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The Reform and Perfection of China's Civil Litigation Level System: The Establishment of the Third Trial System as the Main

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Abstract: China has been implementing a civil litigation hierarchy based on a system of two trials with final adjudication, supplemented by a trial supervision procedure of retrial, with a view to enabling our civil litigation process to better achieve the established value objectives; over time, this long-running procedural system has revealed serious problems in terms of institutional framework and specific rules. In recent years, the Supreme People's Court has issued a series of relevant policy documents to amend and adjust our civil litigation hierarchy in many aspects, including the criteria for accepting cases, retrial procedures and the elevated jurisdiction system. At present, our civil litigation level system is no longer purely a two-trial final adjudication system, but is closer to the substantive three-trial final adjudication system.

1. Introduction

1.1 Alienation of the Retrial Process

As China's retrial procedure has adopted the same "statutory trial plus factual trial" as the civil first and second trials, its trial procedures also follow the ordinary civil litigation procedures, and the grounds for applying for retrial provided for in the Civil Procedure Law are also relatively extensive, the retrial procedure, which was originally independent of the framework of the trial level system, has in essence dovetailed with the ordinary trial procedure of civil litigation and become another level of ordinary trial procedure - the third trial procedure - under the framework of the two-trial final adjudication system, except that it still leaves room for the application of the factual trial.

And the consequences of the alienation of the retrial process become more and more apparent when the intake of civil retrial cases is understood in the form of data charts. As can be seen from Table 1, in terms of the intake of cases in the national court system, although the intake of civil retrial cases is on average only 3-5% of the intake of civil second instance cases, it is still in the tens of thousands; in particular, since 2019, the intake of civil retrial cases has remained above 50,000 for several years in a row. Of course, the figure of 50,000 is unremarkable compared to the number of civil second instance cases received, as the former can easily exceed one million. However, considering that in China's civil trial system, only the High Court and the Supreme Court are the main

bodies hearing retrial cases, and there are only about thirty of them combined, a decline in the quality of adjudication of civil retrial cases is almost inevitable. This seriously affects the specialized function and scale of adjudication that the High Court and the Supreme Court have in unifying the application of law, and also poses a threat to judicial fairness.

Table 1: Statistics on the number of civil second instance and retrial cases received in the national court system of China, 2017-2021

Statistical year(year)	Number of civil second instance cases received (cases)	Number of civil retrial cases received (cases)
2017	1145959	34601
2018	1222727	44043
2019	1367075	76139
2020	1332919	59053
2021	1642816	53477
Average	1342299	53462

Under the influence of the alienation of the retrial process and the strong will to solve the problem, the original two-trial final adjudication system has begun to alienate itself into an institutional framework that is gradually moving towards a three-trial final adjudication system, which requires our further revision.

1.2 Consequences of the Alienation of the Retrial Procedure

According to the provisions of Article 207 of the Civil Procedure Law of the PRC, as long as one of the thirteen conditions of this article is met, the people's court shall conduct a retrial of the civil litigation case, which has made a breakthrough in the two-trial final adjudication system from the perspective of mandatory acceptance. Therefore, the alienation of the retrial procedure to the civil trial procedure has led to the original system of final adjudication of two trials, which has the disadvantage of "final adjudication without finality". Under the basic framework of the second instance final adjudication system, civil cases are finalised upon second instance, and the second instance judgement takes effect as soon as it is served, with only a very short interval of time between the delivery of the judgement and its entry into force. Therefore, generally when the parties to the people's court to propose a retrial, the second instance verdict has already come into effect, once the court of retrial to change the verdict, send the case back for retrial or mediation, it will inevitably affect or negate the results of the verdict has already come into effect, which puts the court of retrial in a difficult position[1]: in the premise of sufficient reasons, if the case is changed, sent back for retrial or mediation, it will certainly damage the court of second instance; if not, it may lead to a direct violation of professional ethics and even the law, which will have a strong impact on the judge's personal credibility and judicial impartiality. Thus, the mere existence of the retrial procedure poses a serious problem for the judiciary in terms of its theoretical setting.

The problems revealed in theory are even more serious when corroborated by practical data. As can be seen from the table 2, in recent years, the rate of dismissal of applications for retrial by the courts under the national court system has been extremely low, accounting for less than 1% of all cases received, so that the filing of applications for retrial has basically been given the judicial effect of inevitably initiating civil retrial proceedings. This close connection between the retrial and the litigation rights of the parties requires us to address the issue of the retention or modification of the retrial process. At the same time, the rate of rejection of the effect of the so-called "final decision" of the court of second instance by the court of review is extremely high, reaching 50%. In view of the embarrassing situation, the reality requires us to take measures as soon as possible to properly resolve

the contradiction between the design of the civil litigation hierarchy and the credibility and res judicata of judicial decisions at the theoretical level, while facing up to the issue of revision of the re-trial procedure. The shortcomings of the retrial process will be accompanied by more and more unpredictable and unbearable consequences as time goes by.

Table 2: Statistics related to civil retrial cases received in the national court system of China, 2017-2021

Statistical year (year)	Number of cases received for retrial (cases)	Number of retrial cases received (cases)	Retrial acceptance rate (%)	Number of retrial cases re-sentenced, mediated and remanded (cases)	Rate of retrial re-sentencing, mediation and remand (%)
2017	34778	34601	99.49	18521	53.53
2018	44211	44043	99.62	22990	51.99
2019	76327	76139	99.75	27800	36.51
2020	59277	59053	99.62	28895	48.93
2021	64260	63943	99.51	29846	46.68
Average	55771	55556	99.60	25611	47.53

2. Restructuring of the Court's Functions and the Establishment of the Three-Trial System

2.1 Feasibility of Establishing a System of Third and Final Instance

The establishment of a system of three trials is not a figment of the imagination, but is sufficiently feasible. On the premise that we must face up to the retrial process, the best way for us to transform the retrial process while making the trial level system work properly is to simply abolish the special functional arrangement of the retrial process, replace it with a civil third instance process and establish the civil third instance as the final instance of civil litigation.

The institutional setting of countries that have implemented a system of third and final instance in the field of civil litigation shows that the use of fully legal trial in civil third instance proceedings is an important, if not central, feature of the system of third and final instance in civil litigation. In Germany, Japan and the United States, the courts of third instance in civil matters (the Supreme Court) all have fully legal trial [2] and their main function is to unify the standards of adjudication of similar cases through the introduction of statutory levels of review for third instance cases, thereby bringing into play the social significance and guiding function of judicial adjudication activities. Therefore, in these countries with a three-trial system, the three-trial procedure with fully legal trial is the "most important feature and valuable tool" [3] in their civil litigation hierarchy. At the same time, the application of fully legal trial helps to reduce the burden of adjudicating cases in the courts of third instance, thereby reducing the workload of the courts of third instance as a whole and enabling them to allocate more resources to single cases of third instance, so as to effectively improve the quality of adjudication in third instance and better perform the special function of the courts of third instance.

Following the issuance of the Implementation Measures, errors in the application of law became the basis for parties to seek relief from the judicial power of the Supreme Court. As Article 12 requires the parties to declare that they have no objection to the facts and evidence of the original judgment and the proceedings before the Supreme Court, the Supreme Court is not required to hear the facts, evidence and procedural parts of the case when accepting civil retrial cases, i.e. it can conduct a fully legal trial. In other words, Articles 11 and 12 of the Implementation Measures indirectly establish the scope of application of the fully legal trial in the retrial proceedings.

Thus, the application of the fully legal trial, as a core feature and rule of the universal system of

the third trial, becomes a solid bridge between the third trial system and the current reform of the hierarchy, providing an important path for the alienated second trial system to be transformed in the direction of the third trial. Based on an analysis of the substance of the system, as well as an examination of comparative law and the content of the Supreme Court's initiative, we can affirm the full feasibility of replacing the civil retrial process with a third instance system of final adjudication.

2.2 The Need for a System of Third Instance Review

If we make changes to the design of the system, then even minor changes will fundamentally undermine the stability of the system, so the system must be amended not only with clear feasibility but also with full necessity. The necessity of establishing a three-trial final adjudication system is mainly reflected in two aspects.

As mentioned above, the original system of final adjudication in two trials has been alienated along with the alienation of the retrial process. Therefore, in the future, the civil third instance procedure will replace the civil retrial procedure and become the final instance of civil litigation in general, thus completing the construction of a "true third instance final instance system". In this case, the second instance judgement will not take effect as soon as it is served, but will have a full appeal period, just like the first instance, and will take effect as soon as the third instance case has been heard and served. If the third trial is also flawed, the parties can apply to the procuratorate, a specialised trial supervision authority, to initiate a protest through the trial supervision procedure. In this way, there are no cases where a higher court overturns the final judgment of a lower court, and the credibility and res judicata of the court system can be better protected. Of course, within the framework of this system, the protection of the parties in exercising their right to litigation remedy should become the focus of our attention to the new content.

In addition, the application of a fully legal trial in civil third instance proceedings generally requires the party filing the third instance application to explain the errors in the application of the law in the original judgment at the time of filing the application, and the court of third instance will then review the reasonableness of the reasons given. The obligation to state reasons and the power of review conferred on the court of third instance make the application for third instance essentially subject to a double review process. Under such a strict review process, the possibility of abuse of litigation rights and malicious litigation by parties is greatly reduced[4] and the review burden on the court of third instance and the risk of wasting resources on case review is also reduced.

Therefore, the third instance final adjudication system plays an important role in maintaining judicial credibility and res judicata, optimising the allocation of trial resources, improving the quality of the third instance, and strengthening the functions of courts at all levels, and its establishment is feasible and necessary. The proper establishment of a system of final adjudication in the third instance to replace the original civil retrial procedure should be an important means of optimising the hierarchy of civil litigation and strengthening the functions of courts at all levels, and needs to be implemented as soon as possible.

3. Construction of the System Relating to the Third Instance System

3.1 Unification of the Criteria for Admissibility of Cases in the Third Instance System

Articles 11 to 13 of the Implementation Measures sever the unified criteria for civil re-trial applications. While intuitively beneficial in ensuring that the special function of the Supreme Court is fulfilled, this initiative is bound to lead to serious consequences if it is applied intact to the civil third instance application procedure under the third instance system.

From the perspective of system unification, the fragmentation of what should be a unified system

would complicate the content of the system and raise the procedural costs for all parties in its implementation. For example, in the case of the civil third instance, whether the subject is the Central Court, the High Court or the Supreme Court, a uniform standard of admissibility and adjudication should be maintained so that the coherence and integrity of the system can be brought into play and the admissibility system can be more easily integrated and coordinated with the other elements of the third instance system. If the system were to be forcibly split up, each part of the system would have its own separate standards of judgement and operation, which would make the already complex content of the proceedings even more fragmented and difficult to unify. Furthermore, in terms of the purpose of the system, one of the main purposes of replacing civil retrial proceedings with civil third instance proceedings is to achieve the positive effect of introducing the fully legal trial. However, if the civil third instance system is divided into two and fully legal trial are only implemented in civil third instance cases before the Supreme Court, the scope of application of fully statutory trials will be severely restricted due to the small number of cases before the Supreme Court, thus preventing the positive significance of fully statutory trials from being fully utilised, and the efficiency and quality of third instance trials from being improved. Therefore, we should establish a unified standard for admissibility of civil cases in the third instance, a standard that does not distinguish between the courts of third instance themselves and focuses only on whether there is an error of law in the original decision.

3.2 Strict Control over the Exercise of the Right to Decide Third Instance Applications

Because of the importance of the third instance court's power to decide on third instance applications (the exercise of which includes "positive leave" and "negative refusal", hereinafter), their exercise must be strictly limited and monitored.

There are two main restrictions on the exercise of the right to decide on third instance applications. The first is the setting of mandatory proportional limits on the exercise of the right to decide, and in particular the right to refuse. For example, the court of third instance may set 50% of the number of third instance cases received in the previous year as the maximum limit on the number of cases that may be rejected by the court of third instance in that year. If the number of cases dismissed by the court of third instance exceeds this limit, no further applications for third instance may be dismissed in that year, unless it is clear to the court that the applicant has subjective bad faith in abusing his or her right to litigate or in bringing false proceedings. Secondly, the admissibility criteria for civil third instance cases are strictly limited, i.e. the admissibility criteria for other third instance cases are eliminated as far as possible, provided that errors in the application of law have become the main third instance admissibility criteria.

The restrictions on the exercise of the right to apply for third instance rulings are based on two main considerations. Firstly, according to the table 3, we find that although the circumstances set out in Article 207 of the Civil Procedure Law are relatively broad, in practice the number of retrial cases is generally maintained at around 50,000 per year and the "civil retrial rate" is almost always below 1% per year. When the civil third instance system of full trial by law is operational, it is expected that the number of cases received in the civil third instance will drop by more than half to a state of less than 20,000 cases, and the "civil third instance rate" will only drop accordingly. Under this expectation, if no restrictions are placed on the exercise of the right to apply for third instance adjudication, the number of civil cases that can be heard in the third instance will only get smaller and smaller. This phenomenon not only risks infringing on the litigation rights of the parties, but may also lead to an insufficient number of cases being heard by the courts of third instance, thereby affecting the level of cases heard and adjudicated by the courts of third instance and reducing the quality of the courts' performance of their function of uniform standards of adjudication and

application of the law. [5]

Table 3: Statistics relating to civil retrial rate in the national court system, 2017-2021

Statistical year (year)	Number of civil first instance cases received (cases)	Number of civil retrial cases received (cases)	Civil retrial rate (%)
2017	11253599	34601	0.31
2018	12423169	44043	0.35
2019	13821658	76139	0.55
2020	13106643	59053	0.45
2021	16576300	63943	0.39
Average	13436274	55556	0.41

Secondly, in the third instance, there is a high possibility that the specific connotation of the provision is unclear, such as the "no guidance on the application of law" as stipulated in Article 13 of the Implementation Measures. This kind of subjective provision will not only cause great trouble to the judgment and interpretation of the specific meaning of the provisions, but also leave a lot of room for free interpretation by the executive authorities. Therefore, once similar ambiguous provisions exist in the standards for third instance cases, it is likely to become a tool for the executive authorities, becoming an important tool for the courts of third instance to shirk their tasks and forcibly "reduce the burden". We should delete or make specific the above-mentioned standard provisions that are vague and unclear and leave too much room for interpretation, otherwise they may pose a great risk to the operation of the practical work and the trial level system.

3.3 Gradually Replacing the Case Referral System with a System of Elevated Jurisdiction

The practice in China over the years has shown that the petition system has too many negative effects compared to the subordinate jurisdiction system and should be replaced by the latter. From a jurisprudential point of view, although most of the petitions are submitted by the lower courts to the higher courts on their own initiative, they are essentially direct interventions by the higher courts in the trial operations of the lower courts, interference by one organ with independent judicial power in the operations of another organ with the same independent judicial power, which turns the original horizontal relationship between the two into a hierarchical vertical relationship, directly undermining the independent judicial power of the lower courts and intensifies the process of administrative alienation of the operational supervision relationship between the upper and lower courts. At the same time, in conjunction with the business regulations of the court system, the responsibility for the defects of a specific case is in principle borne by the court making the decision, while under the system of referral of cases, the actual decision is made by the superior court of the requested party, but the risk of responsibility for the decision made by the lower court of the requested party formally makes the decision, such a state of fault subject and the subject of responsibility are not unified is unfair. From the perspective of the legal basis, the subordinate jurisdiction system has been confirmed by Article 39 of China's Civil Procedure Law, and its operation is obviously more in line with the basic state policy of following the rule of law, making the adjudication of cases more standardized, thus speeding up the promotion of the rule of law society. If the lower courts lack the motivation to report cases due to various reasons or pressure, it is difficult for the system to function well [6]; whereas the system of elevated jurisdiction contains a two-way case delivery mechanism, which is more flexible than the former, even if the lower courts do not report the necessary cases for elevated jurisdiction, The higher court can still initiate the elevated jurisdiction procedure on its own initiative. This is of great significance in terms of breaking down the host-and-away factor of litigation and

strengthening the guarantee of the independence of the court system in judicial trials [7]. Therefore, in comparison, it is necessary to replace the system of referral of cases with the system of superior jurisdiction in the future, which should be one of the main directions of the reform of the civil litigation hierarchy.

4. Conclusion

We wish to amend the existing civil litigation level system in the future, formally establish a three-trial final adjudication system, and establish a set of rules for the level system more suitable for our judicial practice. At the same time, I hope the reform of the civil litigation level system in China a complete success and sincerely hope that our civil litigation system will move forward with the times.

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