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THE EVOLUTION OF THE CIVIL PROCEDURE SYSTEM OF CHINA

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This article reviews the initiation, stagnation, recovery and reformation of the Civil Procedure Law of China, and places an emphasis on the evolution of the Civil Procedure Law under the background of judicial reformation. This article observes the amendment of the Civil Procedure Law, the adjustment of the rules of civil procedure, the establishment of the basic principles of the Civil Procedure Law, the trend of the Civil Procedure Law that is based on the research of major litigation systems and the perfection of legislation.

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I. THE HISTORY OF CHINESE CIVIL PROCEDURE LAW

The Civil Procedure Law of the People's Republic of China (hereinafter, the "Civil Procedure Law") has experienced a difficult history. By reviewing its historical development, it will help to direct the future of its development. In summary, this law has experienced four phases: beginning, stagnation, recovery, and reformation.

A. The Beginning

After the People's Republic of China was established in 1949, the Six Laws Pandect was abolished, a new judicial system is consisted of the institution of procedure law as an important part. In December 1950, the Committee of Legislative Affairs of the former State Council drafted the General Principles of Civil Procedure of the People's Republic of China (draft), hoping to use it as the procedural basis for the judicial organs to deal with different kinds of litigation

cases and guide the litigations taking place in China, before the initiation of a code for procedure law is promulgated. It is the first draft for the procedure law in China, which marks the beginning of the procedure law of China. This draft proposed three principles: (a) to abolish the formalistic, complex, sluggish litigation procedure that the past reactionary judicial organs adopted; (b) to implement the litigation procedure that is convenient, efficient, and based on truth due to facts; (c) to set the principle that courts need to adopt substantive law when hearing civil cases.

In September 1951, the Central Government of China promulgated the Interim Regulation of the Organization of the Court, the Temporary Ordinance of the Supreme Procuratorate, and the Organizational Principle of the Court in Different Levels. These statutes established trial principles and institutions, such as public trial, circuit trial, jury system, and the like, making rules for the Procuratorate. According to the Interim Regulation of the Organization of the Court of the People's Republic of China, the court system at that time was divided into three levels, i.e., (a) county court, (b) province-level court with its branch courts and subdivision panels, (c) the Supreme Court and its branch courts and subdivision levels. Of which, final judgment is with two rounds of trials; under special circumstances, final judgment is with three rounds of trials, or with one round of trial.

The Constitution of the People's Republic of China, the Organizational Law of the Court of the People's Republic of China and the Organizational Law of the Procuratorate of the People's Republic of China serve as the milestone of socialist legal rules, making rules for the organizations and the courts and the procuratorates, which established the principles and norms of civil procedures.

In October 1956, the Supreme Court issued the Procedural Summary Regarding the Court at All Levels When Hearing Civil Cases (hereinafter, the "Summary"), requesting all the courts to hear civil cases according to the Summary. The Summary is comprised of seven components: receiving cases, pretrials, trial, adjudication, appeal, retrial, enforcement. In 1957, the Supreme Court changed the Summary into provisions, and enacted the Procedure of Hearing Civil Cases (draft) with 84 provisions.

Strictly speaking, as the beginning of the legal construction of Chinese civil procedure law, it is far from mature. Formally, there are no unified norms of civil procedure law, the Procedure of Hearing Civil Cases (draft) of 1957 was not passed, and the publicized "Summary" was not seriously implemented. From the perspective of judicial practice, civil trials at that time had not yet enacted new appropriate norms since 1949. Then, the guiding principle of "follow the mass line" was emphasized, in judicial practice of civil trials the biased way of "according to the public" was adopted, which makes the activity of trial severely deviated from the special mechanism of trials.

B. The Stagnation

With the magnifying of the struggle of the "Anti-Right Deviation" and its subsequent political movement, the legal construction in China has been stagnated; legal nihilism prevailed. In July 1963, the Supreme Court convened the first nationwide conference of the administration of justice in civil law, and on August 8, proposed the Opinions Regarding Several Issues of the Civil Trials (amended draft)" (hereinafter, the "Opinion"). After adjusting the recognition of civil trials and emphasizing the implementation of the policy of the Party, the Opinion pointed out that "investigating and researching, settling the problem right on the spot, with a focus on mediation" are a basic method. In 1964, the guideline of civil trials was further developed into the guideline of "according to the public, investigation, real time solution, most using the mediation" and had formed a more integrative guideline of civil trials.

During the Cultural Revolution, the legal construction of China was greatly damaged; the premature drafting of civil procedure law did not escape the devastations. The civil law construction during this period was stagnated in both legislation and academic research.

C. The Recovery

1. 1978–1982. — In December 1978, the 3rd session of the 11th Central Committee of the Communist Party of China was held. The meeting proposed the establishing socialist democracy and strengthening the socialist legal construction, showing that the legal construction of China has entered into a phase of recovery. Also, the Supreme Court convened a conference for the second time regarding the nationwide civil trial, which lasted for 17 days, and in February 1979 issued the "Supreme Court's Regulation Regarding the Institution of the Procedure of Civil Cases (trial version)" (hereinafter, the "Regulation"), the Regulation touched upon 16 issues, including the reception of cases, pretrial preparations, case investigation and adopting prevention measures, mediation, court hearing, adjudication, appeal, execution, plead and retrial, return visit, documentation of cases, which was served for the temporary use before the enactment of the Civil Procedure Law.

In June 1979, the 2nd session of the 5th National People's Congress (NPC) passed seven laws (including the Organization Law of the Court of the People's Republic of China), and the drafting of the Civil Procedure Law was also in the

preparations. Over two years' time, the drafting of the Civil Procedure Law was completed. The 22nd Meeting of the 5th NPCSC passed the Civil Procedure Law of the People's Republic of China (trial version) on 8 March 1982, which took effect since 1 October 1982. This was the first version of the Civil Procedure Law since 1949, including 23 chapters and 205 provisions.

This Civil Procedure Law is composed of five parts: (a) "General Rules," i.e., Tasks and Basic Principles, Jurisdiction, Trial Organization, Recusal, Litigation Participants, Evidence, Time Period, Service, Compulsory Measures against Obstruction of Civil Actions, and Litigation Expenses. (b) "Procedure of the First Instance," i.e., Ordinary Procedure, Summary Procedure, and Special Procedure. (c) "Procedure of the Second Instance, Procedure of Adjudication Supervision." (d) "Execution," i.e., General Rules, Transfer of Execution and Application, Execution Measurement, Suspension of Execution and Termination. (e) "Special Rules of Foreign Related Civil Procedures," i.e., General Principles, Arbitration, Service, Duration, Conservatory Measures in Litigation, Judicial Assistance.

2. 1983–1991. — In order to guarantee the implementation of the Civil Procedure Law, the Supreme Court issued several judicial interpretations during this period, such as: Replies to the Economy-Related Cases When Applying the Civil Procedure Law (trial version) on 21 July 1987, and the Charging Method of Litigation Fees by the Court on 29 June 1989. The Legal Affair Committee of the NPCSC started the amendment of the Civil Procedure Law from 1986, which lasted for over five years and was passed in the 4th session of the 7th NPC on 9 April 1991.

The Civil Procedure Law is constituted of 27 chapters with 270 provisions, and is divided into 4 parts: (a) "General Rules," including 11 chapters: Task, Scope of Application and Basic Principle, Jurisdiction, Trial Organization, Challenge, Litigation Parties, Evidence, Duration, Service, Mediation, Preservation of Property and Prejudgment Adjudication, Enforcement Measures against Hampering with Civil Litigation, Litigation Expenses. (b) "Trial Procedure," including eight chapters: Ordinary Procedure of the First Instance, Second Instance, Summary Procedure, the Procedure of the Second Instance, Special Procedure, Supervision Procedure, Procedure for Hastening Debt Recovery, Procedures for Public Invitation to Assert Claims and Procedure for Bankruptcy and Debt Repayment of Legal Person and Enterprises. (c) "Execution Procedure," including four chapters: General Rules, The Application and Transferring of Execution, Execution Measure, Suspension and Termination of Execution. (d) "Foreign-Related Civil Litigation Procedure," including six chapters: General Principles, Jurisdiction, Service, Duration, Preservation of Property, Adjudication, and Judicial Assistance.

D. The Reformation

1. 1992–2007. — Compared with the Civil Procedure Law (trial version), the Civil Procedure Law of 1991 has made many amendments and supplementations, which facilitated the related parties to exercise litigation rights and the court to hear civil cases. In order to better implement this law, and to supplement its deficiencies, the Supreme Court issued judicial interpretations, which made the provisions of the Civil Procedure Law more operable.

The Judicial Committee of the Supreme Court passed some judicial interpretations, such as: Opinions of the Supreme Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (valid on 14 July 1992); Several Rules on the First Instance of Economic Dispute When Applying the Ordinary Procedure to Hear a Case and Several Rules on the Economic Dispute When Applying the Summary Procedure to Hear a Case (valid on 16 November 1993); Several Rules Regarding the Strict Implementation of the Civil Procedure Law of the People's Republic of China in Economic Trials (valid on 22 December 1994); Several Rules on the Reformation of Civil Economic Trial Method (valid on 11 July 1998); Several Rules on the Execution Work of the Court (trial version) (valid on 8 July 1998); Several Rules on the Civil Procedure Evidence (valid on 1 April 2002); Several Rules Regarding the Application of the Summary Procedure when Hearing Civil Cases (valid on 1 December 2003). With the promulgation of these judicial interpretations, it implicates that the current legislation cannot satisfy the needs of the society; as a supplement, judicial interpretations are significant to the implementation of the Civil Procedure Law.

On 28 October 2007, the 30th session of the Standing Committee of the 10th NPC passed the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, which targeted at minor amendments regarding the difficulty in retrial and enforcement out of judicial practice.

In 1997, with the growth of academic studies of procedure law, the Procedure Law School of China Law Society has established the Professional Committee of the Criminal Procedure Law and the Professional Committee of the Civil Procedure Law. The Professional Committee of the Civil Procedure Law will manage the academic activities regarding administration procedure law, which has enabled the study of civil procedure law. In September 2006, the Procedure Law School of China Law Society was divided into the Professional Committee of the Criminal Procedure Law and the Professional Committee of the Civil Procedure Law, which has further provided favorable conditions for the

academic research of civil procedure law.

2. 2008–2011. — On 1 April 2008, the amendment of the Civil Procedure Law was commenced, in order to better enforce the amended provisions of the procedure of adjudication supervision and enforcement procedure, the Judicial Committee of the Supreme Court adopted the Interpretation of the Supreme Court Concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China in its 1452nd meeting on 8 September 2008, which took effect on 1 January 2009; and adopted the Interpretation of the Supreme Court Concerning the Procedure of Adjudication Supervision in the Application of the Civil Procedure Law of the People's Republic of China on 10 November 2008, which took effect on 1 December 2008. These judicial interpretations have detailed rules regarding the adjudication supervision and enforcement, which is beneficial to the operability of judicial practice.

II. CHINESE CIVIL PROCEDURE LAW IN JUDICIAL REFORMATION

A. The Civil Trial Reformation in the 1990s

With the reformation of Chinese market economy, in the latter 1980s and early 1990s, judicial institution of civil law gradually revealed its deficiencies, which are irreconcilable with socialist economy. Moreover, the over-simplified Civil Procedure Law of 1991 cannot cope with the rapid development of Chinese economy and cannot meet the exponential increase of cases. As a result, the reformation of civil trial mode is gradually getting on the agenda.

The judicial reformation of civil trial in early years was as the reformation of the burden of proof, by strengthening cross-examination and public trial. The operation of procedure is an interlocking process, and any change in these sectors will cause the whole structure to change. The first influence that emphasizing the burden of proof brings to the entire procedure is the review method of the evidence, especially the questioning method with the parties present at court, and the public trial by reviewing evidence according to the order and arguing due to facts and evidence has become a key segment of the entire trial procedure.[1]

In order to strengthen the parties' burden of proof, different levels of courts started to explore new modes of civil trial. At the same time, a great amount of

[1] Yaxin Wang, 论民事、经济审判方式改革 (On the Reformation of Civil and Economic Trial Mode), from Yaxin Wang, 社会变革中的民事诉讼 (The Civil Procedural Law in the Changing Society), China Legal Publishing House (Beijing), at 89 (2001).

research accomplishment regarding the civil procedure law and institutions of Western countries emerged in the academic field, and topics such as the reformation of civil trial, distribution of burden of proof, disposition principle, trial mode of adversary system, procedural safeguard, and due process of law have frequently appeared in legal publications. The academic field has spent great efforts in introducing into the civil procedure mode of adversary system. These accomplishments of theoretical research have provided material for the trial reformation of China.

In July 1996, the Supreme Court for the first time hosted a nationwide civil trial reformation meeting, which signified that the reformation had moved from different regions to nationwide unification implementation. The meeting proposed that the guidance for civil trial reformation includes adopting constitutional and procedural laws as the base, adopting safeguard of adjudication justice as the purpose, adopting public trial as the center, and adopting the parties' burden of proof, trial function, and the panel's responsibilities.

In June 1998, the Supreme Court, after summarizing the reformation of civil trial mode over the past ten years, promulgated the Several Rules on Civil and Economic Trials, which provided clarified norms to the burden of proof, the mode of trial, and the responsibilities of panel as well as sole judge.

B. The Outline of the Courts' Five-Year Reformation

After ten years reformation centered on civil trial, some problems surfaced. On the one hand, the reformation involves problems of judicial system that prevent its advancement, as the trial mode reformation experienced resistance when trying to move forward. People started to question the "trial without adjudication, adjuration without trial" in judicial practice and rethink deep factors of institution reformation. On the other hand, courts in different areas started to "create reformation" which is not beneficial to national unification of judicial system. As a result, the reformation itself began to demonstrate the trend of normalization and unification, and pushed itself further in the direction of deeper judicial reformation. Scholars have summarized this reformation is in the process of "emphasizing on the parties' burden of proof, reformation of court's hearing mode — reformation of trial mode — reformation of trial institution — reformation of litigation institution — reformation of judicial institution."[2]

The symbol of the formalization and the ordering of civil trial reformation is

[2] Hanchao Jing & Zijuan Lu, 经济审判方式改革若干问题研究 (The Research of the Rule on the Issue of Civil and Economic Trial), (5) 法学研究 (Chinese Journal of Law) 3, 3 (1997).

the promulgation of the Five-Year Reformation Outline of the Supreme Court. In 1999, the Supreme Court promulgated the Outline of the Courts' Five-Year Reformation I (1999–2003). On 26 October 2005, the Supreme Court issued the Outline of the Five-Year Court Reformation II (2004–2008). The outline is the blueprint of courts to exercise judicial reformation, which includes the reformation of litigation procedure and judicial system. The former is the continuation and in depth exploration of the reformation of trial mode, while the latter touches upon more detailed problems such as managing system, human resources system, financial system.

In the first Five-Year Reformation Outline there are altogether 7 parts with 50 provisions, apart from the first part which is "further in depth research on trial mode reformation" containing 11 provisions that belong to the procedure reformation; the rest belongs to the category of judicial system reformation. The second Five-Year Reformation Outline has altogether 50 provisions, of which only the first two sections "reform and improve litigation procedure system" and "reform and improve trial guiding system and unification mechanism of the application of law" belong to procedure reformation; the rest belongs to judicial reformation.

In the first Five-Year Reformation Outline, the Supreme Court concentrated on the mode of trial, working mechanism, and procedure. In addition, it placed emphasis on the improvement of the judge system and of judges' inner qualities. The National Judicial Examination is important in promoting the professionalism of Chinese judges. The second Five-Year Reformation Outline touches upon the management of court's property and human resources, which belongs to the exploring phase of judicial reformation. The third Five-Year Reformation Outline included the judicial reformation in the purview of the political system reformation.

The Outline of the Courts' Five-Year Reformation III (2009–2013) states the purpose of judicial system and working mechanism, in the aspects of improving the allocation of court's power and duties, implementing the criminal policy of temper justice with mercy, enforcing the team construction, reforming the safeguard system of funding, making robust of the working mechanism, trying to resolve the controversy between judicial needs and relatively short of manpower of the judiciary, pushing the self-perfection of trial system with Chinese characteristics, establishing the judicial system with high efficiency and authority.

What is to be emphasized is that the second and the third "Five-Year Reformation Outline" originate from the guidance of judicial reformation of the 16th and 17th NPC. The 16th NPC for the first time thoroughly proposed and elaborated the historical mission of pushing the reformation of judicial

reformation, the 17th NPC proposed that "further pushing the judicial reformation forward, improve the allocation of judicial resources, standardize judicial acts, establish socialist judicial system that is just, efficient and authoritative, safeguarding the trial organ, procuratorate organ, independently exercising the judicial power and procuratorate power." The decision made by the17th NPC to further conduct judicial reformation, symbolizing that Chinese judicial reformation has entered into a new era of institution and mechanism innovation. In April 2009, the Supreme Court announced the Outline of the Courts' Five-Year Reformation III (2009–2013), which is the guiding document of the judicial reformation made by the Supreme Court, based on the two previous "Five-Year Reformations."

C. The Content of Judicial Reformation

The Several Rules on Civil and Economic Trials of 1998 is an empirical summary of the civil judicial reformation in the 1990s, but in general it is an amendment of traditional civil procedure and did not make a breakthrough. Since 1999, when the Supreme Court issued the Five-Year Reformation Outline, till today, the reformation of civil litigation procedure did not pause. In the first Five-Year Reformation Outline, the important achievement of reformation was the Several Rules on the Civil Procedure Evidence issued by the Supreme Court on 1 April 2002. This judicial interpretation expressly established the burden of proof, the institution of explanation by the judge and the principle of discretional evidence, making the principle of discretional evidence with Chinese characteristics, the rulings of self-confession system and the standard of proof preliminarily established in the adversary system in China. During the second Five-Year Reformation Outline period, the Civil Procedural Law encountered its first amendment in twenty years, and made changes to the procedure of judicial supervision and procedure of execution.

From the initiation of the reformation of the civil trial mode, the civil procedure system in China has experienced twenty years of reformation; compared with the Civil Procedure Law of 1991, there is a great change in the system of the Civil Procedure Law, which has gradually made its own civil judicial system with Chinese characteristics (as below).

1. Strengthening the Burden of Proof of the Parties. — The parties should provide evidence for their factual proposals and answer to the facts at court, and burden the legal outcome of it after judgment.

2. Institution of Public Trial. — In 1998, the Supreme Court proposed the task of establishing the public trial system in the first Five-Year Reformation Outline. On 19 June 2000, the Supreme Court started to publicize the written

verdict of its closed cases to the public. On 14 June 2007, the Supreme Court expressly proposed the public trial should be fully publicized in a timely manner, which was also written into the Several Opinions on Strengthening the Public Trial of Courts.

3. The Exploration and Improvement of Pretrial Procedure. — It established the institution of time limitation in providing evidence, exchange of evidence, rapid arrangement of evidence, investigation of evidence by the judge, which formed the preliminary independent pretrial procedure.

4. The Reformation of the Management of Trial Procedures. — In September 2000, the Supreme Court started to emphasize "three separations", i.e., separation of register and trial, separation of trial and supervision, separation of trial and implementation. From non-classification of registering a case and trial to the formal registration and the separation of register and trial, the purpose of which is to ensure the parties' right to sue. From non-classification of trial and supervision to the retrial procedure, the purpose of which is to ensure the parties' right of applying for retrial. From non-classification of trial and implementation to the separation of trial and implementation, the purpose of which is to strengthen the independence of enforcing agency.

The "three separations" further promoted the standardization of register, review and oversight, execution of courts, which enhanced the quality and efficiency of trials, and increased the awareness of litigation value of judges. This is beneficial to avoid the delaying of trials, and to resolve the difficulty that the public encounter in litigation.

5. Detailed Rules in the Application Scope and Civil Summary Procedure. — The Supreme Court normalized the application of summary procedure by issuing specific judicial interpretations, which is good in terms of increasing trial efficiency, easy litigation, and saving judicial resources.

6. Improving the Systemic Judicial Supervision. — As a special remedial procedure stated by law, the civil judicial supervision is the last phase of litigation to safeguard the justice of trial. The 2007 amendment of civil procedure law, tries to resolve the difficulty of plead by the public in three aspects: (a) to make further details for the reasons of retrial, before the amendment of civil procedure law five reasons are used to apply for retrial. The amendment make thirteen reasons (more detailed than before), and the public is more clear as to when they can plead; (b) to state that the upper court can apply for retrial, and ruled out the investigation period of retrial; (c) to improve the legal supervision of the procuratorate.

7. Adding the "Instant Execution" System and Financial Reporting System. — The Civil Procedure Law of 2007 strengthens the enforcement deterring mechanism, increased the fine of the non-performance of judgment.

8. Standardizing the Subject Exercising Adjudication Power, Clarifying the Nomination, Rules, and Power of Trial Judges, Collegiate Bench, Chief Justice, Judicial Committee and Jurors. — For example, the Implementation Opinion Regarding the Reformation of the Institution of Judicial Committee (issued by the Supreme Court in September 2007) and the Decision on the Improvement of the Institution of Jurors (issued by the Supreme Court in May 2008).

What is worth noting is that, in recent years, the direction of judicial reformation has demonstrated a complicated trend of ambiguities and even repeated. It concentrates on the evolvement of the court's mediation. The traditional civil trial in China always places emphasis on mediation, which is a basic judicial policy determined by Chinese culture and judicial practice of the New-Democratic Revolution era. However, over ten years' judicial reform (from the beginning of the 1990s to 2006) is based on the burden of proof to establish the litigation mode of adversary system. This reformation trend was climaxed by the issuance of the Several Rules Regarding the Civil Litigation Evidence in 2002.

In such a context, compared with mediation, the court has a dominant position when adjudicated by law. However, in recent years, the public was not very satisfied with the verdict of court, the appealing to the higher authority for help relating to law. In order to resolve this difficult problem, the judicial mediation has once again been emphasized and valued, and the dynamism of mediation was enhanced to settle disputes. Some courts put up slogans such as "back to the trial mode of Xiwu Ma." Especially in the grass-root courts, strict adherence to the due process is not necessarily respected. Currently, the relationship between mediation and adjudication is still in the discovery, and has not yet reached a consensus.

III. THE DEVELOPMENT OF CHINESE CIVIL PROCEDURE LAW

A. The Amendment Theory of the Civil Procedure Law

Because of the innate deficiencies resulting from the restriction of time, shortly after the promulgation of the Civil Procedural Law in 1991, the amendment to this law has become an important project for research in theory,[3] which is a hot issue that theoretical research has focused on. It can be said that, for the theoretical research of civil procedure law, all have direct or indirect connection with amending this law.

[3] See Weijian Tang, 民事诉讼法全面修改专题研究 (The Research of the Amendment of Civil Procedure Law), Peking University Press (Beijing), at 2 (2008).

Apart from specific ideas, systems, procedures, the concentration of research of the amendments of the current civil procedure law focuses on full or partial amendments, which are "major amendment" or "minor amendment." As a matter of fact, before the "minor amendment" of the Civil Procedural Law, there were no concepts of "major amendment" or "minor amendment." For a long time, in theory it is commonly acknowledged that, because the litigation ideology, mechanism of litigation, litigation structure have defects that are not adjustable, the Civil Procedural Law of 1991 should be revolutionarily reformed, in order to modernize Chinese civil procedure law system. This can be known as that, during this period, full amendment of civil procedure law has become a common understanding in theory. However, on 28 October 2007, the 3rd session of the 10th National People's Congress passed the "Decision on the Amendment of the Civil Procedural Law of the People's Republic of China," which targeted at retrials and implementation, in order to resolve the issues of retrial and enforcement.

It can be concluded that this amendment is to resolve practical issues, and its content was restricted to specific technical operation, and did not change the basic ideology and institutional structure, which is only an amendment in a very small scope. However, both retrial and enforcement are in the final process of litigation, hoping to change the litigation system by small partial modification is difficult, and even impossible. Targeting at technical reformation of specific issues cannot achieve the goals because of the restriction of the entire litigation system. Because of this "minor change," it is realized that, for the amendment of civil procedure law, apart from the theoretical questions that lie within specific law, more attention is to be paid on how to amend the law from the perspective of legislation, such as the starting point, scope, levels of civil procedure law, and compared with the theory of civil procedure law.

If theoretical issues, such as "major change" and "minor change" of civil procedure law, cannot be resolved, then the chronic illness of the civil procedure law cannot be fundamentally resolved. The theoretical issues of civil procedure law might not be revealed after the amendment of civil procedure law for the restriction of the scope of amendment, which makes the theoretical research lose its real meaning that it should have. As a result, when touching upon the research in amending the civil procedural law, more attention is paid to the theory of pushing forward the full amendment of civil procedural law, apart from focusing on the inner theory of civil procedure law such as guiding principle, basic theory, procedural structure, etc.

In general, the conditions for full amendment of civil procedure law are enough. On the one hand, Chinese social economy has revealed its fundamental changes, people are not used to procedural norms, and might even have instinctive resistance to over-exercised power interference. On the other hand,

the academics are prepared for the full amendment of civil procedure law in terms of theory.

It can be concluded that scholars have touched upon almost every specific issue of civil procedure law in theory. Furthermore, by reviewing the judicial interpretations issued by the Supreme Court in recent years, which have absorbed many research accomplishments, proving that the theoretical accomplishments meet the basic conditions of China, and have strong changeability in legislation and operability.[4] As a result, it is generally acknowledged that a full amendment of civil procedure law is necessary.

B. The Adjustment of the Structure of the Civil Procedure Law in Practice

Whether a code is reasonable can be revealed by the thoroughness of its outer appearance. As a result, the improvement of the code is not only a self-improvement, it also includes and might even include the adjustment of the systemical structure, the scientific design of systematical structure can provide guidance for the amendment of institutions, and macro ideas.

The systematic structure of the Civil Procedure Law is reasonable in the whole, however, with the development of economy there gradually emerged unscientific factors. First, the ruling of the system of evidence is over simplified, which only constitutes 12 provisions, and cannot adapt to the practical needs of judicial practice. Second, execution procedure is within civil litigation procedure, since basic principles, systemic ideologies of execution procedure is fundamentally different from trial procedure, such a ruling is not only scientific in terms of structure, but also because of the restriction of the structure, and the execution cannot influence legislation, which greatly affects the resolving of execution problem in China. Third, applicable principles and procedure of non-litigation procedure are completely different from civil litigation procedure, but are often placed in the trial procedure with normal litigation procedure in the Civil Procedure Law, which causes chaos and the imbalance of layout, and is to be improved.

In my opinion, the Civil Procedure Law should emphasize trial procedure, making its relevant legislations distinctively different from trial procedure. Specifically, I suggest making a law as "Compulsory Execution Law," which can be divided into General Rules, Sub-rules, and Annex. The General Rules can be remained unchanged, and enrich its evidence rules. When the conditions for enacting evidence is mature enough, it can be proposed to make this chapter independent and enact an independent "Evidence Law." In the Sub-rules lie the

[4] Id.

rules of normal litigation procedure of, i.e., trial of the first instance, second instance, and retrial.

The summary procedure can be ruled in the first instance. The Annex should concern non-litigation procedure, special procedures of foreign-related civil cases, and the rest which is not suitable to be ruled in the General Rules and Sub-rules. What is to be emphasized is that, because voting qualification cases belong to administrative cases, its existence in the Civil Procedure Law is affected by the former Soviet Union, and in reality it is not reasonable and should be deleted from the Civil Procedure Law. Instead, it can be written into the Administrative Law, or directly included in the Voting Law. Cases like adjudication of disappearance and death, cases of citizen's incapacity and restricted capacity for civil conduct, identifying unclaimed property cases in nature are more related to substantive law but not procedure law.

As a result, civil procedure law is related to trial organization, time of trial limitation, and the rest in substantive laws. Such civil procedure law is not only unified in legislation, but is purified. The procedures for hastening debt recovery and pressing notice procedure are closely connected with civil procedure law, and causing typical litigation procedure, they can be included in the Annex, together with foreign-related procedure.

C. The Principles of the Civil Litigation Procedure

The principles of civil procedure law serve as the guidance for the entire civil procedure, which are included in the first chapter "Task, Scope and Basic Principle." The Civil Procedure Law includes the principle of equal treatment, principle of equality, principle of independent trial by the court, principle of based on the facts and law as the criterion, principle of equal litigation rights, principle of mediation, principle of using local dialect and languages of the nationalities, principle of argument, principle of disposition, principle of supervision by the Procuratorate, and autonomy of minority nationalities (that can make supplementary provisions).

The scope of the principles are wide in range, and the main reason for this is because the law did not hold the defining standard of the principles, causing many non-principle norms and even specific rules to be included. Basic principles have important guidance to the legislation of civil procedure law, so the amendment of the Civil Procedure Law should first limit its principles, for those fundamental principles are significant for the Civil Procedure Law.

Normally it is acknowledged that the Civil Procedure Law includes the principle of equal treatment, principle of equality, principle of independent trial, principle of based on the facts and law principle of equal litigation rights,

principle of mediation, principle of using local dialect and languages of the nationalities, principle of argument, principle of disposition, principle of supervision by the Procuratorate, autonomy of minority nationalities in making supplementary provisions.

The principle of equal treatment and the principle of reciprocity are basic principles that are obeyed as the principles of the Civil Procedure Law. The principle of equal treatment is in fact offering national treatment to foreigners, and stateless persons, which is the national treatment principle of international law embedded in the civil procedure law. The principle of reciprocity is for realizing the equality among the countries, which is the principle of retaliation in civil procedure law.

Article 6 of the Civil Procedure Law provides the principle of the independence of trial, compared with the Civil Procedure Law (trial version), the current Civil Procedure Law changes "organization" into "social organization." This change places an emphasis on the cases heard by the court, which is to be led by the governing party and supervised by the NPC. Article 7 of the Civil Procedure Law states the principle based on the facts and law. This principle is an empirical summary of trials in China, which is rooted from the "proceeding from reality and seeking truth from facts" by Marxism-Leninism and the rules being demonstrated in the Civil Procedure Law. The principle of equal litigation right is the focus of civil procedure law, and it is also the guarantee of justice in the implementation of civil procedure law. Article 8 of the Civil Procedure Law contains two meanings: (a) In legislation, the parties of civil procedure enjoy equal *locus standi*, equal rights and obligations; (b) in judicial practice, the court must safeguard the parties to equally exercise their litigation rights, and treat the parties equally in legal application.

The principle of mediation is a principle that China has always adhered to from legislation to judicial practice; in the current civil procedure law, more emphasis has been placed on voluntariness and legality.

The principle of using local dialects and languages of the nationalities was ruled in article 11, which is the demonstration of the equality of nationalities in the Civil Procedure Law.

The Principle of argument is ruled in article 12, which is enacted that the parties have the right to argue.

The principle of disposition is ruled in article 13, which is enacted that the parties can exercise their civil rights and litigation rights within the scope of law.

The principle of supervision is ruled in article 14. By reviewing civil procedure laws around the globe, supervising the civil procedure by the Procuratorate is a common practice, which is demonstrated that the Procuratorate enjoys legal supervision power in the Civil Procedure Law.

The principle of supporting the filing of claims means that, in case the

infringement act of hurting the benefit and rights of the country, groups and individuals, if the individuals or groups (as the victim) cannot file a lawsuit for some reasons, the agencies, social groups, enterprises, and public institutions have the right to support the victim to sue at court.

The principle of mediation by court is in article 16 of the Civil Procedure Law. Compared with the trial version, the Civil Procedure Law changes "the Mediation Committee mediates cases" into "the Mediation Committee mediates civil disputes," which further states that the Mediation Committee is obliged to mediate disputes but not adjudicate them.

The principle of the autonomy of minority nationalities that make supplementary provisions is ruled by article 17 of the Civil Procedure Law. With the implementation of the Civil Procedure Law for 17 years, no self-governed minority nationalities have ever exercised this right, but this provision in the Civil Procedure Law is to safeguard nationalities' unification and respect the right of self-government by the minorities.

In my view, there are two defining standards for the principles of the Civil Procedure Law: (a) implementing throughout the process; (b) serving the normative and guidance to the legislation, judicial and law obeying to the Civil Procedure Law. Using these two standards to reconstruct the principles of the Civil Procedure Law can be summarized as below:

First, what is to be deleted from the principles of civil procedure law: (a) principle of equality, (b) principle of equal treatment, (c) principle of supporting to file a case, (d) principle of mediation and autonomy of minority nationalities in making supplementary provisions.

The principle of equality and principle of equal treatment are in fact targeted at special rules of foreign-related civil procedure . As a result, categorizing those into general principles of special rules of foreign-related civil procedure is more suitable. The principles of civil procedure should serve the purpose of civil actions.

The principle of supporting to file a case only supports the victim (both individuals and organizations) to file claims at court, and its validity scope is only effective until the case is filed, and does not met the standard of basic principles.

The principle of mediation and autonomy of minority nationalities that make supplementary provisions in that legislation, judiciary and law obeying do not have, thus it cannot be basic principles. Considering the fact in filing a case, principle of mediation and autonomy of minority nationalities that can make supplementary provisions in the Civil Procedure Law, and that they do not have any specific changes in sub-rules, it is not feasible to have a complete deletion, but can use them as ordinary principles which can find their places in the Annex.

Second, what is to be supplemented based on current rules: principle of

argument and principle of disposition. The two principles are ruled only for the parties' right of argument and right of disposition in an abstract manner, but not stated the court's checks and balances when the parties exercise such rights. As a result, the provisions of checks and balances need to be included in the amendment of the Civil Procedure Law when modifying the two principles, in order to reach the restriction of adjudicative power by the right to sue.

Third, what is to be supplemented in the basic principle include: principle of honest and trustworthy, and principle of direct oral evidence. The principle of honest and trustworthy means that the court, parties, and other litigation participants must be just, honest, and *bona fide* when engaging in civil trials and civil litigations. Principle of direct oral evidence is composed of the principle of direct trial and the principle of oral evidence. The principle of direct trial means that the judicial verdict can only be delivered by the judge who directly participate in the judicial activity and hear the argument of the parties. The principle of oral evidence means that the litigation activity of courts in the evidence investigation procedure and the argument procedure must be oral.

D. The Improvement of the Litigation Institutions

1. The Research of Civil Execution Legislation. — The difficulties of execution have become a tough issue in law, and have aroused a hot debate regarding civil execution theory. What is worth mentioning is, judicial organs have shown a great deal of interest in the theory of execution, which demonstrates a simultaneous progression of both practice and theory that is worth celebrating.[5] However, in general, theoretical research is still limited to basic issues of execution, and major issues (such as the nature of execution right) are still in the debate. This shows that, theoretical research of civil execution is still developing, and civil execution system is still undergoing.

The civil execution theory has to be established. Because of the influence of the theory of amending the Civil Procedure Law and the establishment of legal rules of civil execution, and the difficulty that China is facing with civil execution, whether to enact an independent civil execution law has become a controversial topic debated in theory.[6] So far, there are two points of view: (a) to make an independent civil execution law, and (b) to merge civil execution with civil procedure, and civil execution will be a part of civil procedure law. Because of the major difference between civil procedure and civil execution, scholars

[5] Rongxin Yang, 民事诉讼原理 (The Principle of Civil Procedure), Law Press (Beijing), at 664 (2003).

[6] Qiugui Tan, 民事执行原理研究 (The Research of Civil Execution Principle), China Legal Publishing House (Beijing), at 414 (2011).

support enacting an independent civil execution law.

2. The Theoretical Discussion of the Institution of Legal Supervision by the Procuratorate. — In recent years, with the judicial unjust gradually increasing, the importance of reinforcing civil supervision is realized. Therefore, how to construct a better and more operable system of legal supervision, especially the procuratorate supervision, has become a major topic.

With the Procuratorate as the supervision agency, its legal supervision for the civil procedure has always been an important topic, however, in the past the theory is restrained to the post adjudication supervision which is demonstrated in the form of counter-appeal, and even in the full supervision on cases. With the signal released by the judicial reformation regarding further strengthening effective procuratorate supervision, the research on procuratorate supervision has greatly expanded in scope. The pre-supervision of the legality of normal events, proposing public interest actions, and the supervision of full-scale participation of civil procedure have become the theoretical core of procuratorate supervision.

Because the current procuratorate supervision has broken away from the restriction of counter-appeal, and has developed from a simplified supervision to an integrated, full-scale system, while directly promoting the judicial practice of procuratorate, such development has promoted the emergence of legislation theory of procuratorate supervision. Based on the theoretical research to the diversity of procuratorate supervisions, the recognition of adjudication, the legislation of supervision law of the Procuratorate has become a feasible legislation project.

3. The Enactment of Civil Mediation Law. — Mediation in the Civil Procedure Law is a characteristic in Chinese legislation; however, mediation is not a trial, and the rules of common civil procedure cannot be used for mediation, and special requirement of mediation lacks of the objective basis to merge with trial procedures. As a result, how to coordinate and tackle the relationship between trial and mediation, how to reasonably establish the transition of mediation system and trial system, how to eliminate their conflicts, and how to realize the benign connection, which should be focused in new civil procedure law.

If the conditions are mature enough, mediation can be separated from the procedure law and merge with other types of mediation, which can be independently enacted as a unified "civil mediation law." Moreover, theory has also paid attention to other methods of dispute settlement, in consistent with mediation and litigation. Theoretical research on pluralism dispute settlement, such as arbitration, mediation, labor dispute arbitration, and the system of correspondence and visitations, has become an important topic in China.

4. The Quick Settlement of Civil Dispute Mechanism. — In judicial practice, for alleviating the conflict between the shortage of judicial resources and the

accumulations of cases, many courts took measures in settling civil disputes, for the purpose of facilitating the parties, increasing efficiency, and lowering cost. In this context, more research is paid to the quick settlement of civil dispute mechanism, and its content is basically restricted to the summary procedure and the construction of small-claim procedure, both of which are to increase the efficiency of civil procedure law by simplifying the procedures.

5. Constructing the Institution of Public Interests Actions. — In recent years, many events in China are concerned with public interests, the amendment of civil procedure law should refer to Chinese rules, and establish the system of public interest actions. The major problem is the defining of the subject of lawsuit. As a result, the first matter that the public interest actions should resolve is to define the subject of lawsuit. Because of its special circumstances, public interest actions in China should include three subjects:

(a) The procuratorate. It is the legal supervision division in China, representing the country to safeguard the operation of law, which is subject for filing a lawsuit when public interests are jeopardized.

(b) Relevant organizations. When the injury or damage are inflicted on a group of people, the group can then file a public interest lawsuit representing that group.

(c) Individual citizens. The damage to public interest must be reflected as direct or indirect damage of individuals' benefit. When relevant agencies and organizations do not file public interest claims, individuals should be encouraged to make such claims.

Apart from the determination of the subject, public interest action will involve many procedural issues, such as the payment of legal costs, allocation of the burden of proof, the burden of litigation risks, etc. When the Civil Procedure Law is fully amended, apart from constructing the related rules of initiating public interest actions, more attention is to be paid to the establishment of related institutions.

6. Establishing the Institution of Diversified Class Actions. — From the legislation around the world, the establishment of class action institutions, which involves many participants mainly includes American class action, German class action, Japanese chosen participant institution and Chinese representative litigation institution. Because the representative litigation institution is rarely adopted in judicial practice, scholars consider that, apart from deleting Chinese special objective factors, the institution itself is worth rethinking.[7]

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[7] Zhongshan Wang & HongWu, 我国代表人诉讼制度面临的困境及其改革对策 (The Difficulty Faced by the Representative Action Institution and Its Reformation Measures), in Jianming Cao (ed.), 程序公正与诉讼制度改革 (Due Process and Litigation Institution Reformation), People's Court Press (Beijing), at 418 (2002).

More controversies are focused on how to establish class actions in China. Scholars proposed to introduce into the class action of the USA. This is in the direction of development. But more considerations are to be taken in Chinese circumstances, in establishing a system of class action that suits to China. For example, in China there exist many social organizations which represent individual interests, so the qualifications of litigation subject can be granted to some of these organizations, including the class action (as a special form in the system).

*7. Establishing the Pluralism Judicial Hierarch*y. — Facts have proven that, adopting one level of judicial hierarchy with two levels of judicial hierarchy as dominated, and with retrial as supplement cannot cope with the rule by law and social development in China, in the amendment of civil procedure law it is to be abolished, and establish a pluralism judicial hierarchy, the content of which include:

First, adopting the final judgment after three rounds of trial, it means that normal cases should have gone through three rounds of trial before the final judgment could be delivered, but the initiation of the third round usually needs special conditions. For example, it is only concerning legal issues, in which the third round can be known as conditional.

Second, using final judgment with one round of trial for cases (like adopting summary procedure and small claims), and prohibiting the parties from appealing. Of course, this is in conditions (with some exceptions), such as the cases involving public interest or special legal meaning, even though these cases fulfill the requirement of small claims, but cannot use the rule of final judgment with one round of trial.

Third, restricting the initiation of retrial, the current retrial procedure in China in fact serve as the third round of trial; after the establishment of final judgment with three rounds of trial, even though the retrial cannot be denied, but the conditions of retrial should be restrained, in order to avoid of abusing retrials to impact the order of judicial hierarchy.

8. Establishing the Dualism System of Jury.[8] — Although the jury system is a litigation institution with universal significance, but according to the circumstances of different countries, each country or region's jury system has its own characteristics. The UK and the USA adopt the jury system, continental countries adopt the mixed jury system, and China will absorb the advantages of the two legal systems and formalize the dualism system of jury.

[8] Weijian Tang, 应当制定《人民陪审员法》(The Juror Act Ought to be Enacted), (3) 团结 (United) 12, 13 (2005).