ON THE STATEMENTS
OF
THE PARTIES
OF
CIVIL PROCEDURE

民事诉讼当事人陈述理论重构

——以哈贝马斯的交往理性为视角

陈文曲 / 著

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图书在版编目(CIP)数据

民事诉讼当事人陈述理论重构:以哈贝马斯的交往理性为视角/陈文曲著.—北京:法律出版社,2010.8
ISBN 978-7-5118-1139-4

Ⅰ.①民… Ⅱ.①陈… Ⅲ.①民事诉讼—证据—研究 Ⅳ.①D915.213.04

中国版本图书馆 CIP 数据核字(2010)第 163061 号

民事诉讼当事人陈述理论重构——以哈贝马斯的交往理性为视角	陈文曲 著	策划编辑 刘伟俊 责任编辑 班运华 装帧设计 汪奇峰

开本 A5　　**印张** 7.5　　**字数** 210 千
版本 2010 年 9 月第 1 版　　**印次** 2010 年 9 月第 1 次印刷
出版 法律出版社　　**编辑统筹** 独立项目策划部
总发行 中国法律图书有限公司　　**经销** 新华书店
印刷 世纪千禧印刷(北京)有限公司　　**责任印制** 张宇东

法律出版社/北京市丰台区莲花池西里 7 号(100073)
电子邮件/info@lawpress.com.cn　　销售热线/010-63939792/9779
网址/www.lawpress.com.cn　　咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)
全国各地中法图分、子公司电话:
第一法律书店/010-63939781/9782　　西安分公司/029-85388843
重庆公司/023-65382816/2908　　上海公司/021-62071010/1636
北京分公司/010-62534456　　深圳公司/0755-83072995

书号:ISBN 978-7-5118-1139-4　　**定价**:26.00 元

本书系湖南省哲学社会科学基金项目《民事诉讼当事人陈述理论重构》（项目编号为09YBB407）和中国行为法学会部级研究课题《当事人陈述行为研究》（项目编号为2010学研038）的研究成果。

摘　要

在我国传统理论中，当事人陈述是作为一种独立的证据形式，其功能是作为一种独立证据证明案件事实，但在立法上对当事人陈述规定得相当粗略，缺乏可操作性。在司法实践中，由于人们普遍认为，当事人与事件有直接利害关系，其陈述不可靠，加之作为证据的当事人陈述与当事人的主张、辩解以及主观情感的表达在诉讼中无法分离，因而，当事人陈述作为独立证据实际上名存实亡。随着科学技术的发展，物证技术的广泛运用，人们的认识手段日益客观可靠，对人证的依赖性（尤其是对“口供”的依赖性）日益削弱，科学技术的发展已成为作为证据的当事人陈述沉沦的催化剂。同时民主的进一步完善，对人的尊重上升到一个新的层次，由主体性发展到主体间性，主体的话语沟通成为生活常态，民主发展为作为证据的当事人陈述的消退提出了人文要求。而我国民事证据规则的出台，又为作为独立证据当事人陈述的隐退提供了现实可能性。故作为独立证据形式的当事人陈述的消退具有必然性，但对其否定，并不是否定当事人陈述在诉讼证明活动中的作用，反而是为充分释放当事人陈述在诉讼中应有功能而做准备。

为破题而破题是没有意义的，为立题而破题才是破题的使命。否定当事人陈述作为独立证据形式，是因为当事人是程序主体，其陈述是其在诉讼程序中以口头或书面形式对案件情况的描述、诉讼主张、辩解等，是其在诉讼中的语言行为或者说是其在诉讼中的

言语性的诉讼行为。从性质上讲，是当事人意思表示的言语表现，是言论自由在诉讼空间下的具体体现，既是权利，又是义务，当事人陈述是诉讼语境下的当事人的合理交往行为，是当事人常态的诉讼行为、民事诉讼中最普遍的诉讼现象。当事人陈述具有特定性、广泛性和矛盾性等特征。

否定当事人陈述作为证据形式，而将当事人陈述扩展为言语行为和常态诉讼行为，其背后必须要有充分的理论依据，否则系异想天开。哈贝马斯的交往行动理论注重主体间性、言语性和程序性，这与诉讼有诸多暗合之处，将哈贝马斯的合理交往行为理论引入民事诉讼理论中，依此对民事诉讼一些基本理论，特别是当事人陈述与诉讼的合法性、诉讼模式的合理化的关系的反思，寻找到了重构当事人陈述的理论家园，找准了当事人陈述回家的路，进而论证现代民事诉讼是在交往理性下的事实与规范的言语整合，当事人陈述是这种整合的基础。申言之，其一，诉讼活动是一种主体间的交往活动。主体间性在诉讼中表现为当事人的主体间性与诉讼主体间性，这种由主体性向主体间性的转变，真正体现了对人的尊重。其二，诉讼是一种言语行为。若将普遍语用学引入诉讼中，建立诉讼语用学，注重诉讼主体的言语，尤其是当事人的陈述，将极大地保障当事人的诉讼参与性，增强诉讼结果的可接受性。司法的言语性，解决了司法权威的真正源泉，这也是诉讼的合法性之所在。其三，当事人陈述是民事诉讼这种言语活动的基础。

当事人陈述的功能问题是讨论当事人陈述这种局部活动对于整个民事诉讼的贡献，即当事人陈述在民事诉讼中的积极功能问题。发掘、释放当事人陈述的应有功能，将为后续的当事人陈述制度化建设做良好铺垫。哈贝马斯的普遍语用学认为语言具有表现、表达和调节的功能，而诉讼是一种语言行为，当事人陈述是诉讼语言行为最基本的表现，因此当事人陈述自然具有语言的三大基本功能，但当事人陈述作为一种在民事诉讼语境中的语言行为，

其功能会特色化，具体表现为表明案情、催化心证和调控的功能，这或许是对当事人陈述的功能比较深刻、恰当的认识。

欲使认识更加全面些，对当事人陈述的研究除了上述较为宏观的角度探讨之外，还需从一种微观的角度进行分析，对当事人陈述的内容类型化就是微观分析的具体表现。在总结吸收其他学者关于当事人陈述的分类法的基础上，从当事人陈述的内容是否有利于己，以及陈述者的主观因素积极与否，将当事人陈述分为积极陈述、消极陈述。积极陈述是指当事人为了追求有利于自己的诉讼结果而进行利己性陈述，具体包括主张、辩解等。消极陈述是指非积极追求诉讼结果的陈述，具体有自认等承认性陈述、不知陈述和沉默。这种类型化分析，对当事人陈述的内容会有较全面、系统的认识，有利于当事人陈述的制度化设计。

我国当事人陈述制度化是法治现代化之所需，对当事人陈述的恰当归位、语境设计、功能释放以及当事人陈述内容的类型化都为制度化做了充分铺垫，在具体制度化设计中，理念上应将为权利而斗争转变为为权利而沟通，遵循真实、正当、真诚三大原则的指导，确立当事人真实陈述义务，引入听取当事人陈述制度，建立以自认为核心、认诺、权利自认为配套内容的承认制度，正确定位法官的角色，明确法官释明义务，完善释明制度，健全心证公开制度。这种制度化，既具有现代性，又体现了中国的国情。

Abstract

In our traditional theory, the statements of the parties are a kind of independent evidence form, and its function is as a kind of independent evidence to prove the judicial case. But about the statements of the parties in law are fairly glancing and lack of operable provision. In the judicial practice, it is generally believed that there is direct relationship of interests between parties and case, so its statements are unreliable. Additionally it can not separate the statements of the parties which are as the evidence with parties' claim, defend and expression of subjective emotion in the litigation, otherwise the statements of the parties as a kind of independent evidence exist in name only. Under the development of technology, the extensive use of the technique of material evidence, and people's epistemic means become more and more objective and reliable, the dependency to testimony of a witness become gradually weakened, especially to the confession. The development of technology becomes the catalyst which brings the statements of the party's downfall. At the same time, the democracy move forward to be perfect, respect to human goes up to a new level, and it develops from entity to inter-subjectivity and using words to communicate between subjects have become life normalcy. The development of

democracy creates the human conditions for the subsidizing of statements of the parties. Under the guidance of science and democratic thought, the civil evidence regulations came into existence, so it provides its possibility. So the subsiding of statements of the parties is inevitable. But it is not negative its function in activity of litigation proof. Instead, it makes preparation for releasing proper function of statements of the parties fully.

It has no significance for only give the theme in one or two sentences, its mission is to research. The statements of the parties are negative as the independent form, because the parties are the subject of procedures, their statements are the description of case's situation, litigation claim and defend and so on which litigation parties bring out in oral and written form. It is parties' linguistic behavior or speech act of procedure in litigation. Essentially, the statements of the parties are parties' speech expression of declaration of intention and the specific reflection of freedom of speech in litigation space. They are rights and also obligations. So the statements of the parties are parties' reasonable communication behavior in the litigation context and normal act of procedure and the most universal litigation phenomenon in the civil litigation. The characteristics of statements of the parties are specifically, universality and contradictoriness and so on.

It must have sufficient theory basis to expand statements of the parties to speech behavior and normal act of procedure and negative its evidence form, otherwise it will let one's imagination run riot. Harbermas's theory of reasonable communication behavior put great emphasis on inter-subjectivity, speech and procedural, and it have many affinities with litigation. The article leads Harbermas's theory

of reasonable communication behavior in civil procedure and recollects some basic theory in the civil litigation, especially to the reasonable relationship between statements of the parties and litigation's legality and mode. So it may find the homestead of reconstructing statements of the parties and seek its way to home. And then, it put emphasis on proving the integration of facts and rules is under the communicative rationality in modern civil litigation. The statements of the parties are the basis of integration. Firstly, act of procedure is a kind of contact activity among the subjects. The inter-subjectivity registers as parties' and litigation inter-subjectivity and the transformation from entity to inter-subjectivity show its respect to human truly. Secondly, litigation is a kind of speech behavior. If lead universal pragmatics in litigation and build litigation pragmatics, and emphasize the speech of subject of litigation, especially statements of the parties, it will ensure parties' litigation participation and increase litigation result's acceptability. Judicial speech resolve the rue source of judicial authority and it has the litigation validity. Thirdly, statements of the parties are the basis of speech behavior in civil litigation.

It should discuss the function of statements of the parties which is just local activity make what kinds of contribution to the whole civil litigation, and so it is the positive function in civil litigation. Exhumating and releasing its proper function of statements of the parties will pave the way to build the subsequent institutionalization of statements of the parties well. Herbermas's universal pragmatics believe that speech have the function of displaying, expressing and adjusting, and litigation is a kind of speech behavior, and then statements of the parties are the most basic behavior in litigation of

speech behavior. So the statements of the parties have speech's three basic functions, but as a kind of speech behavior in civil litigation, the function of statements of the parties will become to be specialization. It specific show the function of indicating details of a case, catalyzing moral conviction and adjusting and controlling. It may be profound and proper cognition to the function of statements of the parties.

If you wish to make the cognition overall, it should analyze from a kind of microcosmic angle, except for macroscopically angle. The specific expression of microcosmic analysis is to stereotype content of statements of the parties. On the basis of summarizing and absorbing other scholars' taxonomy, the statements of the parties could divide to positive and passive statements, from whether its content is benefit to himself or not and representor's subjective factors is positive or not. The positive statement is about claim and defend and so on that the parties make the statements benefit to himself in order to seek litigation result benefit to himself. The passive statements is about confession, not know statements and silence that the parties do not positive seek litigation result. This kind of analysis will get some total and systemic cognition to the content of statements of the parties, and it is in favor of designing the institutionalization of statements of the parties.

The modernization of ruling by law needs to make institutionalization of statements of the parties. Reseating, designing context, releasing function and set retyping the statements of the parties, they pave the way for institutionalization. In the specific design of institutionalization, fighting for rights should transform to

communicating for rights, following the three principle such as true, just, and sincerity, establishing parties ' obligation of true statements, leading the system of hearing statements of the parties, building recognition systems which recognizing himself is the core and admission and rights recognition are assorted content, locating judge ' s role rightly, making interpretation obligation clearly, making interpretation system perfectly, constructing system of discoursing moral conviction. These kinds of institutionalization have its modernization, also reflect Chinese national conditions.

目　录

绪　言

一、问题的提出及研究意义

（一）问题的提出

“人类关于世界的思考和探求是永不满足的。无止境的反思、批判、超越精神是它的本性。”[①]正是这种精神促成了人们问题意识的形成，让人们不断地追问，不断地发现需要研究的对象。“问题意识是学者发现问题、思考问题、质疑问题、把握问题、解决问题的敏锐感和自觉性。如果说学术功底的形成主要靠学习和培养，那么问题意识的形成则主要仰赖思考和追问，没有一种刨根问底式的追问精神，问题意识的形成绝无从谈起。”[②]那么，选择当事人陈述作为本书主题缘于何问题意识？在一般人看来，当事人陈述作为一篇论文，或许尚有独特价值的命题，而作为本书的选题，未免小题难以大做？笔者面临着选择“小题大做”普遍性的质疑。但一次次追问：传统的当事人陈述有什么问题？当事人陈述是否

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① 孙伟平：《事实与价值——休谟问题及其解决尝试》，中国社会科学出版社2000年版，第1页。

② 陈兴良：“学术功底、问题意识、研究方法（刑事法学研究丛书总序）”，载李文健：《刑事诉讼效率论》，中国政法大学出版社1999年版，第4～5页；转引自廖永安：《民事审判权作用范围研究——对民事诉讼主管制度的扬弃与超越》，中国人民大学出版社2007年版，第1页。

还需作为证据使用？当事人陈述应如何界定？对于当事人陈述，应以何种视角看待？当事人陈述在现代民事诉讼中具有什么样的功能？当事人陈述与民事诉讼程序的合法性、诉讼模式的合理化等相关基本诉讼理论的关系如何？应怎样对当事人陈述的内容进行类型化分析？我国应当如何构建适合国情的当事人陈述制度？等等！

对上述问题的苦苦思索，笔者认为当事人陈述表面上是一小题，而背后有大文章，隐含着一些常常被忽视的道理，对其系统研究有可能对传统的一些诉讼理念、理论、制度带来颠覆性的冲击，但亦难逃痴人说梦之嫌。姑且一番痴人说梦吧，难叫尔等明知小题而大做呢？

（二）选题背景及意义

小题欲大做，需占据高度，选准角度，设置一种大场景，方可深挖其大道理，并“以点见面，以小见大”。笔者认为，跨越诉讼法学内部视域，从更具有统摄和整合功能的哲学领域借用理论工具，在整体解读诉讼程序的前提下，结合宪政的视角，运用交往合理性理论、国家—社会二元理论、协商民主理论，反观当事人陈述，或许发现这里风景独好。当事人陈述是诉讼民主的具体体现，是市民社会中市民不可或缺的权利。当事人陈述是推动诉讼程序合法化和合理化的原动力之一。

在许多哲学家看来，西方哲学发展经历了三个阶段：本体论、认识论（意识哲学）、语言哲学。在古希腊，哲学家侧重于研究现实存在的本源或者某种形而上学的本体，因而本体论成为他们哲学研究的中心。到近代，哲学研究的中心从本体论转向研究认识的起源，研究人的认识能力的界限，研究认识世界的途径和方法等。到了现代，哲学的发展又从认识论转向语言哲学，对语言的研究已成为哲学的中心课题。大多数的现代西方哲学家赞同把这种从认识论到语言哲学的转变，称为“语言哲学转向”，并把这种转