Front. Law China (2006) 4: 550–565
DOI 10.1007/s11463-006-0026-1

RESEARCH ARTICLE

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Reform of lawsuit system and revision of filing conditions[1]

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Abstract Currently the Civil Procedure Law stipulates rather "high conditions" for lawsuits and the reason is that in the institutional design, we have equated the conditions of adjudicating the merits with those of lawsuits and the initiation of lawsuits. The trial of conditions of adjudicating the merits are usually conducted after the beginning of lawsuits, while in China it is carried out before the beginning of lawsuits, and thus the related procedures have become a kind of "pre-lawsuit procedures", and theoretical and institutional confusions and contradictions arise. This article is of the opinion that filing conditions should be separated from those of adjudicating the merits, and the trial of the latter should be incorporated into the proceedings. A "dual" trial structure should be constructed, that is, the trial of conditions for adjudicating the merits goes parallel with that of merit disputes. In the attempt to improve civil procedures, attention should be given to the institutionalization of conditions of adjudicating the merits, which should be reasonably designed and integrated into relevant systems. When reforming the lawsuit system, we should also adjust the courts' trial organs. We recommend not setting up any case-filing or appeal divisions and removing the existing "separation of case-filing and trial".

Keywords civil lawsuit, civil procedure, filing conditions

Translated from *Law Study*, No. 6, 2004

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[1] Originally it is titled the "File conditions and Conditions of Adjudicating the merits", published in the 6th Issue, *Law Study*, 2004, about 20000 words, here it is somewhat abridged.

1 Introduction

In civil lawsuits, the proceedings should be initiated by parties: the proceedings of first instance will begin upon parties initiating the lawsuit; while the proceedings of second instance will begin upon appellants initiating the appeal. According to Article 108 of the *Civil Procedure Law*, the conditions must be met when a lawsuit is brought, i.e., (1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case; (2) there must be a definite defendant; (3) there must be specific claim or claims, facts, and cause or causes for the suit; and (4) the suit must be within the scope of acceptance for civil actions by the People's Court and under the jurisdiction of it where the suit is accepted. Besides the above-mentioned conditions, there are also so-called "essential file conditions", such as *non bis in idem*, arbitration does not preclude court trial. Correspondingly, conditions stipulated in Article 109 of the *Civil Procedure Law* are called as "formal file conditions", that is: when a lawsuit is brought, a statement of complaint shall be submitted to the People's Court, and the copies of the statement shall be provided according to the number of defendants. If the plaintiff has genuine difficulty in presenting the statement of complaint in writing, he may state his complaint orally; the People's Court shall transcribe the complaint and inform the other parties of it accordingly. In China, the People's Court shall only accept cases in conformity with filing conditions prescribed in the *Civil Procedure Law* (Article 111.1 of the *Civil Procedure Law*), therefore, whether filing conditions are met is the key for the court to decide whether or not to accept a case. Precisely for these filing conditions prescribed in the *Civil Procedure Law*, "case-filing" has become a unique concept in the civil proceedings. Chinese scholars have defined the "case-filing", such as: in civil proceedings, the People's Court in the first place will examine lawsuit brought by the plaintiff, if it satisfies statutory conditions, the court will decide to accept and try the case and thus begin the proceedings.[2] Actually, proceedings only in fact begin after the court "accepts" the case. The case-filing or examining is just a part of "docketing the case", and a series of provisions for examination and case-filing constitute the so-called "examination and case-filing" system. In connection with the case-filing system, inside the court there are special organs – case-filing division or appeal division, responsible for "separating case-filing and trial".[3] Case-filing organs deal with many case-filing related affairs, and

[2] Wei Jiang (ed.), *Civil Procedure Law*, 2nd Edition, 2004, p.264, Higher Education Press.

[3] The Supreme People's Court, Art. 5 of *Provisional Rules for Case-filing by the People's Courts.*

except the "case-filing by examination" and "case-filing by registration" in cases of first instances, they also deal with case-filing appeals and protests. The case-filing system, together with relevant organizational establishment, is a distinctive feature for the civil procedures and trials.

Procedurally, upon receiving a statement of complaint or an oral complaint (summary procedures), the People's Court should examine it in strict accordance with filing conditions. If it meets the requirements for acceptance, the court shall place the case on the docket within 7 days and notify the parties; if it does not meet the requirements for acceptance the court shall make an order within 7 days to reject it. In practice, the court usually informs the plaintiff of its rejection; if the plaintiff still insists on bringing a lawsuit, it can decide not to accept this case. The plaintiff, if not satisfied with the order, may file an appeal with the court on the next higher level within 10 days after the date on which the written order was served. If the court, after filing a case, finds it does not meet requirements, it can order a rejection.[4] Written orders for non-acceptance or rejection shall be prepared by judicial officers responsible for the case and submitted to the chief judge of a division of the court or the president of the court for approval.[5] For cases rejected or not accepted, if the plaintiff brings an action for the second time and it conforms to filing conditions, then the court should accept it.[6]

Exactly for this internal connection between filing conditions and filing a case, filing conditions become for initiating civil proceedings of first instance, i.e., conditions for beginning a lawsuit. However, can we prescribe such conditions for initiating a lawsuit? Or, should a lawsuit have such conditions? I think, it should be seriously reflected by the provisions for filing conditions in relevant systems. Since, when constructing legal procedures, we actually confuse conditions for beginning a lawsuit with conditions for adjudicating the merits, as a consequence, conditions for bringing and case-filing an action are somewhat demanding. The forward movement of substantial trial procedures results in a paradox, that is, conceptually, the examination by court is not a part of proceedings, since if the lawsuit does not meet requirements, it will not be initiated, while examination processes or procedures do exist or have already occurred actually. Since their existence is conceptually denied, they become a kind of "pre-lawsuit procedures". For this reason, people easily overlook the

[4] The Supreme People's Court, Art.139.1 of *Opinions as to Applying the Civil Procedure Law of the People's Republic of China*.

[5] The Supreme People's Court, Art. 12 of *Provisional Rules for Case-filing by the People's Courts*.

[6] The Supreme People's Court, Art. 142 of *Opinions as to Applying the Civil Procedure Law of the People's Republic of China*.

legitimacy or justification of such "pre-lawsuit procedures", which become a "grey zone" or "grey procedures". Precisely for those demanding file conditions and "grey" examination procedures, the rather unique "difficulty for lawsuit" arises and persists.

2 Conditions for bringing a lawsuit

In some countries applying the continental law system, there is indeed the concept of "lawsuit condition". The so-called "filing conditions" refer to conditions that a lawsuit must meet for the court to continue the trial of disputes and make an adjudication of the merits. The so-called "conditions of merit judgment" (conditions for adjudicating the merits)[7] refer to preconditions that a lawsuit must meet for the court to make a judgment on claims or disputes lodged by parties. Obviously, here "filing conditions", rather than the equivalent of conditions for beginning a lawsuit, are conditions that a lawsuit must meet for the court to adjudicate the merits. However, its outcome lies with the fact that, if a lawsuit does not meet such conditions, the court will be unable to judge on the claims and disputes lodged by the plaintiff. According to Professor Takahasihiroshi, an expert on civil procedure law, "lawsuit condition" is a rather inaccurate expression and is easily taken for "conditions for establishing or beginning a lawsuit".[8] Since "filing conditions" are not equal to conditions for beginning a lawsuit, therefore, in these countries, the absence of the so-called "filing conditions" affects neither the establishment of a lawsuit nor the initiation of the court trial. Though in countries applying the continental law system, "lawsuit conditions" has become an established concept. However, to avoid misunderstanding, hereafter I will use "conditions of adjudicating the merits" as a substitute for "filing conditions"[9]

In countries applying the continental law system, theoretically, conditions of adjudicating the merits usually include the followings: (1) the actual existence of parties; (2) the parties must have a capacity to be a party; (3) the parties must be eligible; (4) the parties must bring an action; (5) it is effectively executed; (6) not belong to a re-litigation; (7) have litigation

[7] Shindo Koji [Japan], *Civil Procedure Law*, 1989, p.203, Koubundou, Takahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.1,Yuubikaku.

[8] Takahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.1, Yuubikaku.

[9] In other countries, there is a similar expression, i.e., "Condition of merit judgment, since it is also liable to be misunderstood and thus is not used in this article.

interest; [10](8) must be within the judicial power of the court; (9) must be under the jurisdiction of the court, etc.[11] According to Article 108 of the *Civil Procedure Law*, the following conditions must be met when a lawsuit is brought: (1) the plaintiff must be a citizen, legal person or any other organization that has direct interest in the case; (2) there must be a definite defendant; (3) there must be specific claim or claims, facts, and cause or causes for the suit; and (4) the suit must be within the scope of acceptance for civil actions by the People's Court and under the jurisdiction of the People's Court where the suit is accepted.[12] It should be noted that, in Chinese court practices, lawsuit condition does not confine itself to requirements stipulated in Article 108 of the *Civil Procedure Law*, and actually still include conditions such as *non bis in idem*, arbitration does not preclude court trial. The court will not accept or will reject a lawsuit under any such condition.

By comparing the lawsuit condition in the continental law system with that in China's civil proceedings, we can find much similarity: (1) Though the *Civil Procedure Law* does not provide for the capacity and eligibility of parties, yet, in theory and in practice, it emphasizes that the plaintiff should have the capacity and eligibility to be a party (proper party). What is different, it does not stress the eligibility of the defendant.[13] The existence of a definite defendant will be all right. In practice, the ineligible defendant, after case-filing, will be changed so as to realize the eligibility of the defendant. (2) As to the object of litigation, though the *Civil Procedure Law* does not prohibit "re-litigation" as the countries of the continental law system do, yet in practice, it also insists on no re-litigation, and upon finding a re-litigation, the court will not accept it. In the theory and practice, we have not recognized the concept of "litigation interest", and the court will not

[10] According to civil action theories in countries of continental system, litigation interest refers to the necessity and validity for the plaintiff to obtain case judgment (adjudicating the merits) through legal action. For the plaintiff, if there are no necessity and validity for case judgment, its legal action will also have no litigation interest. Kobayashi Hideyuki, Gennkyou [Japan], *Civil Procedure Law*, 2nd edition, 2003, p.61, Koubundou.

[11] Itou Makoto [Japan], *Civil Procedure Law*, 2nd edition, 2002, p.221, Koubundou. There are many academic classifications of judgment conditions, in order to have a better comparison, here we just choose one of them.

[12] The Supreme People's Court, Art. 5 of *Provisional Rules for Case-filing by the People's Courts* provides for the conditions that a lawsuit must meet for the court to entertain a party's lawsuit: (1) the plaintiff must have the capacity required by the law; (2) there must be a definite defendant: (3) there must be a specific claim or claims, facts, and cause or causes for the suit; (4) the suit must be within the scope of acceptance for civil actions by the People's Court and under the jurisdiction of the People's Court where the suit is entertained.

[13] Such absence of provisions for the defendant's eligibility makes it hard for the court to decide whether to reject the lawsuit or to reject litigation claims.

reject or refuse to accept a lawsuit for the sake of its having no litigation interest, yet when the court exercises its judicial power, sometimes it will take into consideration something similar to "litigation interest". (3) As to the exercise of judicial power, it also emphasizes that the plaintiff's claims should be within the scope of the court's judicial power, in another word, in China, it should belong to or be under the jurisdiction of the People's Court. When docketing the case, whether it is under the jurisdiction of the People's Court will be one of the important aspects that the case-filing organ has to examine. Generally, the court has no right to try and judge on a case that is not under its jurisdiction. (4) As to the functional division inside the court, it also stresses that a lawsuit must be under the jurisdiction of the court that accepts it. Due to the above similarity, we can say that, of conditions of adjudicating the merits in the countries of the continental law system, the majority is roughly similar to filing conditions.[14]

By comparison, we can easily find out such a problem, that is, we actually take filing conditions for conditions beginning a lawsuit and mistakenly equate conditions of adjudicating the merits with filing conditions. The outcome of such filing conditions is: before or when beginning civil procedures, the court will examine matters that otherwise should have been tried during the course of proceedings. Matters, such as whether the case is within the scope of the court's judicial power, whether parties are eligible, whether it is re-litigation, and whether it is under the court's jurisdiction, should be examined after the beginning of proceedings. Besides, all the submission and disposal of objections to jurisdiction should be carried out in the course of proceedings. Yet, the provisions refuse to admit it.

So far as I know, foreign civil procedure laws do not provide for filing conditions in similarity. In other countries, civil procedures begin upon the plaintiff bringing an action, which virtually need not meet any precondition. There are only some purely formal requirements, such as the plaintiff must submit to the court a statement of complaint, which sets forth parties, agents, purposes and causes of claim or claims. In Japan, the plaintiff submits his statement of complaint to the affairs office of the court, the clerk on duty will forward the statement to a judge in accordance with predetermined distribution arrangement. Upon receiving the statement, the judge only examines whether it conforms to legal provisions, and will not go to check whether parties are eligible, whether the case is under the court's jurisdiction, whether the case conforms to the principle of *non bis in idem*, and whether there is litigation interest and so on. They all belong to conditions of

[14] Yaxin Wang, *Adversary and Judgment-Basic Structure of Japan's Civil Actions*, 2002, p.33, Tsinghua University Press.

adjudicating the merits (file conditions). In fact, the court is mainly concerned with whether the defendant's address is correct or whether the charges for judgment and lawsuit service are paid (in foreign countries, charges for the lawsuit service will be borne by parties). If the statement of complaint has problems, the judge can ask the plaintiff to modify it. If the plaintiff refuses to modify, the court can order the rejection of his statement of complaint. (Actually, it is to reject the lawsuit.) If not satisfied with this order, the plaintiff can "immediately appeal" to the superior court (a kind of summary appeal). In Japan, the court rarely rejects a statement of complaint, since it is not very difficult for the plaintiff to modify his statement of complaint. Once the court accepts the statement, the case will enter into a state of "*lis pendens*", which starts when the plaintiff brings an action and terminates when a judgment is made or parties reach a compromise or the plaintiff withdraws his lawsuit.[15]

By incorporating conditions of adjudicating the merits into filing conditions or by taking conditions of adjudicating the merits as those for beginning a lawsuit, it could be effective at the very beginning to prevent cases, which are not under the court's jurisdiction and with ineligible plaintiffs and bounded by arbitration clauses that preclude court trial, from entering into proceedings, and prevent the plaintiff's from abusive actions imposing too unnecessary workload on the court (More accurately, reduce the trial workload, since such a practice will increase the burden of case-filing organs), and prevent from imposing much burden on the defendant. While, on the other hand, we must clearly see that, such a practice can also lead to the following problems.

(a) By incorporating conditions of adjudicating the merits into filing conditions, we inevitably raise the "threshold" of bringing and beginning a lawsuit, giving rise to the unique difficulty for lawsuit. "Lawsuit difficulty" actually means that it is difficult to have a case docketed or accepted. This might be a psychological feeling. The artificially raised "threshold" will necessarily have a negative impact upon the mentality of the masses, and serves to "close the door of the court rather than invite into the door". The plaintiff, being barred before the beginning of the proceedings and on the ground of requirements not being met, will have a sense of futility, and judicial trial based on such a practice will alienate itself from the masses.

(b) A considerable part of filing conditions have already touched upon substantial matters, and their examination and trial require some time and procedures. So, it is inappropriate to deal with them during the short time of examination. For instance, parties' eligibility, the scope of the court's judicial

[15] Huzimoto, *Small Law Dictionary*, 1972, p.597, Yuubikaku.

power and the existence of an arbitration agreement that preclude the court trial, etc., concerned parties should be allowed to fully represent and even debate such substantial matters. The investigation whether conditions of adjudicating the merits are met is not the business of the court itself, and some claims and facts should be given and debated by parties. While, according to the institutional design of the *Civil Procedure Law*, the examination of filing conditions completely belongs to the authority of the court, and the court just unilaterally relates itself to one party. Since the court does not examine matters related to filing conditions (in essence, conditions of adjudicating the merits) through open procedures (such as debate) and in a more neutral way, the impartiality of civil procedures of course will be affected.

(c) The equation of filing conditions with conditions for beginning a lawsuit has resulted in a contradiction between the essence and the forms for procedures. For a case lodged by the plaintiff and accepted by the court, its beginning might be lawful in form but not necessarily so in essence. Once the court upon further trial finds or recognizes the defendant's denial of filing conditions, as long as no judgment is made, all the procedures executed before this will be illegitimate. Take the plaintiff's eligibility for example, though the court, in the beginning, does not find the plaintiff's ineligibility or does not accept the defendant's objection, which is accepted in subsequent court session, yet, since we equate filing conditions with those for beginning a lawsuit, therefore, whether procedures already begun are lawful will be a sort of uncertainty. If the court decides the inconformity of filing conditions, it necessarily will imprint upon its behaviors a mark of illegitimacy. In practice, an embarrassing situation might occur wherein the court accepts the case and the lawsuit enters into trial, but the defendant still objects to the conformity of filing conditions (conditions for case-filing), for example, not belonging to civil procedures. While the court thinks that filing conditions have been met or whether it should be accepted is already solved at the stage of case-filing and examining, the court session covers only disputes related to substantial rights and obligations. However, the defendant insists that no judgment shall be made before settling the determination of filing conditions.

(d) The incorporation of conditions for adjudicating the merits also gives rise to logical confusion of the court. In practice, if the court thinks that it should not accept the plaintiff's case, it in the first place will inform the plaintiff of the inconformity of filing conditions and non case-filing, and ask the plaintiff to withdraw its complaint. If the plaintiff insists on a lawsuit, the court will decide for a non-case-filing. The party, if not satisfied with the order, may appeal against it. But, during the trial course, the court may still find that it should not accept some case already begun and thus go to reject the lawsuit (since the conformity of case-filing conditions usually needs to

be check during the trial, rather than before the beginning of the trial), and the party can appeal against such rejection. But, all these occur after the actual case-filing.

When deciding filing conditions, we may tend to think that, if we do not take the competence and jurisdiction of the court as filing conditions, then how should the court have the right to try the case? If proceedings and "*lis pendens*" begin without consideration of the court's competence and jurisdiction, then would the court not try the case beyond its authority? Therefore, only when the plaintiff's legal action is under the competence and jurisdiction of the court can it acquire a kind of legitimacy and avoid the trial in excess of the court's authority. This perception is rather problematic and is a serious misunderstanding of the connection of the court's competence and jurisdiction with its trial and judicial powers. I think, the competence and jurisdiction actually mean the court's power to make a judgment on substantial issues of the case. Not belonging to the court's competence means that the court has no authority in adjudicating the merits upon substantial issues of the case; having no jurisdiction means that the court cannot judge on substantial issues of the case. Beyond the court's competence and jurisdiction, it does not necessarily mean that the court can not try the dispute (people often distinguish "examination" from "trial", when in fact, examination is also a form of trial, only that the court does not "examine" the case before parties and therefore examination has a unilateral and closed nature. Other trial actions, such as those in court session–court investigation or debate, are executed before both parties). Only after the trial can the court know whether the dispute is within the scope of its judicial power and under its jurisdiction. Cases beyond the court's competence (not the claims) will be rejected, and cases beyond the court's jurisdiction will be transferred to the court with proper jurisdiction. Therefore, the examination of conditions of adjudicating the merits should not be excluded from trial procedures and turned into "pre-lawsuit procedures".

3 A dual structure for civil procedures

Such "high-level" filing conditions have something to do with the perception of the object and the basic structure of civil procedures. Some people always tend to equate the trial of the case with the trial of its substantial issues and separate "examination of procedural issues" from "trial of substantial issues", and the court trial is divided into two dimensions, that is, "procedure" and "merits". Since the determination of filing conditions or conditions for beginning a lawsuit is a "procedural issue", therefore, it should not be an

object for court "trial". They think, the court "trial" is carried out only after the court accepts the case and the trial procedures by self do not include procedures for the examination of filing conditions. In other words, we think the trial of civil cases should be a unitary structure for the trial of substantial issues of the case. Because of such unitary trial structure, i.e., trial object of the court is a substantial issue of the case. Now that the examination of filing conditions is procedural and unsubstantial, then the court examination should not include substantial issues. However, the *Civil Procedure Law* also provides for substantial issues, such as (1) the court's competence and jurisdiction, (2) the parties' eligibility and (3) the existence of an arbitration agreement that precludes court trial.

The court's competence and jurisdiction. The court's competence in nature is the scope of its judicial power. Whether a dispute is an object of court judgment is related to the nature of this dispute, which no doubt is a substantial issue. If we cannot accurately determine the nature of the dispute, we will be unable to determine whether the court has judicial power over it. Upon the determination of its legal relationship, we should further go to determine whether it is a civil case. Only when the dispute is a civil case can civil procedures apply and a civil judgment be made. Therefore, the determination of competence cannot but touch upon substantial issues.

The jurisdiction of the court that accepts the case. On the surface, jurisdiction seems to be far away from the merits, when in fact it is also related to substantial issues. The most typical is the determination of the court that has jurisdiction over contract disputes. According to the *Civil Procedure Law*, a lawsuit brought on a contract dispute shall be under the jurisdiction of the People's Court where the defendant's domicile is or where the contract is performed (Article 24 of the *Civil Procedure Law*). Yet, the determination of contract performing place varies with the nature of contract. For example, if parties do not define the place of performance, for purchase and sale contract, the agreed place of delivery will be the place of contract performance; for contract of processing works, the place of processing will be the place of performance; for property and financial leasing contracts, it is the place where the leased item is used (unless otherwise agreed); for compensatory trade contracts, it is the place where the investment-receiving party performs most of its obligations; for loan contract, the lender's domicile is the place of contract performance (unless otherwise agreed); to determine the nature of a contract, the court in the first place must examine specific contractual rights and obligations. As a result, as long as the *Civil Procedure Law* provides for the above filing conditions, it inevitably will touch upon the trial of substantial issues, which is unavoidable.

Parties' eligibility. With such eligibility, a party will have the right to ask

the court to judge on the rights and obligations of the case and acquire the capacity to be a party of civil procedures.[16] Though the *Civil Procedure Law* does not explicitly prescribe a party's eligibility as a lawsuit condition, since it provides that the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case, whether there is a direct interest is directly related to whether the plaintiff is eligible and further related to whether the other party is also proper, that is, eligible. Though as filing conditions, the *Civil Procedure Law* only provides that there must be a definite defendant, yet when talking about the plaintiff's eligibility, we cannot circumvent the defendant's eligibility, and the latter is also related to substantial issues. Generally speaking, in *condictio* and *action for alteration*, if someone is not a party of the disputed legal relationship, then he is also not an eligible party (an eligible plaintiff or defendant).[17] For this reason, it is somewhat improper for us to distinguish procedural issues from substantial issues and construct the trial structure on this basis.

As is well-known, the exercise of judicial power eventually rests on the judgment of the disputed legal relationship. However, before making a judgment, the court logically has to settle down some issues, for example, the scope of the court's judicial power, the jurisdiction of the court that accepts the case, the parties' eligibility, etc. Without solving these issues, the case-filing court will not have the power to jud\ge on the dispute or even if it can judge it, the judgment will not have any practical meaning (when the plaintiff or defendant is ineligible). So, in civil procedures of first instance, it must be determined whether the court can or is necessary in adjudicating the merits, only when the court has such power and necessity, can it further go to try the case, and judge on it. Under such circumstance, the trial of a civil case actually consists of two parts: One part is to settle the issue whether the court can and is necessary to make a judgment; the other part is how the court will judge on the disputed legal relationship. Accordingly, it also constitutes a dual structure for civil procedures—the trial of the claim to judgment (also called as "trial of filing conditions") and the trial of case claims (also called as trial of case conditions)[18]. Though the civil procedures have the same structure, however, the problem is that the Civil *Procedure Law* and related theories do not incorporate the trial of conditions of adjudicating merits into the trial procedures. In other words, rather than incorporating it into trial procedures, we put the trial of conditions of adjudicating the merits at the very beginning, since filing conditions are also

[16] Weiping Zhang (ed.), *Textbook for Civil Procedure Law*, 1998, p.132, Law Press.
[17] Weiping Zhang (ed.), *Textbook for Civil Procedure Law*, 1998, p.132, Law Press.
[18] Takahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.2, Yuubikaku.

deemed as those for beginning the trial procedures or civil procedures. In this way, the examination of filing conditions actually becomes a kind of "pre-lawsuit procedures".

Besides procedures of first instance, such "procedures outside procedures" also exist in retrial. As a special relief, retrial procedures also include two components: One is the examination of the conformity of retrial conditions; the other is the retrial of the finished adjudicated legal relationship in dispute or dispute. The focus of the civil procedures is on retrial conditions, mostly the provisions for retrial causes, but they do not prescribe examination procedures for retrial conditions. People seem to think that the satisfaction of retrial conditions is the precondition for beginning retrial procedures. Actually, the examination whether an already adjudicated case should enter into a retrial shall be an integral part of the retrial procedures. For this reason, retrial procedures also have a dual structure. Precisely for the wrong perception, the *Civil Procedure Law* fails to provide examination procedures for retrial causes,[19] and such absence has resulted in a "grey zone", an area of judicial corruption.

From the history of procedure law, there indeed existed a period that decreed in beginning a lawsuit, filing conditions must be met. This is the period of ancient Roman law.[20] In ancient Roman law, procedures, though varying with the period, can be divided into two stages. In the first stage, the state's magistrates would examine the litigation right, that is, whether the lawsuit meets the requirements of substantial trial. Then they would go to determine disputed points and trial schedule. Upon disputed points and trial schedule being agreed by parties concerned, they would transfer the case to the court under the jurisdiction, thus entering into the second stage. In the early Roman period, there were no professional judges, and magistrates selected from ordinary people would take charge of merit disputes. In the late Roman period, though the magistrates were strictly bound by statutory evidence rules, it was still the court judged merit disputes to judge on the case. In ancient Roman procedures, the first stage (the trial of conditions for adjudicating merits) and the second stage (the trial of disputing merits) were completely separated from each other. The first stage was the precondition for beginning the second stage, and without the first stage there would be no second stage. Foreign scholars also called this structure as "staged

[19] Weiping Zhang, *The Legalization of Procedures Examination for Civil Retrial*, No. 2, 2002, Jurisprudence.

[20] Kashiwaki Kuniyoshi [Japan], *A Study on File Conditions*, No. 19, 1973, Journal of Civil Procedures; Nakayama Kouji, *The Nature of File conditions*, No. 37, 1986, A Collection of Legal Studies, Waseda University. Quoted fromTakahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.1, Yuubikaku.

proceedings".[21] At that time, the lack of conditions of adjudicating the merits (filing conditions) would constitute the cause for the nullity of the sentenced case. In other words, trial procedures of merit disputes without meeting conditions of adjudicating the merits would also be null and void. Later, this opinion was criticized, and people thought the nullity of the sentence must be through special procedures so as to ensure the stability of the sentence. For instance, in the period of German common law, such lack no longer led to the nullity of the sentence. The sentence was declared to be null through a "complaint of nullity" and the sentence thus declared would be null from the every beginning. In such a way, the connection between the nullity of the sentence and conditions of adjudicating the merits was severed, and the proportion of the trial of conditions of adjudicating the merits gradually declined.[22]

4 Lower filing conditions and case-filing reform

From the above analysis, we can see that, since we have equated conditions of adjudicating the merits with filing conditions, the bringing and beginning of a lawsuit will face a higher "threshold", and procedures for conditions of adjudicating the merits will be marginalized to be a kind of "pre-suit procedures". Therefore, to amend the current *Civil Procedure Law*, we need to adjust filing conditions and clearly provide for conditions of adjudicating the merits. To lower filing conditions is to lower the "threshold" of the initiation of civil procedures.

By bringing an action, a party originally intends to require the court to decide on his claims, while in essence he is initiating the civil procedures. Issues such as whether the claims are within the judicial power and under the jurisdiction of the court, whether the plaintiff is eligible, and whether the claims are tenable, should be determined after the beginning of civil procedures. Therefore, we should better relax filing conditions as likely as possible. It will be quite all right if the plaintiff has set forth definite parties for the convenience of the court. The indefinite claims may not be a hindrance for beginning the procedures. Claims can be dealt in the course of civil procedures. That is to say, the function of a lawsuit is merely to initiate the proceedings, and the investigation and examination of all procedural matters and substantial issues should be dealt with after the beginning of the

[21] Takahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.2, Yuubikaku.
[22] Takahasihiroshi [Japan], *Important Lectures-Civil Procedure Law* (last vol.), 2004, p.2, Yuubikaku.

proceedings. For this reason, it is unnecessary to impose upon parties the conditions such as whether the case is within the judicial power and under the jurisdiction of the court, whether the parties are eligible and whether there is litigation interest. If we can say that the lawsuit brought by a party should meet certain conditions, other countries usually define such conditions as: To submit to the court a statement of complaint, which should set forth the parties, legal agents, purposes and causes of claims. In other countries, due to such simplicity or low level, we can only find "lawsuit mode", and either in legal provisions or in related theories there are virtually no discussions about the so-called "lawsuit condition". To them, the above provisions cannot be called as "conditions" at all and they are only requirements on modes and forms. (I think, strictly speaking, it does not matter whether the lawsuit, through which a party exercises his litigation right, is bound by conditions [to be more accurate, case-filing conditions] or not. Of course, the lawsuit may even fail to observe such formal requirements, for example, the statement of complaint submitted by the plaintiff may have some defects, such as not set forth the defendant and purposes of claims, etc.). In such a circumstance, the court may require the party concerned to add and correct it; if the plaintiff refuses to do so, the court may reject his statement of complaint. As a remedy, the plaintiff can immediately appeal it. If the statement of complaint cannot be served, including non-payment of charges for service, the court may also reject the statement of complaint. Since these matters are not complex, the court, without the need of oral dispute, can directly decide for rejecting the statement of complaint.

If we are to adjust filing conditions and set forth low levels, then conditions for the court case-filing will be loosened or eliminated. Accordingly, the functional division inside the court should also be adjusted. At present, the court practices the so-called "separation of case-filing and trial", that is, the case-filing and trial of a case will be separately carried out by different organs. Case-filing division or appeal division takes charge of case-filing, while various trial divisions are responsible for trying and deciding the already accepted cases.[23] According to the *Provisional Rules*

[23] Before the adoption of "separation of case-filing and trial", case-filing job was done by various trial divisions. In April 1997, the Supreme People's Court promulgated the *Provisional Rules for Case-filing by the People's Courts,* Art. 5 of which provides: "People's Courts adopt the principle of the separation of case-filing and trial"; and Art. 6 of which provides: "A special organ will be responsible for case-filing job, which can be established inside the Appeals Division or established separately if there is no Appeals Division." On July 2, 1998, Yang Xiao, President of the Supreme People's Court proposed to improve the system of "the separation of trial for case-filing, execution and supervision".

for Case-filing by People's Courts by the Supreme People's Court, the so-called case-filing includes the following aspects: (1) To examine civil, administrative and criminal cases of private prosecution and decide whether the cases should be accepted; (2) To accept and register criminal cases; (3) Courts at the higher level accept and register (civil, criminal, administrative) appeals and cases in which the protest was made by the procuratorate; (4) To accept and register retrials brought up by itself or assigned by higher courts and cases that the procuratorate protested in accordance with the procedures for trial supervision. Besides, case-filing also includes the examination of the appeal filed by parties concerned.

Here, a distinction is made between "case-filing by examination" and "case-filing by registration".[24] For cases of "case-filing by registration", the court will not "examine" them. In fact, for the case-filing division, its major workload is to examine and deal with appeals, and "case-filing by examination is the focus of the case-filing job."[25] Once filing conditions are relaxed, such examination will be somewhat meaningless, and "case-filing by examination" will be changed into a simple practice of "case-filing by registration". If such is the case, the necessity for special organs that deal with "case-filing by examination" may be untenable.

The purpose of the "separation of case-filing and trial" is to strengthen the court's examination and disposal of filing conditions, emphasize the check of case-filing on trial and solve "difficulty for lawsuit". However, due to the "demand" for filing conditions, the stress over case-filing in turn serves to strengthen "difficulty for lawsuit". Since the court necessarily will be strict with case examination. On the surface, the "separation of case-filing and trial" is a kind of power decentralization or division, but the outcome of such decentralization is not a beneficial constraint, and it leads to plural powers and emerging powers and thus to the expansion of judicial corruption. We should not forget, corruption is the shadow of power. In reality, case-filing has become a "golden key" through which the few exact benefits and enrich themselves. To prevent judicial corruption, we need a drastic measure, that is, the reduction of power and the control of power. At present, we just pay attention on how to prevent power abuse and overlook the necessity of reducing power or establishing as few power as possible. The "separation of case-filing and trial" is a product of and its necessity is tenable only under existing systems. Once we reform existing case-filing provisions, relax filing conditions, changing them into the conditions of adjudicating the merits and

[24] Min Ji (ed.), *Court's Practices of Case-filing and Relevant Reforms*, p.66, 2000, China University of Political Science and Law Press.

[25] Min Ji (ed.), *Court's Practices of e Case-filing and Relevant Reforms*, p.66, 2000, China University of Political Science and Law Press.

removing the examination of such conditions back to the trial procedures, the "separation of case-filing and trial" will lose the meaning of existence. Since it is very difficult to sever the trial of the conditions of adjudicating the merits from the trial of disputed rights and obligations of the case, we cannot adopt "staged proceedings" of ancient Rome, that is the separation of the trial of conditions of adjudicating the merits from the trial of the case. Instead, we should learn from the "composite structure" in the countries applying the continental law system, that is, the trial of conditions of adjudicating the merits goes parallel with that of merit disputes.

5 Conclusion

No doubt, the equal conditions of adjudicating the merits with filing conditions has raised the threshold of beginning a lawsuit and is the institutional cause of difficulty for lawsuit. Such equation on the one hand fails to reflect fundamental procedural justice and on the other hand leads to institutional inconsistency. Therefore, filing conditions should be separated from those of adjudicating the merits and the trial of the latter should be incorporated into proceedings. A "dual" trial structure should be constructed, that is, the trial of conditions of adjudicating the merits goes parallel with that of merit disputes. In the attempt to improve civil procedures, attention should be given to the institutionalization of conditions of adjudicating the merits, which should be reasonably designed and integrated into relevant systems; when reforming the lawsuit system, we should also go to adjust the courts' trial organs. We recommend not setting up any case-filing or appeals divisions and removing the existing "separation of case-filing and trial" system.