敞开司法之门

——民事起诉制度研究

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摘　要

20世纪80年代以来，人类几乎在全球展开了司法改革运动。这次司法改革的目标之一就是如何使人们更容易接近司法，即如何保障公民起诉权。改革开放所带来的中国社会结构的巨变，使得各种民事纠纷大幅增加，出现了一定程度的“诉讼爆炸”。然而，许多纠纷起诉到法院后，经常被法院裁定或口头告知“不予受理”。社会纠纷如果没有一个良好的解纷机制予以解决，人们将会寻求非法方式，那将会导致更大的社会纠纷甚至动乱。因此，民事起诉权的保障对于有序化地解决社会纠纷、维持社会稳定具有举足轻重的作用。

民事起诉问题是民事程序法中涉及范围较广的一个课题。本书仅从共性的意义上，抽象出民事起诉制度的设计理念或法理，在总结两大法系主要国家立法、司法实践经验的基础上，结合中国目前的实际，提出完善我国民事起诉制度的宏观设想。

本书分为四个部分。

第一部分，民事起诉制度的基本理念。法律的理念是人们对法律制度的价值判断及制定规则的抽象价值取向。而法律制度是在法律理念基础上制定的具体行为规则。民事起诉制度的基本理

念是：民事起诉权是公民的基本权利，民事起诉权的保障是国家对公民的基本义务。随着人们物质生活和精神生活水准的提高，法律赋予人们的实体权利会越来越多，而权利如果没有相应的诉权予以保障，那么这些权利只能停留在纸面上。

司法救济请求权（right to judicial remedy）也称为接近法院权（access to court）或接近司法权（access to justice），是指当个人的权利或自由被非法侵犯时，有要求司法机关给予听审和裁判的权利。它是在第二次世界大战后，人们对人权观念理解的深化而产生的权利概念。司法救济请求权包括两方面的内容：其一，不得拒绝受理；其二，不得拒绝裁判。

作为司法救济请求权之一的民事起诉权与民事实体权是既有联系又有区别的。民事起诉权与民事实体权的联系表现为，民事起诉权的基础是民事实体权，民事实体权应包含民事起诉权；但民事实体权与民事实体又是相对分离的，即享有民事起诉权的人未必一定享有民事实体权。

我国至今未将司法救济请求权作为公民的基本权利写入宪法。刚刚结束的第十届全国人民代表大会第二次会议，通过了《中华人民共和国宪法修正案》，增加了“国家尊重和保障人权”的条款。宪法中尊重和保障人权的规定表明，我国主流意识在观念上已发生了根本转变，即从过去的权利规定转变到现在的权利尊重和保障，注重了权利的实践性。笔者认为，司法救济请求权的保障应该是人权保障的应有之义。随着我国政治文明建设的不断深化，司法救济请求权作为公民的基本权利应该明确写入宪

法。

第二部分，外国民事起诉制度评述。通过考察大陆法系和英美法系国家民事起诉制度的具体规定，探知其规定的内在理念及意图，从中探寻可供我国立法及司法借鉴的经验。

法国的民事起诉制度的特点可以概括为以下两点：其一，建立了诉权制度。法国民事诉讼法规定的诉权是指程序意义上的诉权。该法典关于诉权的规定，极大地促进了程序理念的形成与普及。其二，创立了团体诉讼资格制度。为保护个人（行会成员）的权益提供了又一重要的途径。

德国民事起诉制度有以下三个特点：其一，规定了被告的应诉责任。即被告如未在规定的时间提出答辩，或虽提出答辩，但未有效地反驳原告提出的事实的，就可能要承担败诉的后果。这一规定增强了诉讼的对抗性，提高了诉讼效率。其二，规定了诉讼要件。该规定为法官提供了作出实体裁判在诉讼法上必须满足的程序条件，也为诉讼双方提供了在程序上攻击和防御的目标，从而使得程序的作用与价值在诉讼中得到提升。其三，规定了较全面的诉的合并制度。尤其值得一提的是，通过规定附带的诉的合并与选择的诉的合并制度，赋予了当事人更多的选择权，能够更加充分地保护当事人的实体权利，简化诉讼程序，符合当事人对法律的合理预期，也便利于法院对判决的执行。

日本民事起诉制度主要模仿德国，但也有其特点：其一，明确区分了起诉要件、诉讼要件和权利保护要件。这种区分，有利于明确诉讼不同阶段的任务，使得程序权利的功能得到充分体

现。其二，全面规定了诉讼费用制度。日本民事诉讼法对诉讼费用的范围、负担、担保及诉讼救助等都作了详尽规定，为进行诉讼提供了费用规则。

英国民事起诉的特点如下：其一，宽泛的反诉与追加之诉制度。英国的民事诉讼程序规则第20章规定了反诉与其他追加之诉，依据此规定，可以提起诉讼的范围相当广泛。该制度极大地方便了当事人进行诉讼，在程序上使得多个纠纷及多方当事人的诉讼能够在一次诉讼中得到解决。其二，英国的诉讼费用范围较宽。英国法院的诉讼费不仅包括法院费用，也包括律师费。这一制度使得胜诉方降低了诉讼成本，在一定意义上鼓励了民事起诉行为。

比较而言，美国的民事起诉制度是相当完备的。其特点如下：其一，规定了适用范围较广泛的反诉及交叉诉讼制度。美国的反诉不一定要求必须与本诉有联系，这就拓宽了反诉的受理范围。共同诉讼人之间可以提起交叉诉讼，使得共同诉讼人之间的纠纷也能够与本诉一并解决。其二，创立了诉讼引入与诉讼介入制度。使得第三人根据其在诉讼中的地位，能够更加方便的参加诉讼，限制了法官的恣意，提高了诉讼效率。其三，规定了集团诉讼制度。美国的集团诉讼适用范围宽泛，对推动民权运动及保护众多消费者、受害者的权益，提供了不可替代的制度保障。

第三部分，我国民事起诉制度的回顾与反思。如果不考虑本国的具体法治传统及现实环境，而将域外的制度和经验照搬过来，那势必出现“水土不服”现象。因此，有必要研究我国民事起诉制度的过去与现状，以发现问题之所在。

中国典型意义的传统社会主要是指封建社会。在中国封建社会中，在意识形态上居支配地位的是儒家思想。儒家思想在治国目标上追求大同，天下为公；在观念上主张无讼、耻讼。这样，主流社会对具体司法体制及法律制度，就不可能有太多的关注与建树。儒家法律思想及制度对当代国人的观念仍有一些潜移默化的影响。

迫于内政外交的压力，清政府仿效日本和德国的民事诉讼法，制定了《大清民事诉讼法草案》。该草案虽因清朝政府的覆没未及实施，但它成了民国民事诉讼法典的蓝本。可以说，从此开始，中国的法律人士才开始认识到民事诉讼制度对司法公正的重要性。

1911 年的辛亥革命推翻了满清帝国的统治，建立了中华民国。由于一直未建立起正常的社会秩序，法律不可能有效实施。在此期间，中国共产党于 1921 年宣告成立，此后，共产党解放了广大的中国农村，在解放区建立了人民司法制度。人民司法最突出的特点是群众路线，司法干部不再凭诉状和文件坐堂办案，而是走出办公室，就地审理。况且取消了诉讼费用，方便了当事人诉讼，采用调解方式解决纠纷，简化诉讼程序。可见，解放区的司法仍然沿用了我国封建社会民间的纠纷解解方式，只是调解所依据的“原则”不同。在封建社会是“礼”，而解放区司法调解更多地是依据共产主义的意识形态和民间习惯。这一时期，人民司法关注更多的是社会秩序的维持，程序意识十分淡漠。

中华人民共和国成立后，由于注重社会稳定和政治运动，直

到1982年才有了民事诉讼法，虽经1991年的修改后正式实施，但该法仍然过于简略，在实践中随意性很大。

笔者认为，我国民事起诉制度落后的原因如下：一是我国缺乏对人性本质的深层研究和认识，过于相信人而忽视制度；二是对诉权的研究和重视不够，民事起诉权是以诉权作为其理论基石和逻辑起点的，诉权不被重视，必然导致民事起诉权的观念与制度缺乏根基；三是习惯于以言代法，以德代法，在一定程度上讲，中国司法界至今并未真正树立起法律至上的理念。

第四部分，敞开司法之门：完善我国民事起诉制度的宏观思考。在宏观上，我国民事起诉制度存在的问题主要是：民事受案范围狭窄，民事起诉条件设定不合理，案件受理费过高，应当合并审理的诉讼未予合并，对滥诉行为缺乏规制等。这使得当事人未能充分有效地利用司法资源。因此，要在这些主要方面，对我国民事起诉制度进行改造。笔者认为：鉴于我国目前的立法和司法状况，在受案范围上应予扩充，即凡是民事法律调整的权利义务关系纠纷、因正在生成中的民事权利义务关系产生的纠纷以及侵犯宪法基本权利导致民事权利损害的纠纷，法院均应受理；在起诉的条件上应当降低，即只要符合法定的形式要件，法院就应当受理；在法院的案件受理费上，对现行收费标准应予以改革，使得收费依据更加合理并降低收费；在合并审理制度上，应规定凡是可以合并的诉讼，法院不得拒绝合并；此外，在保护起诉权的同时，应对滥用民事起诉权的行为予以规制，加大对滥诉行为的处罚力度，使民事起诉规则逐步健全。

Research on Civil Litigation
Abstract

Since 1980', a judicial reform has been carried out almost world-wide. One of the objectives of the reform was to enable people to get access to justice in an easier way, i. e. to secure the right of litigation of citizens. Huge changes in Chinese social structures resulting from the introduction of opening – up and reform policies led to the hike – up of various civil disputes, and to some extent formed a "suit explosion". After being brought to courts, many disputes were denied by courts either in the form of a written determination or an oral notice. In the absence of a reliable dispute settlement mechanism, people would resort to illegal means, which would likely result in more social disputes, even chaos. Therefore, security to the right of civil litigation is crucial to orderly settlement of social disputes and maintenance of social stability.

Civil Litigation is a subject in the civil procedure law which involves a wide range of issues. This article will abstract general rationales and principles behind the civil litigation system, and outline the

possible improvement of Chinese civil litigation system, on the basis of summarization of legislative and judicial experiences of typical countries in two major law systems in the world, as well as the current situation of China.

This dissertation falls into four parts.

First part is Rationale of Civil Litigation System. Rationale of law represents people's value judgment on law systems and value preference in establishing law systems. And law systems are code of conduct developed based on rationales of law. The rational of civil litigation system is that the right to judicial remedy is a basic right of citizens, and that guarantee of the peoples' right to prosecute civil actions is a basic obligation of the state. With the enhancing of the people's material and spiritual life, the law will confer more and more substantative rights on people. Such rights must be secured by corresponding safeguard measures, otherwise they would simply be words on paper.

Civil right to judicial remedy, also called "access to court" or "access to justice", refers to people's right to request judicial authorities to hear and adjudicate the case with respect to their rights or freedom that have been illegally invaded. Such right was a fruit of in - depth understanding of human rights concept after the World War II. Right to judicial remedy includes content of two aspects: first is about "can not reject the case", and second is about "can not refuse to make rulings".

As a part of the right to judicial remedy, right to prosecute civil suits is connected to but also distinct from substantative civil rights. The connection between the two kinds of rights is that substantative civil rights lay the foundation for, and include right to prosecute civil suits. On the other hand, the two kinds of right are relatively separated. This means that people enjoy the right to prosecute civil suits do not necessarily enjoy substantative civil rights.

Up to now, right to judicial remedy has not been listed in the Constitution of PRC as a basic right of citizens. A provision to the effect that "the State respects and safeguards human rights" was added to the Amendment to the Constitution of the People's Republic of China, which were adopted in the just – finished second conference of 10th Session of National People's Congress. This purports substantial change in mainstream ideologies of China. The provision with respect to respect and safeguard to human rights shows that the legislator has taken into account the practicability of the rights, in addition to previous provisions as to human rights. I am of the view that, safeguard to human rights should include security to the right to judicial remedy. I believe that with the gradual development of political civilization, in the near future the right to judicial remedy will be expressly set forth in the Constitution.

Second part of the dissertation is Comments on Foreign Civil Litigation Systems. In this part, through studying the specific provisions

concerning civil litigation system of major countries falling within continental law system or Anglo – American law system, I tried to ascertain the internal rationales and intentions of such provisions, to seek for experiences which can be learned by Chinese legislators and law enforcers.

The civil litigation system of France is featured in two points: first, the establishment of the litigation right system. Litigious right provided in the French law of civil procedure refers to the right in the procedural sense. Provisions contained in the law have made great contribution to the formation and prevalence of the procedure concept. Second, the establishment of class action qualification system, which provides an additional instrument for protecting individual's (guild members) rights and interests.

German civil litigation system has three characters: First, it provides for the responsibility of the defendant to respond to the civil action, i. e. if the defendant fails to defend itself in a specified time limit or fails to repudiate the facts furnished by the plaintiff, it might assume the consequence of losing the suit. This provision has enhanced the antagonism and efficiency of the suit. Second, it provides for essential elements of lawsuits. This provision contains necessary procedural requirements for judges in making substantative rulings, as well as attack and defending targets for both the plaintiff and the defendant, therefore has reinforced the effect and value of the procedure in

lawsuits. Thirdly, It provides a comprehensive system of joinder action. In particular, the accidental and alternative joinder action systems set forth in the code of civil procedure provide parties with more options, protect their substantative rights in a better way, streamline the procedure of actions, accord with the reasonable expectation of parties on laws and facilitate the court enforcing rulings.

Japanese civil litigation system modeled itself on that of Germany. Nevertheless, it also possesses unique characters: First, it clearly sorts essential elements for prosecution, lawsuits and right protection. Such division is conducive to identification of tasks in various phrases of a legal action, making the function of procedural rights fully achieved. Secondly, it provides a complete set of rules for court fee, specifying scope, assumption and guarantee of court fee, and gratuitous judicial assistance in relation to court fee.

British civil litigation has following features: First is a broad cross action and additional action system. Chapter 20 of the British Civil Procedure Rules provides for cross action and other additional actions. In accordance with this provision, multiple disputes and suits involving multiple parties might be settled in one action, in the procedural sense. This has facilitated parties in proceeding with civil actions. Secondly, the coverage of British court fee is relatively wide. In British courts, cost of action also includes lawyer's fee in addition to the court fee charged by the court. This system decreases the legal

cost borne by the winning party, therefore in a sense has encouraged civil litigious activities.

In comparison with other countries, civil litigation system of the United States is quite mature, with characters as follows: first, counterclaims and cross – action system with a wide applicable scope. United States does not require that the counterclaims necessarily has a connection with the main action thus expands the scope of acceptable counterclaims. Co – litigators may prosecute cross – actions among themselves, enabling disputes among them to be settled together with the main action, Second, the establishment of action and intervention system, which facilitates third parties joining the action according to their status in the action, and restricts discretions of the judge and enhance the efficiency of the action. Third, class action system with a wide applicable scope has become non – replaceable institutional safeguard for the promotion of civil right campaigns and protection of mass consumers and victims.

Third part: Retrospection and Reflection on Chinese Civil Litigation System. If we simply copy the systems and experiences of foreign countries without consideration of the judicial traditions and situation of China, foreign systems and experiences would not work as well as in their own countries. Therefore, it is necessary to research the past and current status of Chinese civil litigation system to identify primary problems.

In the typical sense, traditional Chinese society refers to the feudal society, in which the dominating ideology was Confucianism. Confucianism pursues the objective of Great Harmony in terms of state administration; and it calls for settling disputes without recourse to lawsuits and regards lawsuit as a shame. Consequently, in feudal society people were not in a position to attach much importance to judicial and legal systems. Even today, Confucianism has a subtle influence on people's thought.

Under stress of domestic parties and foreign countries, the Qing Government developed the Draft Code of Civil Action of the Great Qing Empire, based on the civil action law of Japan and Germany. The draft had not been put into force due to the downfall of the Qing Dynasty, nevertheless later it acted as an reference for the code of civil action of the Republic of China. We can say it was from that time that legal professionals began to realize the importance of civil action system on justice.

The Revolution of 1911 overthrew the Qing Dynasty and established the Republic of China. During that period, laws could not be enforced effectively due to lack of normal social orders. The Communist Party, established in 1921, liberated broad rural area of China and built the people's justice in liberated areas. The prominent character of the people's justice is mass line. Judicial cadres no longer

deal with cases only by reviewing petitions and documents in tribunals. On the contrary, they went out of the courtroom to hear cases on site. Cancellation of court fee and introduction of intermediation mechanism has facilitated proceedings and simplified procedures. We can see that civilian dispute settlement means in feudal society continued to be used in the people's justice, the only difference was the rules they relied on: In feudal society, the rules were "rites", while in liberated areas, they were communistic ideologies and civilian customs. During that period, people's justice focused on the maintenance of social orders rather than legal procedures.

After the establishment of the People's Republic of China, since the government paid great attention to social stability and political campaigns, the civil procedure law had not been enacted until 1982. Although amended and put into use in 1991, this law was too simple, causing too much discretion in practices. In my opinion, the reasons why the civil litigation system of China falls behind that of other countries are: first, lack of in - depth research and understanding on human natures and relying on too much on people rather than on mechanisms; Second, insufficient research on and neglect of litigation right. Given that litigation right acts as the theoretical and logical basis for the right of civil litigation, ignoring litigation right would necessarily lead to unreliability of the basis for the right of civil litigation. Third, Chinese governors are used to substitute words and moral standards for