measures.

1. INTERNAL AND EXTERNAL TROUBLES: THE REAL DILEMMA FOR JUDICIAL MEDIATION

Ever since the mid 1990s, the trial session at the people's court has undergone a development from complete reliance on sentence to combine mediation and sentence employed in proper cases and then a combination of them with priority given to mediation. At the moment, resolving cases through mediation have become the optimal choice and therefore a judge's ability in mediation has been a key standard to judge his qualification. Among those advanced figures awarded by the Supreme People's Court, excellent performance in mediation has been viewed as the most important basis. Meanwhile, in many areas, the rate of withdrawal through medication is an important index for performance assessment, hence triggering another wave of medication crazy. However, we cannot help when we see current judicial mediation is confronted with condemnation from the academic field as well as doubts about the court system itself.

Externally, first come the doubts from academics. Some domestic scholars, such as Li Hao, challenge the priority given to mediation and even make sharp criticism that the people's court is bound to become people's mediation institute in this way. Professor Chang Yi, sorting out and summarizing the theoretical debates on China's judicial mediation institution, reveals that such argument has never ceased. (Chang, Wang, 2011) According to Professor Pan Jianfeng, despite the ideally-preset pattern of the relations between the judiciary and mediation at the level of institution and regulation, it suffers from apparent problems and flaws in practice, resulting frequent deviation and deformation (Pan, 2013). Secondly, the effect of resolving a case through mediation is doubted by the public, which can be shown by the high rate of application for enforcement as well as some deadly incidents and false prosecution in recent years. For instance, according to the investigation of the effect of civil suit mediation from 2002 to 2009 by Chen Li from the court of Chengdu Hi-tech Zone, high renege rate is a severe problem in mediated cases. Apart from non-prosecution legitimate documents, the enforcement of civil medication bills has become the focus of court's enforcement section with its higher proportion (49%) than that of civil judgment (41%) (Chen, 2010). It is revealed in the investigation of 784 petition cases by a national social science fund project team studying civil prosecution policies hosted by Professor Zhang Jiazhun of Zhengzhou University that in 124 cases (15.82%) were mediated. Meanwhile, Professor Li Hao from

Nanjing Normal University also conducts an empirical research on the enforcement of masses of mediation cases in his project "Studies on the Basic Principles of Mediation and New Problems in China's Civil Mediation, in which he expresses his objection to merely stressing resolving cases through mediation (Li, 2012). Confronted with the high rate of application for enforcement, Supreme People's Court included the index of such a rate in the assessment index system of people's courts' quality of handling cases last year. Additionally, there have been some instances in which mediation isn't employed properly. For example, in Huangpi of Hubei Province, a judge resolves most cases in mediation while all of these cases are forced to be retried. Obviously, mediation doesn't always work. Meanwhile, due to frequent malicious prosecutions and false prosecutions caused by mediation, the public exclaim doubts about the effect of judicial mediation.

Internally, mediation has turned into an unspeakable pain for judges. First comes the stress of the mediation rate assessment from the higher authorities. Currently, along with the strengthening of trial management, Supreme People's Court has implemented the assessment of case quality dealt with by people's courts and established a system with specific assessment indexes including the mediation rate. Despite no highest standard for that, Supreme People's Court will fit it into the bonus item with specific scores to be added when certain standard is exceeded during assessment. Besides, the stress from the competition with other courts also counts. A mediation rate of 60% and 70% compared with that of 80% achieved by others may lose the concerned judge's face in front of other judges or their leaders. Therefore, mediation becomes the primary choice of judges. Secondly, we are confronted with increasing difficulty in judicial mediation due to the concerned party's enhanced sense of rights as well as the weakened judicial credibility. Against such a background, in order to achieve smooth mediation, judges may unavoidably employ postponing, sentence or even lure to achieve mediation, which may be complained about in the concerned party's petition. Especially in the case of failing mediation followed by sentence, the losing party may doubt the judge for what he has done during the mediation process. Trapped in such a dilemma, judges face tremendous stress, hence producing complaints about judicial mediation. According to the Report on the Case Quality Assessment of National Courts in 2012 issued by Supreme People's Court, the mediation rate of all kinds of cases in China last year increased while displayed a trend of lower promised execution rate but higher enforced execution rate. In some areas, despite its high rate of withdrawal after mediation, its appeal rate and the rate of amendment after the first trial are higher than the nation's average. Besides, the high rate of withdrawal after mediation and retrial coexist in some areas, reflecting some unreasonable phenomena such as forced, delayed, retried mediation and enforced execution after mediation, which brings about barriers for judicial mediation to exert its positive effects.

2. REASONABLE ATTITUDES: THE ANALYSIS ON THE REASONABILITY OF JUDICIAL MEDIATION

In my opinion, we should conduct a rational analysis on judicial mediation by considering possible challenges as well as affirming its responsibility.

2.1 Actual Requirement for Judicial Mediation

Any country's judiciary should stick to its actual requirement of the country and people as well as conform to international judicial principles. Due to different conditions of the country and people, China's judicial activism has fundamental differences from that in the west (Luo & Ding, 2010). It is also the case in the case of assessing judicial mediation. In my eyes, China still has urgent actual demands for judicial mediation due to some reasons. First, China, with a long history of medication tradition, still cherishes the ideology of harmony and peace, where mediation seems to be a good choice to solve social conflicts and construct a harmonious society. Second, Chinese society embraces both the acquaintance society and the strange society, hence providing space for judicial mediation. Third, it is another adjustment to the contradiction between the number of cases and judicial staff. It is shown by the statistics given by Supreme People's Court that during 2007 and 2011, the number of cases nationwide increased a large amount while judges seemed insufficient, only an increase of 6,000 from 189,000 to 195,000 (2011). Therefore, it is beneficial for reducing judicial cost and relieving stress of the court to promote mediation measures one of which is judicial mediation. Fourth, the majority of cases are those fit for mediation. According to the report delivered by the Supreme People's Court to NPC in March 2014, there are 1,612,000 cases are fit to be mediated among those first trial cases dealt within 2013 in China, accounting 45.36% of all. Those 1,612,000 ones are linked with marriage and inheritance.

2.2 Judicial Mediation and Judicial Functions

People's court, as a national judicial bureau, functions to ensure the implementation of law, hence establishing legal authority and carrying forward the process of legalization. There are three various opinions on the judicial functions of people's court. The first, equating judiciary to trial, refers to the right of courts and judges to legally cope with and decide cases and give binding sentence. The second considers judiciary as prosecution activities handled by the nation. For example, according to Shen Zongling, a famous professor in jurisprudence, the application of law usually refers to the specialized activity conducted by national bureau to deal with cases with law according to its legal rights and legal procedures. Due to the fact that it is the implementation of judicial rights in the name of the nation, it is called judiciary. According to the third one, judiciary is viewed as the solution to disputes in the broad sense. The sociality of judiciary is emphasized, hence including lawsuits

and some social activities. Chen Guangzhong holds that judiciary can be defined as lawsuit, that is, the judicial actions to solve disputes and punish crimes (Chen, 2008). In my opinion, the judicial function of people's court consists of two levels: first is to solve the disputes in the current society; second is to establish rules for social behavior through the application of law. The two coexist with the former serving the primary function and the latter serving the secondary one, with the former fulfilled through judicial activism and judicial mediation while the latter established through rational judgment. Especially in the current Chinese society undergoing its transition which triggers frequent and various conflicts, it is reasonable to make use of judicial mediation to promote solving them.

2.3 Correctly Following the Principle of “Combining Mediation and Judgment With Priority Given to Mediation”

There is not anything wrong with the principle of “Combining Mediation and Judgment with Priority Given to Mediation” proposed by Supreme People's Court, but it must be understood and applied in the proper way. Giving priority to mediation means that the judge should have medication awareness when coping with a case to search for promising factors for mediation and fully respect the mediation desires of the two parties. If either party is not prepared to accept medication, there is no likelihood for mediation at all and therefore it cannot be enforced. In other words, giving priority to mediation refers to that the judge should first consider the likely to mediate a case, whether there is a basis for that and whether there is a mutual will for that. Given all those premises, there is no reason to dismiss such a choice. So here priority emphasizes the priority of the mediation awareness over the judgment awareness instead of the superiority of mediation over judgment as a wants to resolve a case or in terms of its effect. Certainly a high mediation rate cannot be emphasized as the top standard of excellence. It is safe to say that mediation is just the implementation of judiciary's elementary functions, such as solving disputes and eliminating conflicts while establishing action rules and reflecting the guiding role of law through judgment is actually where the nature of judiciary lies. In this sense, in terms of the establishment of judicial credibility, mediation is not the right best choice. Instead, it should be used in a cautious way.

3. IMPROVEMENT: MEASURES TO REGULATE JUDICIAL MEDIATION

3.1 Amending the Principle of Voluntary Mediation Into Agreed Mediation

According to Article 93 of the Civil Procedure Law, during the hearing of civil cases, based on the concerned parties' will and evident facts, medication can be

conducted. But according to those doubters, it is common to violate the principle of obeying the concerned parties' will or even enforce mediation in actual judicial practice. In my personal idea, here voluntary mediation should be amended to be agreed mediation. Literally, being voluntary emphasizes initiative, that is, the two parties express their will for mediation and apply for that voluntarily. In contrast, to agree means to be willing to accept mediation when one is required by others, which involve weaker initiative but still display a hint of voluntary will. In judicial reality, it rarely happens that both parties express their voluntary will to have mediation. Instead, in most cases, the court asks them whether they have intention to mediation or the court asks one party for opinion when the other expresses his will for mediation. Completely voluntary mediation is less likely in the case of clear facts and evidences. Accordingly, I suggest making such an amendment to promote the sound implementation of judicial mediation.

3.2 Limiting Involvement of People's Court in Mediation

Currently, with the construction of diversified dispute solution system all over China, people's court is taking the role of an organizer, leader and main force. However, we should be aware that in the current society with risks, the court's limited power makes it impossible to solve all disputes and conflicts. If they commit themselves with too many cases, especially those beyond their range, they are bound to be trapped and be weakened in their judicial authority. As a result, they should keep a distance from social conflicts. The mediating organization should be inspired to take an active role in those cases not delivered by the party to the court while the court should stay behind the scene to promote the solution of disputes by confirming mediation agreements instead of voluntarily involving itself into the case before it is required. We have to be fully aware that judiciary is not almighty but only the last defense line to protect social justice. However, it isn't the best one or the most preferred one.

3.3 Establishing the Principle of Mediation Differentiation

First is the differentiation of the courts. Currently in China, the acquaintance society coexists with the strange society, the vast rural area belong to the former while the urban area is stepping into the latter. Accordingly, the people's court in the acquaintance society should cling to the mediation principle to give priority to resolving disputes, eliminating conflicts and restoring neighbor relations over establishing action rules. For example, the court at the county level lies in an atmosphere with both societies, so it is proper to follow the mediation principle actively. While, the court above the intermediate court should use mediation cautiously considering its relatively lower rate of mediation (about 20%) compared with that of the court at the county level (over 70%). Besides, if the mediation during the first hearing fails, its use in the second hearing will not work well. What's more, different from the county court's aim at resolving conflicts quickly, the court

above the intermediate level should be focused on guiding and establishing rules for social behavior, through which the concerned parties and even the whole society can be informed of right and wrong and the lower court can be guided in how to deal with similar cases.

Second is the differentiation of case types. As for those non-business cases related to marriage, inheritance, adjacent relations, mediation is encouraged to be employed to maintain the relations between family members and neighbors. For those business cases linked to contracts, ownership or infringement, mediation is not a good choice considering the needs to promote market transaction, to maintain transaction rules and to establish standards for social behavior.

3.4 Correctly Applying the Combination of Mediation and Judgment

As a way to solve individual disputes, mediation has its special advantages, but judgment has greater universal significance due to its functions in guidance, evaluation, prediction and even instruction, hence conforming to the basic Communist legal institutions that there should be laws to go by, laws must be followed, laws already enacted must be enforced and any violation against laws must be punished. Therefore, along with the emphasis on the priority of the concerned party's voluntary acceptance, the role of judicial judgment cannot be neglected. Cases should be dealt with in fair procedures to guarantee the fairness of the main body; judicial authority should be established by maintaining the adjudged force and harmony of judicial judgment; enforced identity can be employed to push the concerned party to accept judicial judgment, hence realizing the principle of strictly following the law. About the significance of judicial judgment in establishing rules and preventing disputes instead of only dealing with individual conflicts, Gustav Radbruch, German jurist, has an elaborate statement "The creation of a tranquil atmosphere for the legal field is more important than any reform in lawsuit. We have overemphasized the function of judiciary as a way to judge disputes while neglect its importance in preventing them; we have used too many surgery instead of paying deserved attention to sanitation (Radbruch, 1997).

3.5 Enhancing Monitoring and Regulation on Judicial Mediation

Firstly, the concerned parties' legal prosecution rights should be guaranteed. During the hearing process, both parties' mediation should be fully respected and open atmosphere should be created to inform them of relevant information about the related case. With equal information for both parties, it is more likely for them to make right choices. Without the basis for mediation or agreement of the parties, judgment should be given in time.

Secondly, specific guidance regulations on mediation should be issued. In practice, many judges find it extremely difficult to express in the most precise way

during the mediation course. If they express their opinions about the case in an explicit way, their neutrality and even the justice of judiciary may be doubted, leading to the concerned parties' complaint or petition when the case has to be judged after the failure of mediation. But the mediation will usually come to nothing in the end without any personal opinion expressed by the judge. Some scholars suggest that mediation and judgment can be separated (Li, 2013). In my personal idea, Supreme People's Court should organize guidance on judges' methods and expression modes of mediation in order to promote the sound process of mediation.

Thirdly, dishonesty in judicial mediation should be strictly avoided. Since disputes can be resolved through mediation and there is no trouble of amending the judgment, there is greater likelihood of seeking personal gains during mediation. In this sense, sometimes mediation is not mediating the case but various relations, interests or balance. Accordingly, it is a major issue to find effective measures to enhance the supervision on judicial mediation.

Fourthly, the system to prevent and detect vicious mediation should be perfected and the effective range of judicial mediation bills should be limited. To some extent, mediation is a kind of ambiguous solution to cases. Although we try to perfect the skills and innovate the relevant methods, the whole fact cannot be revealed completely and the responsibility cannot be distinguished in a clear-cut way, thus offering a chance for vicious and false prosecution. Despite some articles related to vicious mediation and the relief system for the third party out of the case in the newly amended civil procedure law, there is no established statement about how to prevent and detect vicious mediation.

Consequently, it is necessary to further establish and perfect the system related to the prevention and detection of such mediation and attempts can be made to clearly state a mediation only works for the concerned parties in the mediation bill.

CONCLUSION

As an important solution to the relief of social conflicts utilized by the people's court, judicial mediation has undeniable significance but its problems have sprung up and drawn increasing public rebuke. As for this, we should hold a reasonable attitude by rejecting absolute denial or completely clinging to the traditional pattern. Instead, proper adjustment should be made to regulate and perfect the principles, case types and supervision of mediation.

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