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Judicial practice of the principle of prohibition of alteration with prejudice in the civil litigation

Jing Gui¹, Yan Gong²¹Hunan International Economics University, Changsha, 410205, (CHINA)²Huaihua City Intermediate People's Court, Huaihua, 418000, (CHINA)

ABSTRACT

There is a very important "principle of prohibition of alteration with prejudice" in judicial practice of civil litigation, "principle of prohibition of alteration with prejudice" can ensure that the Court of Appeal make the judgment only in the appeal range, which unable to make even more detrimental to the above person verdict. From the global point of view, whether it is civil law countries, or common law countries have take the "principle of prohibition of alteration with prejudice" into the judicial practice. But from judicial environment, many experts and scholars have controversial of "principle of prohibition of alteration with prejudice". This study by literature research and data analysis to point out that although judicial environment and "principle of prohibition of alteration with prejudice" has some conflict, but the application of "principle of prohibition of alteration with prejudice" is the general trend. This study made a detail introduction of "principle of prohibition of alteration with prejudice", analyzed the conflict between "principle of prohibition of alteration with prejudice" with judicial environment, and proposed rationalization proposals in judicial practice how to properly use "principle of prohibition of alteration with prejudice".

KEYWORDS

Civil litigation; "Principle of prohibition of alteration with prejudice"; Judicial practice.



INTRODUCTION

Due to the impact of up to two thousand years of feudal society, civil litigation system has a strong color of feudal bureaucratic. Although after the founding, CHINA actively learn legal system experience from the former Soviet Union, but it is still difficult to get rid of powers doctrine colors. In civil proceedings, the two sides are too dependent on the role of the courts. Both sides tend to submit the suit and passive wait for the verdict of the court. Justice must not only take the accepting and hearing of a case, but also to carry out investigation, evidence collection and call witnesses. This system and the planned economy system of early days are compatible, which has also played a positive role. The theoretical system of Civil Procedure Law is shown as in Figure 1.

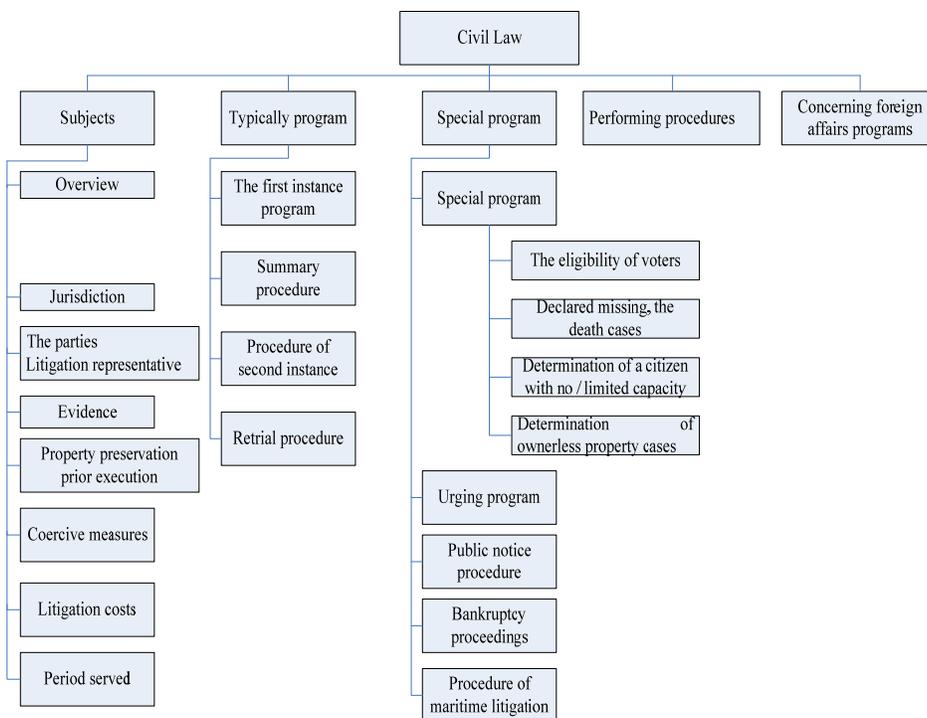


Figure 1 : Theoretical system of Civil Procedure Law

As China's market economy continues to improve, the consciousness of civil parties was enhanced, the parties are no longer passively waiting for the results, but pro-active to use legal means to safeguard their legitimate rights and interests. The civil litigation model will gradually be converted to parties as the center. This requires that the court must take the trial in the parties' range, which is the application of "principle of prohibition of alteration with prejudice" in judicial practice in CHINA.

Worldwide, civil law countries essentially established a "principle of prohibition of alteration with prejudice" in varying degrees. Such as France's new "Civil Law" Article 562, the German "Civil Law" Article 536, the Article 304 of Japan's new "Civil Law" and Article 388 of the "Civil Law" in Taiwan of China. Although the appeal concept of common law countries and civil law countries are very different, from its empirical lawsuit institutional point of view, "principle of prohibition of alteration with prejudice" is also through them.

The purpose of this study was to show that the application of "principle of prohibition of alteration with prejudice" has been a general trend in judicial practice, pointing out the importance of "principle of prohibition of alteration with prejudice" on China's civil litigation. Research is elaborated by the concept of "principle of prohibition of alteration with prejudice" figuring out the scope, pointed out conflicts with existing judicial system, and pointed out how the effective application of this specific judicial practice in principle.

CONCEPT DEFINITION OF "PRINCIPLE OF PROHIBITION OF ALTERATION WITH PREJUDICE"

"Principle of prohibition of alteration with prejudice" refers to only one of the parties appeal in the case, the appellate court should take the investigation judge according to the scope of appeal declared, without any reason to make the judgment more than first instance verdict against the appellant. Worthy of note is that a party appeal refers to a second instance of the program. For the three-tiered system of CHINA, "principle of prohibition of alteration with prejudice" does not apply to the third instance.

Nature of "principle of prohibition of alteration with prejudice"

"Principle of prohibition of alteration with prejudice" is the guiding principle of the sentencing for the judge in the case of civil proceedings which a party to appeal. According to China's actual conditions, "principle of prohibition of alteration with prejudice" applies only to the second instance with a more limited scope and not all apply. "Principle of prohibition of alteration with prejudice" is not the principle of civil action program, but the guiding principle of the judge's decision, the object of regulation is the second trial judge, not the parties and other participants in the proceedings.

"No interest" range of "principle of prohibition of alteration with prejudice"

"No interest" understands from literally is the detrimental interests in second trial that the appellant have been obtained in first instance ruling. The basic characteristics of the "no interest" are that it detracts the interests of the appellant has been attributed from first instance judgment. The main range of "No interest" refers to the appellant in the first instance judgment, the judgment of first instance has been obtained or entity has been awarded to the appellant's interests, the interests of this entity may be right on the substantive law, may also be the substantive law position. The Civil Procedure flowchart is shown in Figure 3.

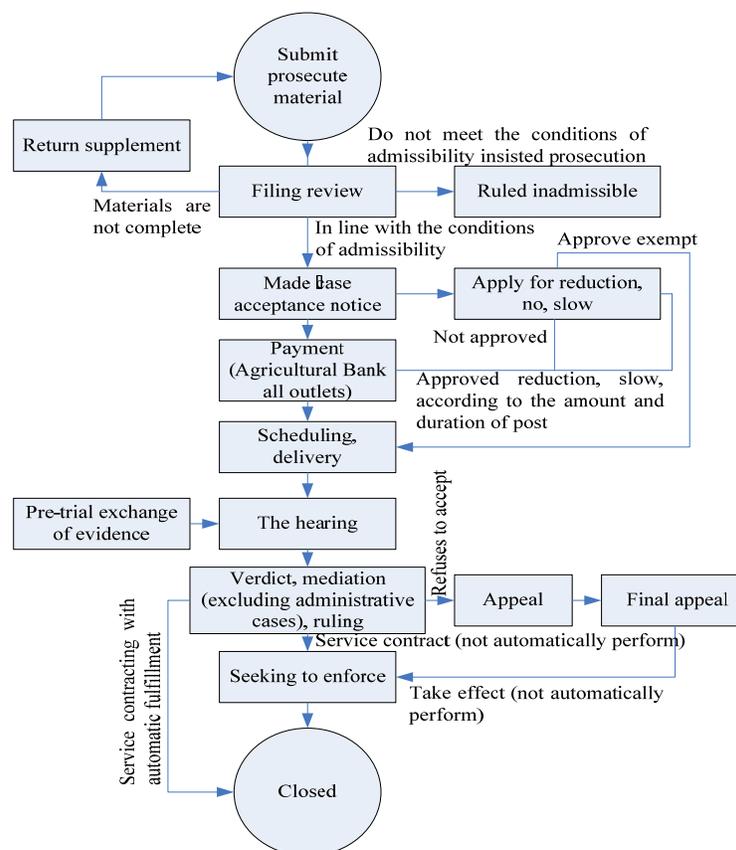


Figure 3 : Civil Procedure flowchart

The application scope of "principle of prohibition of alteration with prejudice"

In addition the "principle of prohibition of alteration with prejudice" does not apply to three judicial decisions, there are certain conditions. For example, when the party filed an appeal, after the second trial program began, appellee filed an appeal. In this case, the parties are not apply to "principle of prohibition of alteration with prejudice". In addition, the "principle of prohibition of alteration with prejudice" shall not harm others and the public interest, although the "principle of prohibition of alteration with prejudice" provisions the rules that the appellant are not allowed to harm the interests, but once the appellant's claims violation the others and the public interests, it can not apply this principle. The relationship between the abstraction capabilities of parties and power is shown as TABLE 1.

TABLE 1 : Relationship between the abstraction capabilities of parties and power

Litigation rights abilities and capacity to be a party	The ability of the abstract parties; specific stakes
Some of the special circumstances easy to test	1. Employment (employees who willful misconduct or gross negligence can regards as a co-defendant) 2. Discrete merger 3. Personal owned enterprises, Partnership enterprises and individual industrial and commercial households, civil partnership 4. Affiliates 5. Deaths: spouse, parents, children and other close relatives
Common litigation	1. Inheritance: should notify; common plaintiff; whether to give up the right to inherit 2. Guaranteed: general assurance plea right (only complaint additional debtor guarantors do defendants) 3. Contributory infringement
The case may beas the third person	1. Subrogation 2. Avoidance action 3. The third person of the contract transfer-case 4. When People's Court takes the invalid marriage cases which due to the bigamy, if it involving the disposition of the property, it should be allowed a legal marriage of the parties have the right to request an independent third party in the proceedings
Cannot be classified as a third person case	1. Have agreed jurisdiction, exclusive jurisdiction, the relationship between the agreed arbitration cases 2. Cases of product quality, the supplier no responsibility 3. A thing sold some times, acquired in good faith

THE LEGAL BASIS OF "PRINCIPLE OF PROHIBITION OF ALTERATION WITH PREJUDICE"

"Principle of prohibition of alteration with prejudice" can contribute to a judge's independence and in favor of judgment democracy, which has important significance of the improvement of civil procedure. "Principle of prohibition of alteration with prejudice" does not come out of thin air, which has a perfect legal basis and is the objective needs of judicial practice.

The inevitable requirement of providing rights relief for the parties

China is a socialist country ruled by law; providing rights relief for the parties is the obligation. In order to improve the socialist legal procedure and to promote the rule of law process, "principle of prohibition of alteration with prejudice" is a necessary measure to maintain the appeal system. Parties can use the "principle of prohibition of alteration with prejudice" to appeal to obtain a more reasonable decision. If there is no "principle of prohibition of alteration with prejudice", then in the second instance, the parties may obtain more unfavorable ruling, so it will greatly suppress the enthusiasm of the appeal of party, which is not conducive to the democratization process in the legal system. The verdict meaning of "fair" is shown as Figure 4.

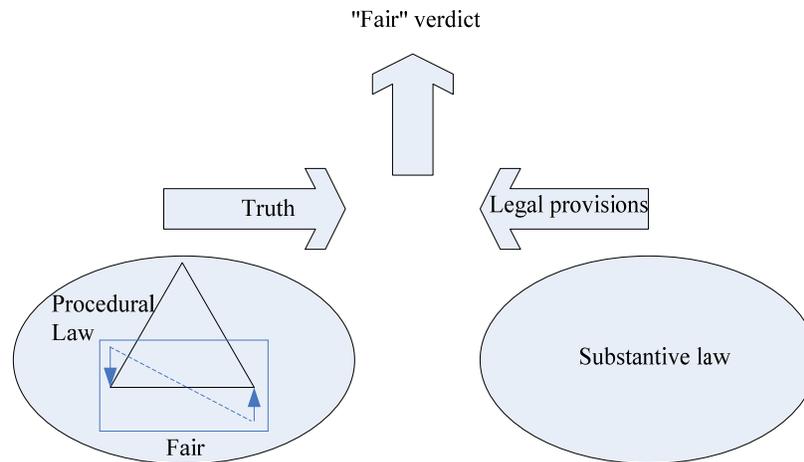


Figure 4 : The verdict meaning of "fair"

The punishment principles and inherent requirements of the judicial negative principles

Civil litigation was the important means to solve the country's civil disputes by public power, which will inevitably reflect the wishes of the parties in the appeal process, the parties filed an appeal is a manifestation of their individual rights. Setting the "principle of prohibition of alteration with prejudice" in the judicial practice is to better protect the rights of the appellant. In addition, the negative principle of justice requires the court to make a judgment only within the scope of the appeal from the appellant with on beyond the scope of the appeal, which is consistent with the requirement of "principle of prohibition of alteration with prejudice".

Objective needs to prevent the raid judgment

"Principle of prohibition of alteration with prejudice" can promote objective and impartial judgment from judge, and it can effectively avoid surprise verdict within the scope of the appeal judgment. The judge must conduct investigation in the dialectical principle and "principle of prohibition of alteration with prejudice", the judgment must be based on objective truth. If there is no "principle of prohibition of alteration with prejudice", it means that the judge can beyond the scope of the appeal to rule parties, once the parties unable to provide convincing evidence, it cannot implement the dialectical principle, it cannot guarantee due process, nor can avoid raid judgment phenomenon.

PROBLEMS OF "PRINCIPLE OF PROHIBITION OF ALTERATION WITH PREJUDICE" IN THE JUDICIAL PRACTICE

From the global point of view, either civil law or common law regarded the "principle of prohibition of alteration with prejudice" as an important principle in judicial practice. In China, with the continuous improvement of the socialist legal system, the introduction of the "principle of prohibition of alteration with prejudice" is at the time. However, there are certain conflicts between the "principle of prohibition of alteration with prejudice" and the current civil trial mode, civil litigation system and other aspects, these conflicts are the problems which cannot avoid during the application of "principle of prohibition of alteration with prejudice".

Conflict with the traditional concept of the civil litigation

The key of "principle of prohibition of alteration with prejudice" is that the court is not allowed to make more adverse judgment against the appellant in the second instance judgment. For the appellant, the worst result is that the appeal is dismissed; their vested interests will not be reduced. "Principle of prohibition of alteration with prejudice" is a restriction on the judgment of the court, but also an encouragement for the appellant to maintain their own interests. Of course, the "principle of prohibition

of alteration with prejudice" will be not applicable in certain circumstances. For example, the presence of against the law in first instance verdict, so that it will take the re-regulate for the interests of the appellant in the second trial. CHINA is a civil law country, the general punishment principle of civil litigation is to determine the content and scope of the appeal by the appellant, the court did not take the intervention of the content and scope for appeals. That is, "principle of prohibition of alteration with prejudice" is in a dominant position for the appellant, while the court is in a negative position.

However, in as long as two thousand years of feudal society of CHINA, the litigation culture which emphasize the entities value is not special attention for procedural fairness. Although in recent years, some experts and scholars recognize the unique value of procedural law, but are far from a high level of awareness of substantive law. In judicial practice, the emphasis is still the judicial entity concept. "Principle of prohibition of alteration with prejudice" emphasized that the justice of process, which will generate conflict with the traditional entity doctrine. For example, appellee have unfair in the first instance verdict, but because appellee did not appeal and the "principle of prohibition of alteration with prejudice" cannot harm the appellant's vested interests. In this case, it will generate the phenomenon that conflict with traditional litigation concepts. The traditional and modern concepts of justice is shown as Figure 5.

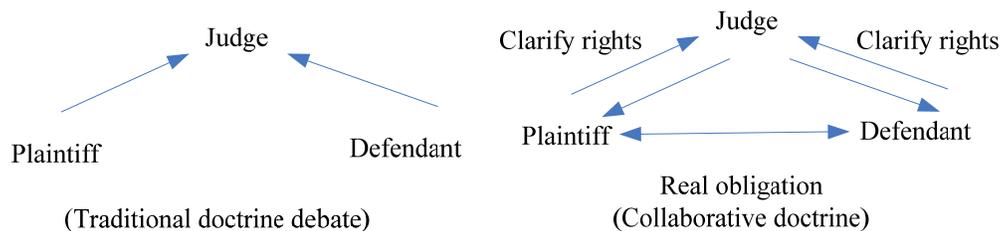


Figure 5 : The traditional and modern concepts of justice

Conflict with the inquisitorial trial mode of the current

Judging from the experience of developed countries, whether civil or common law, both take the parties as the center in civil action, so that the parties focus on the role, played down the role of judges. This is the trend worldwide, because of China's basic national conditions in the primary stage of socialism, The trial mode showing a characteristic with powers doctrine. In civil litigation process, the role of the court is very large, which are both commanding and participants in litigation, but also responsible for the investigation and evidence collection, manipulation and control excessive trial activities. Such a trial mode limits the rights of the parties, which are likely to cause unjust judgments and judicial corruption. However, the legal environment of CHINA is extreme imbalanced, in the vast western region and remote and backward rural areas; local legal services and awareness of party litigation are difficult to meet the needs of the trial mode taking parties as the center. Poor cultural level and poor economic fundamentals have decided that the civil litigation cannot be completed with any circumstances outside forces. In other words, although we recognize the trends taking parties as the center, but cannot deny the rationality of inquisitorial model in some areas of China.

In this judicial environment, there is a serious conflict between the "principles of prohibition of alteration with prejudice" of civil litigation and inquisitorial trial mode. Because in the backward areas with judicial environment, weak awareness of the parties, the parties are accustomed to rely on the courts as the main body, "principle of prohibition of alteration with prejudice" seems to be no longer necessary. The premise of the application of "principle of prohibition of alteration with prejudice" is that the parties have full litigation disposition. After the first trial, the parties will appeal within the time prescribed by law in the purpose of protecting individual interests. The second trial needs to take the judgment in the scope of appeal, which shall not prejudice the interests has been made in the first instance for the appellant, otherwise contrary to the spirit of "principle of prohibition of alteration with

prejudice". But in the specific judicial practice, due to the limitations of the parties education and legal knowledge, the court often in pursuit of the essence of fair grounds, or wrapped in order to avoid future complaints and unnecessary retrial, ex officio initiative is not conducive to the appellant changes. It can be said that in the current legal environment, there is a serious conflict between the principles of prohibition of alteration with trial mode in CHINA, limiting the living space of "principle of prohibition of alteration with prejudice".

Conflict with certain specific litigation system

Conflict with the remand system

Article 153 of "Civil Law" gives judges the discretion for a judge, which judge can make the judgment between the change referee and remand. From a legal point of view, this is reasonable. But in the specific judicial practice, the judge is easily to put discretion into a super-powers doctrine, which will affect the course of justice. Especially in the second trial, the judge often citing remand due to insufficient evidence in order to avoid pressure on all aspects. Such a remand would circumvent the "principle of prohibition of alteration with prejudice" from the program. Some courts still upheld after receiving the views of remand, then passed it to a higher court. Back and forth repeat makes the appellant loss of impartiality and had serious doubts of the judiciary. The higher court cannot determine commuted or upheld for some cases, and often with a remand way to avoid conflicts. Thus, in judicial practice, the remand system is not perfect with too simple provisions, so some judges will abuse this system. For rational application of "principle of prohibition of alteration with prejudice", we must take the regulation for the remand system at the institutional level, the judge can make a reasonable application within the terms of reference, at the institutional level convergence is good, to avoid making the "principle of prohibition of alteration with prejudice" in vain.

Conflict with the not expressly provisions of incidental appeal system

"Principle of prohibition of alteration with prejudice" can worry about lifting for the appellant, because the worst result in second trial is to dismiss the appeal, vested interests will not be damaged. However, in the specific judicial practice, "principle of prohibition of alteration with prejudice" has a tendency to lure the parties' appeal, which is easy to make the parties abuse the right of appeal. Therefore, other countries in the world provides for incidental appeal system to regulate the right to appeal. That came with the main appeal of appeal shall have the same legal effect, which can effectively curb the occurrence of abuse of the right of appeal and a useful improvement for the "principle of prohibition of alteration with prejudice". However, the current "Civil Law" does not specify incidental appeal system, which has become a major institutional barrier.

PERFECT THE "PRINCIPLE OF PROHIBITION OF ALTERATION WITH PREJUDICE" PROPOSAL

Sworn system using in civil proceedings

Because of China's basic national conditions, heavy physical light program is serious. Although oath system is only a ritual, but the law justice also requires suitable ceremony. So the masses can see the seriousness of the proceedings and conducive to enhancing the legal status of the parties sacred hearts. On civil appeals system, the oath system can cause heart consciously of the appellant, reduce the abuse of "principle of prohibition of alteration with prejudice" phenomenon to some extent.

Further improve of the court inform system

In current judicial system, even though "principle of prohibition of alteration with prejudice" can not only protect the interests of the appellant are not infringed, but also easy to restrict the protection of the interests of the appellant, thus affect the appellant's disposition. Thus, in judicial practice, the legal provisions do a detailed description on the "principle of prohibition of alteration with prejudice", the

court should inform the appellant of the various stakeholders to ensure that all cases of appeal the appellant after that encounter. The right action notice can be served for the appellant to perfect this obligation in legal proceedings.

Regulate the remand case

In order to guarantee the seriousness and impartiality of the judiciary and avoid the over abuse of remand of courts in judicial practice, we must regulate the remand case. You can limit the number of remand in judicial practice, but also make provisions for what conditions need to remand. For example, the errors or defects on the original judgment should not be a remand reason, and should respect the interests of the parties of their right to dispose of the trial stage. Only the beginning of the event is not sent back to deprive the trial of first instance of the class interests of the parties who, before being sent back for the verdict.

CONCLUSIONS

This study describes the meaning of "principle of prohibition of alteration with prejudice" and significance for the Chinese civil procedure, a detailed analysis of the difficulties of "principle of prohibition of alteration with prejudice" exists in judicial practice. Against the status quo of China's judicial practice, this paper suggested creatively to the improvement and reasonable application of "principle of prohibition of alteration with prejudice". The next research will focus on how to further break the conflict between the "principle of prohibition of alteration with prejudice" and judicial practice and take more rational application of "principle of prohibition of alteration with prejudice", which can make positive effort for the legal advances of China's civil litigation.

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