

The Necessity and Perfection of China's Pretrial Procedure in Civil Litigation

Dun Xuemei

School of Public Administration and Political Science and Law, Southwest Jiaotong University, China

*Corresponding Author:

Dun Xuemei

Email: 1392245135@qq.com

Abstract: In current China, the judicial reform is under way and pretrial procedure is getting its due status as an independent procedure. However, the lag nature of legal system put some obstructions and difficulties in front of the reform. Thus the choice and design of pretrial procedure will influence the realization of the purpose of civil litigation. At present, the concept of all disputes should be centrally resolved on a trial is prevalent in China's civil litigation. With the increasing disputes in China, this kind of notion can be an obstruction of solving those conflicts to some extent. Also, paying close attention to the trial diminutively is not beneficial to saving judicial resources. To improve China's judicial efficiency from the root, we have to establish and perfect pretrial procedure, in which a portion of disputes can be settled. Even if there is no good results, the arrangement of focuses of disputes and evidences can be full preparation for the subsequent trial. The establishment of the pretrial procedure is one part of the reform of civil procedure, and the important basement of structure of modern civil procedure, which focus on the trail.

Keywords: pretrial procedure, compulsory defense system, evidence disclosure procedure, judicial efficiency, court trial.

INTRODUCTION

The concept of pretrial procedure is not existed in China's civil procedure act amendment(2012),but the law included a chapter which was named the first ordinary trial procedure, in which the preparation before trial was included in Chapter Twelve. Theoretically, the preparation before trial means that once an accuser sue a case to the court and the court accept it ,before a formal trial ,the judges need to proceed some necessary preparatory work to guarantee the subsequent trail can be disposed correctly ,in time and go with a swing [1]. To put it simply, the preparation before trial is exactly a series of preparation work between the prosecution and the official trial [2]. In China, the main clauses about the pretrial procedure in civil litigation refer to China's civil procedure act amendment and Supreme People's Court's Several Rules in Civil Procedural Evidence. According to the Article one hundred and twenty-five to Article one hundred and thirty-three, the above-mentioned preparation work before trial which should be done well by the court includes the following affairs: delivery a copy of the bill of complaint to the defendant and a copy of the bill of defense to the plaintiff, send the case acceptance notice and the notice of responding to action, the notice about the jurisdictional issue and the members of a collegiate bench. At last, the preparation work also includes the choice of a general procedure or a summary procedure. In addition, Article 32 to Article 46 of Supreme People's Court's Several Rules in Civil Procedural Evidence stipulate that adducing evidence in limited time and the specific

application of evidence-exchange. From the above two rules, we can know that in China's present pretrial procedure in civil litigation, apart from some investigation and review by the court, the rest of pretrial preparation work are all procedural matters [3]. Notwithstanding those procedural matters are also necessary preparation work for an efficient trial, our present pretrial procedure is just a section of preparing for a trial, but not a kind of independent procedure. As a result, the current pretrial procedure can not give play to its biggest role in ending countless disputes.

How to define the nature of pretrial procedure?

According to China's current legal rules and practice, the nature of pretrial procedure is confusing [4]. Is it a part of hearing or just some preparation work for the court trail? The second result means that the procedure is a kind of behavior which is purely procedural. The nature of pretrial procedure will be a decisive factor for the confirmation of conductor and the effect of the pretrial meeting and many other systems. In practice, the pretrial meeting, in which the judge and the two parties get together and discuss evidence and disputable points, actually is a part of trail although it is proceeded before the regular trail. From Supreme People's Court's Several Rules in Civil Procedural Evidence and judicial practice, in fact, the pretrial preparation phase is a part of hearing. The maker of Supreme People's Court's Several Rules in Civil Procedural Evidence defined the evidence exchange as a kind of judicial activities. The same

conclusion can be inferred from the aspect of comparative law. Take Germany for instance, they consider the first debate day as a kind of preparation work, but go deep into its nature, it is already a whole process of debate which should happen in courts. So pretrial procedure in Germany is actually a kind of litigation activities. In the same way, in Japan, it is the most important segment that they make preparations, such as organize evidence exchange and arrange the disputable points, for the verbal debate. Whereas, as for the litigation actions of the judge, there are some differences depending on it is public or not. Thus it can be seen that civil law countries, such as Germany and Japan, define pretrial procedure as a kind of trial activities.

It is worth noting that compare with a regular trial, the authority of the judge will be restricted to some extent in pretrial procedure because it usually applies closed trials. To sum up, pretrial procedure is not only preparation for the following central judgment, but also, it is relatively independent. Pretrial procedure is proceeding substantive preparations more than procedural matters. The independent value of pretrial meeting is that it can finish some substantive preparations such as evidence exchange and mediation before a formal court trial, thus pretrial meeting has the feature of substantive trial.

The necessity of establishing pretrial procedure in civil litigation

From all over the world, the stipulations about the purpose and task of pretrial procedure vary in different countries. In America, the purpose of the procedure is relatively simple, which is to get rid of irrelevant matters, analyze and immobilize disputable points. Of course, all above contents are accomplished to prepare for an efficient trial or a conciliation. As everyone knows, procedural justice is always pursued by American judicial system. In Germany, the establishment of pretrial procedure is preparing fully for the following verbal debate, which can improve the litigation efficiency. Although the purposes of pretrial procedure in different countries are diverse, as a whole, the purpose of lifting litigation efficiency is noticed. To be specific, the following are some values of pretrial procedure.

First of all, the democracy of litigation can be embodied. There are two notions need to be mentioned, one of which is civil litigation structure, the other is civil litigation mode. In theory, civil litigation structure and civil litigation mode are two concepts which have relation and, at the same time, distinctions. The preceding concept, namely civil litigation structure, reflects the operating process of civil procedure, which embodies the relation among those phases of civil litigation. Nevertheless, civil litigation mode reflects the

nature or essence of civil procedure, especially it focuses on the dialectical relevance between the two parties and the court. To be specific, there are two different species, which are adversary system pattern and authority principle pattern [3]. In general, civil litigation mode is a sort of keynote and premise, which influences the parties' role orientation in civil litigation structure. Today, China's civil litigation mode is transferring to adversary system pattern. But when we look at China's existing legal provisions, especially the part of pretrial preparation, there are mainly some rules refer to some procedural matters about how to make preparations for imminent trial. In these stipulations, it is rare that the two parties participate in the procedure on their own initiative while the function of judges is very obvious. On the contrary, in the current adversary system pattern, the pretrial procedure should embody initiative of the two parties fully, that is to say ,in this stage, the democracy of litigation can be embodied.

Secondly, the main function of ending disputes can be realized and the judicial efficiency can be improved to a large extent. At present, pretrial procedure is becoming a sort of independent procedure which can be utilized to end disputes on itself. Pretrial procedure itself has all essential rules which are needed to solve disputes, this procedure does not need to depend on other procedures, it has the ability and power to make the purpose and goal of litigation come true. Together with the official trial, pretrial procedure has formed an integrated flow path of ending conflicts [5]. Take America for example, the country's pretrial procedure is well-developed and relatively impeccable, in which ninety-five percent of cases could be ended in this procedure, while formal trials are not needed to be involved in these cases. In China's current situation, the circumstance is extremely prominent that our judges are less and less in pace with the judicial reform, while the cases are increasing explosively. It is to be observed that we are stressing litigation efficiency all the time so that there are some rules to guarantee its accomplishment, such as the installment of time limit for adducing evidence and the avoidance system of civil evidence. After all, high efficiency of litigation is a vitally important lawsuit value that we go after. Those above-mentioned system have improved our litigation efficiency indeed to some extent, but these rules are also more likely to lead to injustice from the truth of cases. In consideration of the relatively low legal accomplishment of our citizen, once the result of a case does not reflect the truth, general people will not accept the judgment. As a result, the parties will appeal to a higher court or apply for a retrial, it is a waste of judicial resources anyway regardless of the new judgment. On the condition that pretrial mediation is always a crucial principle in China, it is mentioned and practiced everywhere through the litigation. In conclusion, if we have a relatively perfect pretrial

procedure, with the help of the characteristic high rate of mediation, there would be a big possibility that many cases can be solved without a trial so the judicial resources can be saved in abundance. Even if the mediation in the pretrial procedure can not be realized, the results we have achieved like evidence-exchange and arrangement of disputable points will avoid repetition in the subsequent trial. One of the conclusions of this analysis is that to avoid dissipation of pretrial procedure, procedure of court trial and pretrial procedure should compose an unbroken assembly line.

Finally, pretrial procedure can further improve the judicial efficiency through making full preparation for the following procedure. The feature of pretrial procedure in this part is similar with our current regulations. However, pretrial procedure is to be ,or in other words, ideal pretrial procedure should be more specific and professional as preparation for a regular procedure of court trial. In addition, in aforesaid pretrial procedure, the parties can take part in the procedure to a larger extent. Ideal pretrial procedure should not only undertake the responsibility of simple procedural matters, but also bear the obligation of evidence-exchange and arrangement of disputable point, which can be easily used in court trial and increase litigation efficiency. In a word, to make the goal of fulfilling full preparation come true, pretrial procedure have to be concrete and feasible design.

CONCLUSIONS

To sum up, under the current condition of China's civil litigation, to establish a sophisticated pretrial procedure is crucial and also feasible. An intact pretrial procedure should satisfy a series of claims. First of all, pretrial procedure should be independent from procedure of court trial. Secondly, pretrial procedure demands initiative of the two parties. Thirdly, when we put our attention on the ability of solving disputes on pretrial procedure itself, we should also focus on another function, which means the preparation function for the following trial. Only combine the above two functions, can we improve our litigation efficiency fundamentally. The last but not the least, if the two parties can reach an agreement and fulfill their mediation or conciliation, it is not necessary anymore to consider the acceptability of the judgment to the two parties. Another benefit is that the judges will rarely worry the execution problem which always exist in a mass of cases. This way, objectives of shortening the period of cases and elevating litigation efficiency can be realized. The following are several points to perfect China's pretrial procedure, besides, some other aspects can be added in future.

The first point is to endow pretrial procedure independent status. To endow pretrial procedure

independent status is extremely important to transform traditional unitary litigation construction, namely prepare and try, to a binary litigation construction [5], which means take advantage of pretrial procedure and judge centrally. Multifarious means of ending conflicts outside the court trial can satisfy the demands of multifarious dispute solutions. Taking litigation idea into consideration, litigation is not only restricted to court trial, but also pretrial procedure should be included. That's why we should abandon our mindset that all litigation must experience court trial and should be refereed by judges. A boldest attempt should be tried in solving a large proportion of issues by pretrial procedure until some cases are badly in need of procedure of court trial.

Secondly, judge assistant should be the compere of pretrial procedure With respect to the host, there are three patterns of pretrial procedure :the first one is that the compere who take charge of pretrial procedure is exactly the judge who will be responsible for the case in the following court trial; the second mode is that pretrial procedure should be controlled by the following judge's assistant, it is the mode we recommend in this article; the third one is a brand new pattern, which purports that the host should be irrelevant with the following judge [6]. For instance, a judge of the case-filing tribunal can assume this obligation to organize the whole pretrial procedure. Nowadays, the judicial reform is under way, this time the reform will accomplish a reasonable allocation between judges and their assistants. On this occasion, I would suggest that the one who will organize pretrial procedure would be the Judge assistant. The following are two reasons for the suggestion: Firstly, Judge assistant have sufficient competence and they are experienced and, in the meantime, professional. And because of this, Judge assistant would be efficient in evidence-exchange and arrangement of disputable points. Secondly, the time of those judges can be saved to proceed their other trials, it is some kind of saving judicial resources. Moreover, if there is no mediation or conciliation has been reached in pretrial procedure and the case need a court trial, the judge assistant can communicate with his judge, who is exactly the case's judge, about the case and then the case can be ended quickly as a whole.

Thirdly, perfect compulsory defense system and evidence disclosure procedure. In China's civil procedure act amendment (2012), the second paragraph of Article 125 stipulates that the court can proceed with the trial even though the defendant has refused to submit his defense. This clause leads to consequence that in judicial practice, most defendant decline defense. On account of our evidence disclosure procedure is underdeveloped, the defendant can get an advantageous position in the court trial. Although above phenomenon

reflects the conception of trial centralism, but in fact it is unjust to the accuser. Once independent pretrial procedure is established, the procedure can be useless if the defendant refuse to present his defense because the two parties cannot communicate so that the disputable points cannot be confirmed [7]. Therefore, compulsory defense system should be stipulated in the act and if the defendant refuse submit his defense, he will fail in this case. Evidence disclosure procedure is recorded in Supreme People' s Court' s Several Rules in Civil Procedural Evidence but it is not compulsory. As a result, the unique phenomenon formed in our country that a defendant always present his evidence on the court trial rather than the time quantum of evidence disclosure procedure so that he can attack the accuser with so-called new evidence. The accuser, however, in most cases, he does not prepare defense for this new evidence, thus, injustice is formed. If we have an independent pretrial procedure, evidence disclosure procedure is a necessary condition for evidence-exchange and arrangement of disputable points, so compulsory evidence disclosure procedure must be accomplished. Furthermore, the second paragraph of Article 40 in Supreme People' s Court' s Several Rules in Civil Procedural Evidence stipulates that except significant cases, difficult cases and the most complicated cases, evidence-exchange can proceed two times at most. I suggest that the limit on times should be canceled or abolished since this kind of provisions is not beneficial to clear and define disputable points of cases and fix the current evidence. The number of times of exchanging evidence can be more flexible thus it can adjust until pretrial solution is reached.

Fourthly, a legal writ should be reached at the end of pretrial procedure. A set of thorough pretrial procedure should be normative, which means that the judge and the two parties proceed the procedure step by step legally. Now that we pursue independent pretrial procedure, of course, a legal writ should be reached at the end of the procedure, which then should be obeyed by the two parties. With respect to this problem, American pretrial meeting is worth using for reference. In America, the purpose of the last pretrial meeting is simplifying disputable points [2]. To be specific, the judge gives a ruling according to the contents of the last meeting and issues an order for pretrial meeting, in which the scope of disputable points, evidence list, the witness list and other important matters can be narrowed down. Now that the orders or verdicts issued by the judge are valid beyond doubt, the subsequent procedural acts of the two parties should be restrained, with the result that the procedure of court trial can be proceeded rapidly. Another possibility is that a mediation agreement or conciliation agreement has been reached by the accuser and the defendant in the pretrial procedure, that way, if the above agreement has been reached before the judge took part in, the final

outcome of this case will be withdrawing an action by the accuser. On the contrary, if the conciliation agreement was reached owing to the judge's participation, the judge will make a particular mediation document for this case. The document will be signed by the two parties then get its validity. In these cases, a dispute can be solved in pretrial procedure rather than a formal court trial, that's why judicial resources can be saved. As a matter of fact, reconcilable cases account for a large proportion in all cases, if there are an independent pretrial procedure, a great many cases can be ended in this platform, thus a trial is not necessary and the litigation efficiency can be improved largely.

The last point is to prevent abuse of pretrial procedure. In judicial practice, China's pretrial procedure has experienced an extremely bumpy evolution. In original time, pretrial procedure was abused badly. During that period, the entire core was concentrated on pretrial procedure, which was guided by the judge only. The result is that the verdict of cases have been made before formal court trials and judges lost their neutral status. Without confrontation in court of the two parties trial, judicial authority often be abused and the judgment often lost its justice, which exactly violated the basic concept of civil litigation.

In conclusion, to perfect China's pretrial procedure, first of all, in terms of lawsuit idea, pretrial procedure should be not only a part of preparation for court trial, but also an independent procedure. Secondly, in relation to the host who will organize the whole procedure, I recommend that judge assistant as the host. In addition, the crucial and concrete system design of perfecting pretrial procedure should be established, such as the compulsory defense system and evidence disclosure procedure and so on. Furthermore, as embodiment of independence, a legal writ should be reached at the end of pretrial procedure, which then should be observed by the two parties. At last, we cannot exaggerate the application of pretrial procedure and distort its nature, which will make it more difficult to realize the purpose of the procedure. A good design of pretrial procedure should aim to bring down the litigation cost of the two parties and minimize the cost of trial and litigation of courts. In this way, limited resources in our country can meet more judicial requests of more people. At the same time, if there is a proper and ideal design of pretrial procedure, the maximization of democracy, litigation efficiency and litigation benefit can be realized.

REFERENCES

1. Xing LJ, Feng PJ. Civil Procedure Law. Beijing. Peking University Press. Beijing. 2001.
2. Qingping S, Feng QJ. The pretrial procedure. The Contemporary Law. 2001;9:61-65.
3. Jian TW. On the Transition of the Modes of

- Pretrial Procedure of Civil Litigation. Journal of Henan Administrative Cadre Institute of Politics and Law. 2005;4:49-55.
4. Ping FH, Nan LW. The necessity and suggestions about how to establish pretrial procedure in China. Hebei Law Science. 2005;23(10):89-92.
 5. Jian TW. On the Construction of the Pretrial Procedure with the Nature of Self — sufficiency in the Civil Procedure of China — The Idea of Reform: Coexistence of Pretrial Procedure and Court Trial Procedure. Tribune of Political Science and Law (Journal of China University of Political Science and Law). 2004;22(4):16-23.
 6. Wu CA. The reconstitution of pretrial procedure in China. Journal of PLA Nanjing Institute of Politics. 2005;21(3):83-87.
 7. Qian BY. The functional review and construction of China's pretrial procedure and trial - researching China's civil procedure act amendment (2012) from the angle of comparative law. Study of Comparative Law. 2012;5:16-31.