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博 士 学 位 论 文

我国法院附设调解制度研究

The Study on the Court-annexed Mediation in China

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内 容 摘 要

近年来，随着经济的快速发展、民众维权意识的显著提高，全国法院的案件数量整体持断上升，许多法院面临着“案多人少”的矛盾。然而，大量事实争议不大、法律适用相对明确的案件挤占了原本就捉襟见肘的司法资源，造成诉讼成本的投入与产出极不均衡。与此同时，由于当事人多元的利益追求、选择偏好、价值取向和实际需求，本质上需要多元化纠纷解决方式和更多的程序选择权。因此，发展利用非诉讼纠纷解决机制（Alternative Dispute Resolution, ADR），既符合我国司法实践的客观实际，也满足当事人的多样化需求，同时还暗合世界各国民事司法改革的共同趋势。在众多 ADR 方法中，法院附设 ADR（Court-annexed ADR）以其兼具司法与 ADR 的特性备受瞩目，而法院附设调解（Court-annexed Mediation）更是脱颖而出。本文围绕法院附设调解制度展开全面细致的研究与探讨，在理论分析、域外考察、追本溯源、实践调研的基础上，提出构建我国法院附设调解的具体思路与制度设计。

本文除前言和结语外，分为五章。

“前言”部分，主要阐述了论题提出的背景与意义。在各国纷纷开展法院附设调解的全球背景下，我国法院面对“案多人少”的司法难题也开始进行与法院附设调解相关的尝试，研究法院附设调解制度有着较高的理论价值及实践意义。随后，对本文在研究中运用的主要方法进行介绍，包括概念分析法、文献研究法、历史分析法、比较分析法、实证研究法等。最后，分析了本文的创新与不足。

第一章“法院附设调解之基础理论”。首先，对法院附设调解的概念进行界定，主张不应按照字面含义将法院附设调解解释为“调解机构设于法院的调解”或“附设于法院的调解”，也不适合以我国目前实践中的“诉调对接”来取代法院附设调解的概念，提出应该对其进行扩张解释。其次，通过与法院调解、传统人民调解的比较，阐明法院附设调解的基本特征，并将其定位为介于国家救济与社会救济之间的纠纷解决方式。最后，从制度源起的现实需求、制度的可持续发展以及制度优势等角度，分析了我国设立法院附设调解的正当性。“案多人少”的矛盾与纠纷多元解决的需要构成了我国法院附设调解源起的现实基础，但要实

现可持续发展，主要缘于该制度能够继续满足法院、司法、当事人、社会等各方需求。除此之外，法院附设调解存在的正当性基础还应归因于其自身的制度优势，主要表现为“司法—自治的双重指向”、“权威—自主的最优结合”、“公正—效率的适度平衡”、“开放—规范的合理兼顾”，等等。

第二章“法院附设调解之域外考察”。深入考察美国、英国、德国、日本的法院附设调解制度，主要阐释各国法院附设调解的产生背景、发展历程、制度概况、实际运作等方面。域外法院附设调解总体上反映出螺旋式上升的发展轨迹，并呈现法制化、电子化、职业化的现代化发展趋势。我们在借鉴域外法院附设调解实践经验时要保持理性的态度，既要承认制度的不完美性，还要立足于我国本土实际的基础上进行制度构建。

第三章“我国法院附设调解之传统与机遇”。先从历史的维度探寻我国法院附设调解的传统，可以发现法院附设调解并非现代社会新创设的制度，而是我国贯通古今的一种传统制度资源。古代的官批民调、民国时期的半官方调解以及抗日战争时期的指示调解等，都展现了我国从古代开始在基层解纷制度中国家与民间的衔接与互动。对于我国法院附设调解的追本溯源，有助于我们从历史的视野中获得某些现实启示。随后，分析我国法院附设调解发展的当代契机。法院调解面临的困境、司法理念与司法政策的变迁等，都为我国当前法院附设调解的实践探索提供了理念支持和制度基础。

第四章“我国法院附设调解之实证调研”。重点介绍三个调研地法院附设调解的具体实践，包括厦门法院、杭州西湖法院和东莞第二法院。在此基础上，对我国法院附设调解的实践进行了归纳分析。先总结了法院附设调解制度设计的主要特点，而后以“法院与调解组织的联系程度”为标准，将其分为“紧密联系型法院附设调解”与“松散联系型法院附设调解”，每一种类别还可细分为不同的表现模式。再者，将调研地法院的问卷调查结果以及座谈和访谈内容进行了整理分析。在法院附设调解的实践中，有三个较有争议的问题需要思考。一是多元化纠纷解决中法院的角色定位问题。多元化纠纷解决中，法院的参与有其必要性，但当前也确实存在角色定位不清或错位的情况，不利于多元化纠纷解决机制的构建和纠纷的有效解决，今后应逐步实现法院角色的理性回归。二是法院附设调解强制性因素的正当性与适度性问题。调解中的强制性因素可分为“显性强制”与“隐性强制”两种，“显性强制”可避免调解的“利用不足”，“隐性强制”则

是调解的应有之义。法院附设调解的强制性因素有其正当性，不过也应注意其适度性。三是人民调解的自治性问题。21世纪以来，人民调解重新焕发生机的同时，由于与民事司法的衔接日益紧密等原因，其自治性不断遭到质疑。然而通过历史考察我们发现，传统人民调解中国家公权力的介入自始有之，人民调解从创建之初就并非作为一种纯粹的自治性制度而存在。在当前人民调解转型发展的过程中，公权力的介入同样必不可少，但必须划定一个最低底线。迈向社会自治型人民调解是未来的发展目标，为了实现这一目标需要扫除诸多障碍，循序渐进。

第五章“我国法院附设调解之构建”。建议分两步进行我国法院附设调解的构建。第一步，完善现有的相关制度，主要包括先行调解、司法确认、恶意调解。第二步，为了让我国法院附设调解制度的运行能够更加顺畅，应该从立法的确立、程序的设计、调解资源的完善、配套措施的设立等方面展开进一步的思考和规划。

“结语”部分，总结过去，展望未来。总结了刚刚过去的十年间，即自2004年最高人民法院“二五改革纲要”首次提出多元化纠纷解决机制改革至今，我国法院附设调解所取得的成效，同时期待我国在这方面的理论和实践能够走向世界、引领潮流。

关键词：法院附设调解；诉调对接；先行调解；司法确认

ABSTRACT

In recent years, with the rapid economic growth and people's rising awareness of right-protection, the number of cases received by countrywide courts continued to increase, resulting in the problem of 'frugal of judicial resources'. Meanwhile, a large amount of cases with little disputed facts and applicable laws took up the already limited judicial resource, leading to the low return of investment in lawsuit cost. On the other hand, the complicated interests, preferences, value orientations and actual demands of the client require diversity of dispute resolutions and procedural options. Therefore, developing Alternative Dispute Resolution (ADR) not only conforms to the reality of China's judicial practice, meets the needs of the client, but also fit the trend of civil judicial reform around the world. Among different ways of ADR, Court-annexed ADR is a successful combination of justice and ADR, especially the Court-annexed Mediation. This thesis centers upon the Court-annexed Mediation system with research, discussion, theoretical analysis, foreign investigation, literature review, reflection from practices, and conclude with the specific design of constructing Court-annexed Mediation in China.

This article contains five chapters besides the introduction.

In the introduction, the author first demonstrated the background and significance of this topic. Against the global backdrop that many countries have started to construct the Court-annexed Mediation, confronting the 'frugal of judicial resources', Court-annexed Mediation also emerged in China. A research into Court-annexed Mediation is valuable both theoretically and practically. Besides, the author introduced the methodology in this research, including conceptual analysis, literature review, historic analysis, comparative study and empirical study. In the end, the author looked into the innovation and limitation of this article.

The first chapter discusses 'The Basic Theory of Court-annexed Mediation'. Firstly, the author gave the definition of "Court-annexed Mediation (CAM)". She claimed that Court-annexed Mediation cannot be interpreted literally as 'affiliated mediation agencies in the court', 'Court-annexed mediation agencies' nor 'The coalition of suit and mediation' which is applied currently. The definition should be expanded. Secondly, in comparison with court mediation and traditional people's

mediation, the author clarified the basic characteristics of the Court-annexed Mediation as the dispute resolution between governmental charity and social charity. Lastly, the author analyzed the legitimacy of setting the Court-annexed Mediation from the perspectives of the realistic demand, the feasibility and the benefits. The ‘frugal of judicial resources’ and the diversified demand of right claiming constitute the practical needs. Only if the Court-annexed Mediation continually meets the demands of the court, the judicial branch, the parties in action and the society could it achieve sustainable development. Besides, the rationality of the Court-annexed Mediation lies in its institutional advantage, namely the optimized combination of “judiciary and self-governing”, ‘authority and individual’, ‘Justice and efficiency’ and ‘openness and norm’.

The second chapter looks into ‘Foreign Investigation of the Court-annexed Mediation’. The author looked into the Court-annexed Mediation system in the United States, Britain, Germany and Japan, research into the background, progress, institution overview and practices. The Court-annexed Mediation system in foreign countries developed in an upward spiral trajectory and is getting institutionalized, computerized, professionalized and modernized. While learning from the foreign experience of the Court-annexed Mediation, we should identify the imperfection of the Court-annexed Mediation and localize it to better suit the reality of China.

The third chapter reviews the ‘Convention and Opportunity of the Court-annexed Mediation in China’. The author reviewed the convention of the Court-annexed Mediation in China in history and found that the Court-annexed Mediation was not invented in modern society but had existed for a long time, such as “Guan Pi Min Tiao (Government-approved Civil Mediation)” in ancient times, “semi-official mediation” in the period of Republic of China and the ‘instructed conciliation’ in the anti-Japanese war period. Through the retrospect we can learn more about the reality. Then the author analyzed the developmental opportunity of the Court-annexed Mediation in China nowadays. The predicament confronting court mediation, the changes of judicial philosophy and policy all provide conceptual support and institutional infrastructure for the practical exploration of the Court-annexed Mediation in China.

The fourth chapter is the ‘Empirical research of the Court-annexed Mediation in China’. Firstly, the author introduced the practice of the Court-annexed Mediation in

Xiamen Court, Hangzhou Westlake Court and Dongguan NO.2 People's Court. Upon that, the author did an inductive analysis of the hands-on experience, summarized the major characteristics of the Court-annexed Mediation and generally classified them into 'closely linked the Court-annexed Mediation' and 'loosely linked the Court-annexed Mediation' measured by the tie between the court and the mediation organization. Each type could be divided further into different branches. Besides, the author conducted questionnaires and interviews and analyzed the results. There are three controversial issues in the practice of Court-annexed Mediation. The first one is the role of court. Though it is necessary that the court should get involved in general mediation, the unclear role of the court will affect the construction of diversified dispute settlement mechanism and effective resolutions to the conflicts. People should further define the role of court and bring it back to the Court-annexed Mediation. Secondly then the author moved on to the legitimacy and rationality of setting the Court-annexed Mediation. The author revealed that the compulsory factors in mediation can be categorized into 'explicit compulsory' and 'implicit compulsory', the former can avoid the lack of utilization while the latter fits the intention of mediation. It's important to moderately implement the Court-annexed Mediation. What is more, the author discussed the self-governing characteristic in people's mediation. While people's mediation is becoming popular today, its self-governing nature is often queried as the civil judicature is increasingly penetrating into it. However, history has taught us the power of public authority always accompanies the people's mediation. Thus the author believed that despite the indispensable intervention of the public authority, a limit of the interference should be set. The social self-governing people's mediation is an irreversible trend which requires us to overcome obstacles and gradually achieve it.

The fifth chapter gives the blueprint of 'The Construction of the Court-annexed Mediation in China'. There are two steps toward the construction of Court-annexed Mediation in China. Firstly, advices on optimizing the 'conciliation prior to giving an arbitration award', 'judicial confirmation', 'preventing vicious mediation' in the Court-annexed Mediation are given. Secondly, to improve the operation of the Court-annexed Mediation needs more planning in the respect of lawmaking, the design of the procedure, the allocation of conciliation resources and the supporting measures.

The conclusion gives a retrospect of the past and a blue print for the future. It

summarizes the achievement of the Court-annexed Mediation in China since the Supreme People's Court put forward the reform of ADR in the 'Outline of the Second Five-year Reform Plan' and looks forward that China will contribute mature theories and expertise in ADR to the world.

Key Words: Court-annexed Mediation; Coalition of Suit and Mediation;
Conciliation Prior to Giving an Arbitration Award; Judicial Confirmation

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