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## ARTICLES



## COMMENTARY

# ARTICLES

# Procedural Options and Procedural Categorization from the Perspective of Responsive Justice: Construction of the Civil Procedure System and Theoretical Reflection upon Legislation

XIAO Jianguo*

## I. The Raise of the Issue

A new round of the modification of the Civil Procedure Law is proceeding intensely, which, as we all know, is the second modification of the Civil Procedure Law made by the legislature since 1991. The legislature held several expert reasoning conferences between 2010 and 2011, during which opinions from all sides were widely solicited according to different amendment issues, ideas fully exchanged, consensus finally built, which set the basement of the revision draft of the Civil Procedure Law. Not only does the legislature fully communicate with academics, closely cooperate with the Supreme People's Court, the Supreme People's Procurato-rate, and the national lawyers association, it also thinks highly of the opinions from other fields, especially the public, which vividly demonstrates the concept of "Open-door Legislation". Since April 2011, the legislature has changed the draft four times, including the "Initial Modifications of the Civil Procedure Law" with sixty provisions on August 2nd, 2011, the "Modifications of

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the Civil Procedure Law" with 84 provisions on August 24th, 2011, the "Amending Draft of the Civil Procedure Law" with 54 provisions on 14th, 2011, and the fourth version of the draft with 54 provisions on April 24th, 2012. The modifications consist of the basic principles of Civil Procedure Law, Jurisdiction, Abstention, Litigant, Proof, Preservation, Pubic Interest Litigation, Service, Compulsive Methods, Mediation, Pretrial Procedure, Judgment, Summary Action, Small Claims, Procedure of Second Instance, Pretrial Procedure, Special Procedures, Execution Procedure and Civil Procedure of Cases Involving Foreign Element, which cover almost all the aspects of Civil Procedure Law. Among them, public interest litigation, act preservation, retrial procedure and others received wide social attention. On the controversial issues, for example, the suit registration system and the suit of the third party discharging the judgment, the legislature is still undertaking careful consideration.

As the legislature positions this amendment as "a complete change", opinions representing different stands and different value tendencies show up one by one. The People's court wants to find a way out of the plight of more people with less resources in the court, and its claims go as follows: the court's authority of command in litigation and the court's right of procedural control should be expanded, and the court's sanction to the abuse of authority should be strengthened; the case sources should be decreased and the actual effect of ADR be expanded; the split-flow of the complicated and the simple should be promoted, and the application of summary procedure, small claims and the civil fast cuts should be increased, thus the application environment should be improved, among which the most urgent issue is "service problem". Meanwhile, what the procuratorate is mainly concerned with is to strengthen procuratorial organs' legal supervision to save the civil justice in crisis from different aspects such as supervision mode, supervision scope, and supervision method through expanding the procuratorial power under such background as the judicial authority and public confidence force of judicature are generally weak. The procuratorate mainly has three claims: the first one is to expand the application scope of the principle of civil supervision by procuratorate authority, realizing expansion from litigation to non-

litigation, from trial to execution, from judgment to mediation, from post-litigation to mid-litigation, and from substance to procedure.[1][2] The second one is to expand the civil supervision mode from counterappeal to prosecutorial suggestion. Thirdly, the procuratorate should be endowed with the right to check case files from the People's court and investigate and verify relative circumstances withpersons not involved in the case. At the same time, the National Lawyers Association hopes to put more stress on solving the generally existing difficulties of litigation, abstention, preservation, proof collection, execution, etc. And it stressed the need to greatly improve the subject status of the litigant and his lawyer, strengthen the procedural guarantee, actually implement the restrictive function of the principle of debate and the principle of disposition to the judges, promote publicity of process and verdict and judge's mental impressions to decrease judge's discretion on procedure and prevent arbitrariness and abuse in the civil litigation structure. The legislature hopes to modify the civil procedure law oriented by the problems, namely, the main problems confronted and existing in practice, and to make sure of the parts needed to be added or modified in the amendment. At the same time, the civil procedure academic circle raises high expectations to this change with a high appeal for it,[3] and the scholars are all ambitious, hoping to create a "model civil procedure law" that can successfully balance procedural

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[1] Tang Weijian, Challenge and Response: New development of Supervision System Stipulated in Civil Procedure Law and Administrative Law, 3 The Jurist(2010).

[2] Tang Weijian, New Tendency of Supervision System Stipulated in Civil Procedure Law and Administrative Law, 1 Henan Social Sciences(2011).

[3] In recent years, there is huge enthusiasm for amendment in the civil procedure law circles, longing for a large scale of amendment. In addition to a large number of papers published, there are expert proposals and argument grounds on details about comprehensive amending of civil procedure law. See Jiangwei, Expert Proposals and Legislation Reasons on Civil Procedure Law(Law Press, 2008). Zhang Weiping, Study on the Civil Procedure Law Edition Seven-The Modification Proposals and Paraphrases on the Civil Procedure Law of the People's Republic of China(Xiamen University Press, 2011).

justice and effectiveness and influence the 21st century through this great change.

The claims and positions above have much in common, and at the same time, demonstrate some differences. Similarities are reflected as follows: based on the understanding of the civil litigation status quo and problems in our country, the interest subjects participating in this change all claim to reform the present civil litigation structure: to build a new model of relations between right of litigation and judgment, and right between litigation and litigation, which is the opinion of the People's court, the National Lawyers Association and some scholars, or to force the scope of the procuratorial authority's supervision relationship beyond the traditional legal relation of civil litigation (the relation between right of litigation and judgment, and right between litigation and litigation), which is the opinion of the procuratorate and some scholars. Obviously, the various pieces of advice given by different interest subjects about the amendment tendency and problem solving are totally different. For example, as to the relationship between the litigant and the People's court, there exists the question of whether the People's court's authority of command in litigation and right of procedure control should be continuously strengthened, rehabilitating the civil procedure to be like an administrative procedure during which the authority's orders must be obeyed to improve the efficiency and close the case as soon as possible, or to reverse the course, fully empowering the litigants and their lawyers to improve the subject status of the litigants in civil procedure and truly establishing a procedural guarantee system with right of litigation restricting right of judgment, in which aspect, the People's court and the National Lawyers Association obviously stand at two contradictory poles. In regard to the distribution of right and duty between the plaintiff and the defendant, whether we should lower the threshold to bring a suit to solve the difficulty of litigation or raise the threshold to restrain the abuse of litigation, whether to reduce the plaintiff's burden of proof to protect his rights or put more weight on it to pacify him, in which the People's court and the National Lawyers Association also hold quite different opinions. Another question exists in regard to the relations between the rights of supervision, judgment and litigation, whether forcing interventionary supervision by the procuratorate in the traditional perfect

logical civil procedure structure improves the structure and promotes judicial justice and authority or destroys the balance of the structure, increases litigation costs, and harms the judicial authority, in which the relations between the procuratorate, the People's court and the national lawyers association are like diamond to diamond.

Confronted with the contradictory positions and values above, the legislature tries its best to balance different sides, seek sameness but keep difference, and at the same time find out the focus of disputes, judge independently and make the corresponding choices. It can be said that the legislature has been always working very hard. In the four versions so far, the legislature's thoughts have become more distinct gradually, and it has responded to the claims from different sides more or less, accepting, declining or compromising, with its attitude and focus reflected in the draft. I have noticed that, except for the fact that the procuratorate's claim to expand its power gains the legislature's acknowledgment that can be added into the law, only parts of claims held by the People's court and the national lawyers association are accepted in the draft. For example, the draft has partly responded to the national lawyers association's claims about solving the difficulties of litigation, abstention, preservation, proof collection and execution, but responses to the difficulties of litigation, proof collection and execution have symbolic meaning. And to the People's court's claims about strengthening the good faith duty, expanding the actual effect of ADR, coalition of suit and mediation, split-flow of the complicated and the simple, establishing small claims procedure, solving the difficulty of service etc, the legislature attaches great importance, but for the claims equally emphasized by the People's court about the retrial procedure, execution procedure, non-litigation procedure and the special procedure of company litigation, the legislature vaguely answers with such excuses as "the legislation timing is not mature", "the disputes hardly turn to consensus" and "the judicial interpretation can be launched to concretize". As different requests can hardly be all met, this change may leave some difficult-to-accept outcomes.

As to the continental countries who believe in "action from norm", the sporadic changing model that focuses on the individual parts, and the model that

attends to one thing and loses another are the taboos in civil procedure construction and legislation. Our country, who builds the litigation system based on the civil procedure theory and legislation of Germany and Japan, should regard Civil Procedure Law as an integral organism with inner life, and thus our law edifice should be built on solid foundation and have an overall framework of the structure, and in which no partial adjustments in the procedure construction can pose threats and challenges to this edifice. As Civil Procedure Law belongs to jus cogens, and the principle of procedure under law and reservation of legislation is stipulated in clause 8, article 9 in Legislative Law that a "lawsuit and arbitration system can only be formulated by law", this also decides that in the construction of the edifice of the civil procedure law, we need to keep effectiveness and sufficiency of legislative guarantees to regulate grants of too much discretionary of judges and the abuse of the judicial power and discretion of the People's court, otherwise, the distorted phenomenon about the surplus of the judgment power and deficiency of the litigation right and the rights in the litigation, which are criticized since the first civil procedure law in 1982 and have not yet improved will not be radically cured, but could become much worse. In this amendment, whether the expansion of the procuratorial power will lead to ten years' surplus of the procuratorial power in our civil justice, and litigation right and the rights in litigation can burden the double high pressure from the public power, including the judicial power and the procuratorial power, are quite worrying.

Thus, the construction and legislation of the civil procedure law should go back to the original point of the litigation system, precisely locating our civil judicial model from the perspective of proceduralism and users of the procedure to unveil different claims in the amending process, and the false appearance that each side is reasonable will collapse by itself.

## II. China's Civil Justice Model: the Location of Responsive Justice

In the hot debate during the amendment of civil procedure law, the most

essential part—litigants—have not showed up. [4] Litigants are the ultimate user and the largest consumer of civil procedure in the pedigree of civil procedure law in Germany and Japan, and they are so important that the civil procedure system is meaningless without them. "Civil procedure is set for the litigants", whose university has beyond the countries under the law system represented by Germany and Japan, and has become the consensus of the modern countries under the rule of law. Deviating from this baseline, the justification and acceptability of the construction and legislation of a civil procedure system cannot be guaranteed. Thus, to precisely locate our civil justice model, as a basic element, the lawsuit status of litigants is indispensable. In this aspect, American comparative law scholar Damaska provides us with a dynamic and comparative interpretative tool that can combine judicial system, state system and ideology through his penetrating and meticulous understanding about the Anglo-American law system, continental law system and socialist procedure system.

**2. 1 Two Types of Institutionalism of Justice: Policy-implementing Justice and Responsive Justice**

According to Damaska, the types of a civil judicial system are different due to the structure, characteristics and mode of a judicial system, and based on the different status and function of the litigants and judges in civil judicial system, the model of civil justice can be divided into implementing justice and responsive justice. The characteristics of implementing justice go as follows: the judicial system and procedure of law serve for the national policy (rule of law); judicature and administration are functionally melded; judicial judgment is alterable. Meanwhile, the responsive justice has features as follows: the judicial system and procedure of litigation serve for dispute resolution; actions during the procedure are centralized; the first instance is the main point (single decision-making level); judgment depends on oral hearing and cross-examination in the court; continuous

[4] Although in some sense, lawyers associations and lawyers can stand for the positions of litigants, they have independent interests in civil procedure law and the legislation and cannot represent or substitute for the role of litigants in the legislation.

trial in session; the litigants' procedural rights are stressed; and the substantive justice and procedural regulation are integrated. [5] Damaska expounds in details about the different traits of policy-implementing justice and responsive justice in such procedural elements as organization of power, nature of justice, importance of procedure, right of procedural control, fact-finding, position of decision makers, role of lawyers, alterability of judgment etc (see table below),[6] which provide the construction and legislation of our civil procedure with a kind of open and universal analytic framework that can be transversely contrasted and vertically inspected.

| Procedural Elements | Responsive Justice | Policy-implementing Justice |
|---|---|---|
| Organization of Power | Coordination system. The state's power depends on the coordination of many social forces, and judicial procedure can be operated by the non-professional. | Bureaucracy system. Judicial officers are professionalized and have strict rank order. Lower judges have no responsibility to follow the higher judges, but listen to their guidance. |
| Nature of Justice | Passive justice. Judicial confirmation in some cases is usually individualized and balanced. | Activism justice. The function and purpose of justice is to realize the state's policy. |
| Importance of Procedure | Emphasizing the independence of procedural rules and the justified mechanism with procedure, and putting the impartiality of procedure above the accuracy of results. No matter pre-specified by state or promised by the litigants, procedural rules must have integrity and independent from substantive law. | Subsidiarity of procedure law. Compared to substantive law and policy, procedural rules and procedural regulation have a secondary and subordinate position. |

[5] Fan Yu, Theory and Practice of Disputes Resolution, at 152-156 (Tsinghua Press, 2007).

[6] Mirjan R. Damaska, The Faces of Justice and Authority—a Comparative Approach to The Legal Process, at 125-269 (Zheng Ge trans., China University of Social Science and Law Press, 2004).

续表

| Procedural Elements | Responsive Justice | Policy-implementing Justice |
|---|---|---|
| Right of Procedural Control | Litigants have control over procedure. Controlling powers of procedure actions, such as the starting and ending of the litigation, clearing the issue of dispute about fact and law, and supervision over litigation procedure, are endowed to the litigants, and thus each party has the authority to punish the opposite's violation of limitation period. | Officials' intervene and monopolize control of procedure, and in order to find proper solutions they take part in the procedure at any time. There is no "litigant" as the procedure owner, but the unofficial procedure participants. They can not choose the procedure freely, but are directly affected by the decision resulted from the procedure. |
| Fact-finding | Setting strict limits on the action of fact-finding, but the "fact" is regarded as the result of discussion not the reflection of reality. It adopts a competitive style of proof taking, and gives the right of proving facts to the litigants. | Devoted to finding out the facts in every case, and regard the fact-finding as the premise of realizing its procedural goal. Citizens have to cooperate with the authority in legal process. |
| Position of Decision-makers | Trying to build an image of neural decision-makers in procedural justice, and must ignore all the elements confronted with that beyond the scope of dispute solution, instead of pursuing the policies that are not related to the specific goal of dispute solving. | Building the image of decision-makers that follow truth instead of justice. Decision-makers must be loyal to their state, and the alienation attitude to state's policies is not only inappropriate, but even should be condemned. Litigants are regarded as the resource of information, and the responsibility of testifying and speaking out the truth is justified. |

续表

| Procedural Elements | Responsive Justice | Policy-implementing Justice |
|---|---|---|
| The Role of Lawyers | Stresses the importance of lawyers. Lawyers' participation is one of the features of responsive justice, which can keep and consolidate autonomous citizens' management to litigation. The limitation of lawyers' activities is similar to the litigants' to a large extent. | Stresses the limited importance of lawyers. In the active legal procedure that the responsibility of reaching the correct results is endowed to government officials, the legislature does not look forward to the exertion of private lawyers' talent, and there is not enough space provided for lawyers to exert their skills and creativity. |
| Alterability of Judgment | Even though there are legal or de facto errors in judgment, they are seldom altered. The preference of stability leads to rejection of future litigation, which not only rejects the litigation claims that have been judged, but also the facts that have been checked. No matter if possible or not, retrial of judgment can only be started by the litigants. | Its will of dissolving the disputes and meeting social expectations are not very strong, with little attention to the stability of results. It prefers to correct the judgm-ents with substantive mistakes, and although the judgment violates legal procedural rules, it is unwilling to alter substantive correct judgment. |

### 2. 2 The Status of Our Civil Procedure System: Transformation from Policy-implementing Justice to Responsive Justice

The civil judicial system of New China is rooted in the judicial experience in the revolutionary bases, draws upon the civil litigation theory of the Soviet Union and the continental law system represented by Germany and Japan and forms its own, personal system type. However, if we inspect China's thirty-year-development of the text and theory of our civil procedure law by Damaska's analytic framework of the typology of judicial system, a clear roadmap from policy-implementing justice to responsive justice is reached.

In the academic pedigree of civil procedure law in China, the civil procedure theory of the Soviet system played the most important role in the 1980s and before,