

学校编码: 10384

分类号\_\_\_\_\_密级\_\_\_\_\_

学号: 13020121150221

UDC\_\_\_\_\_

廈門大學

硕士学位论文

民事诉讼当事人程序瑕疵救济权研究

Research on the Parties' Remedy Rights for Procedural  
Flaws in Civil Procedure

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论文提交日期: 2015年3月

论文答辩时间: 2015年 月

学位授予日期: 2015年 月

答辩委员会主席: \_\_\_\_\_

评阅人: \_\_\_\_\_

2015年3月

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## 摘 要

随着我国程序法的发展, 诉讼程序所具有的独立价值越来越受到关注, 其独立价值的一个重要体现就是对当事人程序权利的保护。救济是对权利保护的必要方式, 但是我国民事诉讼制度过多的将当事人程序权利的救济集中于二审和再审等制度中, 而对诉讼程序瑕疵的救济制度缺乏应有的关注, 导致当事人程序权利受到限制。因此, 有必要建立独立的当事人程序瑕疵救济权制度。

本文除引言和结语外, 分为四章。

第一章分析了民事诉讼程序瑕疵救济权的一些基本理论问题。程序瑕疵是指审判人员不依据法定程序实施诉讼行为导致程序合法性受损的一种状态, 它表现为形式违法性和实质侵权性的结合。程序瑕疵行为和严重程序违法行为的界限在于行为对程序造成的侵害后果的不同。程序瑕疵根据其产生阶段的差别, 可以分为裁判的瑕疵和裁判外的瑕疵。程序瑕疵的救济是指法定主体对法院程序瑕疵行为的纠正, 当事人的程序瑕疵救济权应当在程序瑕疵救济体系中占据主导地位。然而, 程序瑕疵是否需要救济在我国理论和实务界存在较大的争议。文章在赞成设立当事人程序瑕疵救济权的前提下, 从维护程序价值独立性等角度对其正当性进行了法理学分析。

第二章介绍了我国当事人程序瑕疵救济的历史、现状和存在的一些不足。民国时期的诉讼法就有对当事人程序瑕疵救济的规定, 新中国成立后, 立法在瑕疵救济制度上有一些新的发展。在在分析法条的基础上, 论文指出我国当前立法存在分散、遗漏和模糊不清的问题, 通过几个案例分析司法实务中对程序瑕疵不够重视的错误做法, 由此得出我国法官对程序瑕疵救济的价值认识不足等结论。

第三章将视角转向法律制度比较完善的国家, 希冀从其他国家的程序瑕疵救济制度中获得一些有益的启示。文章重点阐述了德国、日本、法国和美国等国家的当事人程序瑕疵救济权——责问权制度, 包括其正当性、具体的内涵和操作流程等, 以此作为建立我国当事人瑕疵救济权制度的参考。

第四章在参考外国救济制度, 特别是责问权制度的基础上, 对建立和完善我国当事人诉讼瑕疵救济权制度提出了一些可行性建议。救济权的构建应以普遍救济、独立救济和救济均衡原则为指导, 采用原则性规定和分散立法相结合的立法模式, 在立法上对权利主体、对象、方式、期限和后果等立法要素予以明确的规

制。最后，论文从程序运行的角度对提出申请、法院审查、作出裁决、申请复议等几个重要程序作了阐述。

**关键词：**当事人；程序瑕疵；救济权利

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## ABSTRACT

With the development of China's civil procedure, the independent value of procedure is getting more and more attention, an important embodiment of its independent value is the protection of parties' procedural rights. But China's current system of civil litigation concentrate more the parties' procedural rights on the second instance and retrial, and lack of due attention to the remedy for procedural flaws system, lead to the parties' remedy rights for procedural restricted. So it is necessary to establish a set of independent procedural flaws remedy system.

Stripped of the introduction and conclusion, the article is divided into four chapters in structure.

The first chapter carries on the analysis to some basic theoretical problems of civil procedural flaws. Procedural flaw refers to the status that the judge doesn't behavior in accordance with legal that injured the legitimacy of procedure, it is expressed as a combination of formal illegality and substantive tort. The difference between the flaw of procedure and seriously illegal procedure is the consequence they caused .Procedural defects can be divided into juridical procedural flaws and procedural flaws outside the juridical according to the different stages they happened. The remedy of procedural defect refers to legal subjects correct the defective procedure behavior of the court, and the parties' remedy should occupy the dominant position in the remedy system. The article put forward that the disputes whether the procedural defect in need of remedy appeared in China's theory and practice. The author approve that the procedural defect needed remedy, and take jurisprudence analysis on maintaining the independence of procedure.

The second chapter introduce China's history, current situation and existing problems in the remedy of procedural flaw. Legislation about the remedy for procedural flaws is existed during the period of Republic of China, and got some new development after the founding of The People's Republic of China. Through analysis

relevant law, the author points out the problems exist in current legislation, dispersion, omissions, obscure and so on. Through several specific cases, the essay points out the wrong behavior in procedural remedy in China's current judicial practice, then further generalizes China's judges recognized the importance of the value of remedy for procedural flaws.

The third chapter shift perspective toward the countries which possess perfect legal system, hoping get some beneficial enlightenment from other countries. This chapter focuses on the remedy rights system——accusatorial right exists in Germany, Japan, France , America and other countries, including its legitimacy, concrete connotation and operating procedures, as the reference to the establishment of China's remedy system.

The fourth chapter proposes some feasible suggestions to construct China's legal system of the remedy for flaws. The set of the remedy right on procedural flaws should be based on the principle of universal remedy, independent remedy and remedy balanced, and adopts the legislative pattern combined with the principle provisions and dispersion. And the legislation elements, including subject, object, and way of remedy, duration and the consequences should be set unambiguously. Finally, the article expound in detail of application is filed, the court review, make a decision, and apply for reconsideration in the view of operate of the procedure.

**Key words:** Parties; Procedural Flaw; Remedy rights.

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## 引言

诉讼法制是恣意人治与民主法治的试金石。<sup>①</sup>近年来,随着立法的完善、司法制度的进步、民事审判方式改革的进一步推进以及诉讼法学者的大力倡导,我国民事诉讼法制建设取得了长足的进步,特别是2012年新《民事诉讼法》及相关司法解释在经过多次调研总结、征求意见之后终于颁布实施,其中许多被学者所诟病的程序问题得到了立法上的改善,从而使得我国司法实践中“重实体,轻程序”的错误理念有了一些新的转变。<sup>②</sup>但是实践中违反法定程序的情况还是屡见不鲜。仅2013年一年,全国法院受理各类二审民事案件627116件,其中改判和发回重审83683件,占全部二审案件的13.34%,其中改判案件占8.33%,发回重审案件占5.01%;<sup>③</sup>在全国受理的33362件再审民事案件中,12.27%的案件发回重审。<sup>④</sup>根据现行民事诉讼法及司法实践,发回重审的案件大部分甚至绝大部分是由于程序性问题所导致的。此数据还未将一般程序性违法的案件计入其中,因为只有严重违反程序法的案件才有可能进入再审程序,对于一般程序性违法案件,法院并不会启动再审。所以,以此推理,存在程序瑕疵案件的数量远远比上述数据中所统计出来的要多得多。另据学者对重庆市高级人民法院2007至2009年间民事案件审理情况的调研,该院因程序违法发回重审的案件共有34件,占全部审结案件的1.67%。<sup>⑤</sup>这些数据都表明我国司法实践中相当多的案件在不同程度上存在程序问题,不仅包括程序性的严重违法,也包括程序性的瑕疵,违反程序法的现象还普遍存在。而且,随着近年来法院收案数量的不断增长,新类型案件的大量增加,案多人少的矛盾越来越突出,法官办案压力持续增大。<sup>⑥</sup>这使得法官在个案审理中违反程序法规定的危险系数增高,造成案件的程序瑕疵甚至具有一定的必然性。

<sup>①</sup> 陈光中,江伟主编.诉讼法论丛(第一卷)[M].北京:法律出版社,1998.2-4.

<sup>②</sup> 参见江必新.新民事诉讼法专题讲座[M].北京:法律出版社,2012.15-30;张卫平.新民事诉讼法专题讲座[M].北京:中国法制出版社,2012.35-40.

<sup>③</sup> 最高人民法院网.2013年全国法院审理各类二审案件情况[EB/OL].  
[http://www.court.gov.cn/qwfb/sfsj/201407/t20140725\\_196828.htm](http://www.court.gov.cn/qwfb/sfsj/201407/t20140725_196828.htm),2015-03-15.

<sup>④</sup> 最高人民法院网.2013年全国法院审理各类再审案件情况[EB/OL].  
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<sup>⑤</sup> 朱福勇.试论民事程序瑕疵之救济[J].法学杂志,2011,(8):100.

<sup>⑥</sup> 周强.2015年最高人民法院工作报告[EB/OL].  
<http://www.court.gov.cn/zixun-xiangqing-13796.html>,2015-03-16.



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