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# The Conflict and Coordination Between the Procuratorial Organ Bringing Civil Public Interest Litigation and Its Responsibilities of Trial Supervision

Liu Xiaochun, Techophat Pornwarin

School of Law, Tianjin University, Tianjin, China

**Email address:**

lxc@tju.edu.cn (Liu Xiaochun), pornwarin.tec@gmail.com (T. Pornwarin)

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**Abstract:** The establishment of public interest litigation system in China, it is a great significance to strengthen the protection of social public interests. However, when the procuratorial organ bringing civil public interest litigation, there is a certain degree of conflict with the trial supervision duties that it undertakes. This kind of conflict is manifested in a conflict of the dual identity, the conflict of the nature of the role and the conflict of value pursuit. These three kinds of conflicts not only affected the balance of civil litigation structure but also affected the credibility of civil trial results. Therefore, there is an urgent need to restrict the relevant litigation rights and litigation obligations of procuratorial organs in civil public interest litigation, adjust the time for performing its trial supervision duties, etc., in order to construct a reasonable system to coordinate these conflicts, giving full performance to the role of procuratorial organs in protecting social public interests.

**Keywords:** Civil Public Interest Litigation, the Responsibility of Trial Supervision, Post Supervision

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## 1. Introduction

According to the relevant provisions of Article 55 of China's newly revised Civil Procedure Law, the public interest litigation system has been officially established in China. The "Meeting Bulletin" which has passed at the Fourth Plenary Session of the Eighteenth Central Committee of the Party, it is also put forward to exploring the opinion of the establishment of procuratorial organs to initiate public interest litigation system. This opinion has long-standing subsided in academic circles to controversy over whether the procuratorial organ has been able to initiate civil public interest litigation, promote the further development of China's public interest litigation. However, new problems also have arisen. When the Public Prosecutor's Office directly brings civil public interest litigation with the identity of the complainant (hereinafter shorten as a civil procedure in public interest litigation), the identity of the litigant will inevitably conflict with the identity of the trial supervisor. Thus, it is necessary to discuss this problem in some detail.

## 2. Conflicts and Effects Between Public Lawsuits and Trial Supervision

### 2.1. The Conflict of the Dual Identity

When filing civil public interest litigation, the procuratorial organs have a dual identity, namely the identity of the complainant and the identity of the trial supervisor. When the procuratorial organs have two identities at the same time, will there be conflicts? The answer is obvious.

Firstly, as a plaintiff, the relationship between the procuratorial organ and the court should be the same as the relationship between the defendant and the court. The three are the isosceles triangles in mathematics. The judges are located at the top of the triangle. Not only the statuses between the litigants completely equal but also the relationship between litigant and judges is also completely equal. [1] This civil litigation structure design is precisely a manifestation of procedural justice because, in the civil lawsuit, the neutrality of the judge is more emphasized. Only

in this way, can the judge perform the trial detachedly, and the trial result can be fair and convincing to both of defendant and plaintiff, also to the public society. [2] However, to become a trial supervisor, according to the relevant provisions of Article 208 of the Civil Procedure Law, the procuratorial organs can supervise the trial activities of the court through protests, put forward the procuratorial proposals, etc. Toward the supervision of the court's trial activities, procuratorial organs accept the trial of the court and supervise the trial activity in the court, and these will undoubtedly affect the independent jurisdiction of the judge. Therefore, it will have a negative impact whether it is the fair trial of the court or correctly perform trial supervision duties on procuratorial organs.

Secondly, as the plaintiff, the position of the procuratorial organ and the defendant in the litigation should be equal. However, according to the provision of Article 210 of the "Civil Procedure Law", when the procuratorial organ, functionally, submits a procuratorial suggestion or protest against the performance of the trial supervision duties, it may investigate and verifies the relevant situation toward persons involved or the off-site person. In this case, the procuratorial organ not only carries out civil lawsuits with defendants, but also takes the power to investigate the defendant, and the relationship between the two must be in an unequal state. If you compare this type of civil public interest litigation to one field competitions, then the procuratorial organ is not only an average player who competes fairly with other athletes in this competitive game, but also being a referee who supervise this contest and maintain the order of the competition, these are also disadvantages to maintaining the equality of the two parties of the civil lawsuit.

Thirdly, as a trial supervisor, the procuratorial organs are required not to supervise the trial with their own benefit as a basis, but also needs to accomplish to be a supervision with an impartial and neutral attitude during the performance of trial supervision duties. But to become such plaintiff of the public interest litigation, the procuratorial organs had a direct stake in the outcome of the trial at this time. This interest will surely affect the procuratorial organs performed its trial supervision responsibility. [3]

Fourthly, as a trial supervisor, the procuratorial organ should also be passively spectator, to ensure that the trial supervisor maintains the supervision with an equitable attitude. However, in such civil public interest litigation, the procuratorate as a plaintiff must inevitably strive to win, from this perspective, there are also conflicts between the two identities. [4]

## **2.2. The Conflict of the Nature of Role**

When filing civil public interest litigation, the procuratorial organ is an "ordinary" plaintiff and "not ordinary" plaintiff. "Ordinary" is reflected in the fact that the procuratorial organ is the plaintiff in the case. Like the plaintiff in a general civil lawsuit, to maintain certain civil rights and interests in litigation activities and actively seek for success, in this situation, the procuratorial organ is a "Private entity" character.

"Not ordinary" is reflected in the fact that the plaintiff in the procuratorial organ is different from a plaintiff in a general civil lawsuit. It is essentially a state organ. It is the trial supervision organ stipulated in the constitution and belongs to "Public entity". The different attributes of these two kinds of roles will give the procuratorial organ conflicts when exercising their rights and obligations.

Firstly, as a private entity, the procuratorial organs are required to participate in civil litigation activities on an equal footing, and the litigation rights should be exactly the same as the defendants. However, the public nature of the prosecutor's office makes the procuratorial organs have a strong resource mobilization capability. This ability, in turn, makes the procuratorial organ not in the same position as the defendant. For example, compared with the defendant, the prosecutor's office has a more powerful ability to investigate evidence collection and obtain evidence. At this point, if the procuratorial organ and the defendant are given equal rights of litigation and litigation obligations, it is unfair to the defendant.

Secondly, as a private entity, the procuratorial organ can dispose of his own litigation rights in accordance with the principle of punishment in civil lawsuits, such as giving up, changing the litigation request, and reaching a settlement with the defendant, etc. However, as a public entity, the procuratorial organ represents the national overall image, if the procuratorial organ is still allowed to dispose of his own litigation rights in accordance with the principle of punishment, allowing him to abstain from litigation or reach a settlement with the defendant will have a negative and negative impact on his image and even on the national image.

Finally, China implements the final trial system of the second investigation. For both parties of general civil litigation, when the court's judgment or after the ruling has taken effect, if it is not satisfied with the verdict or ruling, it is very difficult to initiate trial supervision procedures to change the verdict or ruling. However, as the procuratorial organ of the public entity, the procuratorial organ enjoys the power of trial supervision, not only can initiate the retrial procedure through protest, but also affect the court's judgment or ruling by way of submitting procuratorial proposals to the court. This also conflicts with the private identity of the procuratorial organs when conducting civil litigation activities.

## **2.3. The Conflict of Value Pursuit**

When the procuratorial organ is the plaintiff, its primary value pursuit is to win the case, and while taking the duty of trial supervision, its primary value pursuit is to maintain the fairness and justice in trial activities. However, when conducting civil public interest litigation, the procuratorial organ can only pursue one of their values as a primary value pursuit and the other is the secondary value pursuit. Otherwise, the procuratorial organs will be confusion. Under these circumstances, the pursuit of these two different values will create conflicts in the priorities of the status, and then lead to a series of thought-provoking questions:

First, if the winning case is used as the primary value pursuit of the procuratorial organ in such civil public interest

litigation, when the court's decision is obviously conducive to the procuratorial organ and there are also violations of the law and discipline, should the procuratorial organ exercise the power of trial supervision to initiate the retrial procedure or submit procuratorial proposals to the court?

Second, if the maintenance of the fairness and justice of trial activities are to be pursued as the primary value pursuit, then when the procuratorial organ directly submitted the evidence to the court, should it include evidence that is beneficial to the defendant? If the defendant is not satisfied with the court's judgment and ruling that has already taken effect, can the retrial procedure be initiated again by the procuratorial organ?

The different answers to the above questions will directly affect the specific lawsuit procedure for such civil public interest litigation. Therefore, it must be treated carefully.

During the procuratorial organ filing civil public interest litigation, they also take the responsibility for trial supervision. It is bound to have a negative impact on the civil litigation activities in two aspects of the balance of the litigation structure and the credibility of the judgment results. As mentioned above, as a state organ that takes the constitutional power of judicial oversight, the procuratorial organ has the power to supervise the trial of the court, a strong ability to collect evidence, and the support of the state power behind them, etc., these makes the procuratorial organ and the defendant in an unequal position. Therefore, in this type of civil public interest litigation, the balance of the litigation structure is easily broken because of displacement of the center of gravity. In this case, if the procuratorial organ wins, it is inevitable that people, especially defendants, believe that they have been treated unfairly in the trial. The traditional inertial thinking of "the court and the procuratorate are together" will intensify the feeling of injustice and cause the defendant to distrust and even dissatisfaction with the court's decision. Therefore, it should be established and improve the relevant systems of such civil public interest litigation as soon as possible, refine and perfect specific lawsuit procedures to coordinate the above three types of conflicts and eliminate the negative impacts brought by these civil litigation activities. Finally, the goal of fully performing to the positive role of the procuratorial organs in protecting the public interests of society will be achieved.

### **3. The Coordination of Conflicts Between Public Lawsuits and Trial Supervision**

#### **3.1. The Principle of Coordination of Two Roles**

The conflicts between the procuratorial organs bringing civil public interest litigation, and the trial supervision duties, it undertakes can be coordinated only by constructing a reasonable system. The establishment of this series of systems requires the following three principles:

First, the procuratorial organs should not only perform the

authority of bringing civil public interest litigation but also assume the responsibility of judicial supervision. On the one hand, it gives procuratorial organs the power to initiate civil public interest litigation, which is a major step in protecting social public interests in China, and also a great progress in clarifying the characteristic of procuratorial power in China. On the other hand, as a judicial supervision organ stipulated in the constitution, the supervision of the judicial activities by the procuratorial organs is conducive to the promotion of judicial justice and the maintenance of social justice. Of course, the procuratorial organ bringing civil public interest litigation will conflict with their responsibilities of trial supervision, but fundamentally, the exercise of these two functions is to maintain the overall interests of the society, so they cannot lose the advantage. Otherwise, the setting of any function has lost its due meaning.

Second, in civil litigation activities, the priority should be given to civil public interest litigation, consider the trial supervision as a supplement. Procedural justice is one of the prerequisites for achieving a fair trial. In the civil public interest litigation, procuratorial organs are the only one to carry out civil public interest litigation, so the equality of the legal status of both sides in civil litigation and the independent exercise of the judicial power of the court will become implemented, afterward achieve the procedural justice. In this way, the civil public interest litigation brought by the procuratorial organs can achieve the fundamental purpose of maintaining the social public interests and achieving social fairness and justice. The so-called "trial supervision as supplementary", only adjust the time of performance of the trial supervision responsibility, can be adjusted to the process of nonlitigation activities, not to weaken the judicial supervision responsibility of the procuratorial organs. In this way, we can not only guarantee fair and impartial trial of such civil public interest litigation but also guarantee the performance of the legal responsibilities of the procuratorial organ.

Third, we must limit the litigation rights and litigation obligations of procuratorial organs. The litigation rights and litigation obligations of the procuratorial organs are limited not only to ensure the fairness and justice of civil public interest litigation, but also to maintain the credibility of the procuratorial organ as a state organ. Because of the special status of the procuratorial organs, if they do not limit their litigation rights and litigation obligations to a certain extent, the defendants in the civil public interest litigation will be in a weak position and affect the credibility of the trial. In addition, the litigation rights and litigation obligations of the procuratorial organs are also related to the interests of the many victims, so it is necessary to specify the litigation rights and litigation obligations of the procuratorial organs in detail.

#### **3.2. Clarify the Legal Status of Procuratorial Organs in Civil Public Interest Litigation.**

The legal status of the procuratorial organ is related to the litigation rights and litigation obligations that it takes in civil public interest litigation, and then affects the procedure

design and system's construction of such civil public interest litigation. Therefore, to clarify the legal status of procuratorial organs is the basis for establishing and perfecting relevant systems of civil public interest litigation.

However, the academic circles have not formed a unified opinion on this, and the main points are as follows: (1) the ordinary plaintiff says that the legal status of the procuratorial organ is exactly the same as the plaintiff in the ordinary civil litigation; (2) the judicial supervisor says that the legal status of the procuratorial organ is only the judicial supervisor; (3) the dual identity says that the procuratorial organ is both a plaintiff and a judicial supervisor in such civil public interest litigation; (4) the public prosecutor says that the legal status of the procuratorial organ is in line with its legal status in the criminal proceedings, and should be the public prosecutor; (5) the public interest representative says that the procuratorial organ is the representative of the social public interest, and the sole purpose of bringing up the civil public interest litigation is to protect the social public interest from damage.[3]

The author thinks that the above viewpoints are worth bringing up to discuss. Firstly, the nature of the procuratorial organ and its relationship with the subject of litigation jointly determine that such civil public interest litigation, a plaintiff can only be a procedural plaintiff,[5] and is not suitable as a plaintiff in the general meaning. However, the procuratorial organ should not be merely a trial supervisor, otherwise, the procuratorial organ will not be able to carry out civil proceedings with the defendant. In addition, if procuratorial organs enjoy dual status in such civil public interest litigation, they will not be conducive to civil lawsuit activities and also not conducive to the accurate performance of its trial supervision responsibilities. Of course, the author does not agree with the procuratorial organ's legal status as a public prosecutor. The procuratorial organs obtain civil litigation right on the basis of protecting social public interests which belong to private rights, so it cannot be "public prosecutor".[6] In this way, such civil public interest litigation, procuratorial organs cannot have the status of "public prosecutor".

Therefore, the author suggests that the legal status of procuratorial organs should be positioned as public interest representatives. Protecting the social public interests from damage is the only purpose of the procuratorial organ to carry out civil public interest litigation. This purpose is also the corresponding point between the procuratorial organs brings civil public interest litigation and their judicial supervision responsibility. From this point, we are able to seek for the coordination between procuratorial organs bringing civil public lawsuits and their responsibility. Article 4 of the newly issued "Notice of the Supreme People's Court on Issuing the Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigation Cases Instituted by People's Procuratorates" (hereinafter referred as "Notice") and Article 15 of the "Measures for the Implementation of the Pilot Program of Initiating Public Interest Actions by People's Procuratorates"

(hereinafter referred as "Method") also sets the procuratorial organ's legal status in the civil public interest litigation as a public interest representative, but only used "public interest litigant", and the author thinks it is worth affirming.

As a representative of the social public interest, the litigation activities of the procuratorial organ in such civil public interest litigation should be carried out closely around the protection of social public interests. Therefore, it is necessary to restrict the litigation right and litigation obligations of the procuratorial organs. In order to better achieve its goal of maintenance social public interests.

### ***3.3. Litigation Rights and Obligations of Procuratorial Organs in Proper Limit***

Firstly, it should restrict the procuratorial organ to dispose of its own litigation rights, which is the procuratorial organs do not have the right to give up the litigation request, admit the litigation request of the other party and drop a lawsuit, and cannot reach a settlement with the defendant or apply for mediation. The newly issued Method also provides the relevant provisions of mediation, settlement, and withdrawal a legal charge for procuratorial organs. The provision of Article 23 of such Method: "Civil public interest litigation cases, the people's procuratorate can be reconciled with the defendant, the people's court can mediate. The settlement agreement and mediation agreement shall not harm the social public interest." The provision of Article 24: "In the process of trial civil public interest litigation, if the litigation claims of the people's Procuratorate are fully accomplished, the procuratorial organ can withdraw from prosecution." The author believes that in the case of all litigation claims that accomplishment, allow the procuratorial organ to withdraw from prosecution, it should be affirmed that litigation is economizing the social resources. However, the author does not agree that the procuratorial organs enjoy the right to compromise with the defendant and apply for mediation. First, the procuratorial organ is only the representative of the social public interest, not the owner of the right. From this point of view, the procuratorial organs do not have the right to conciliate and mediate; second, if the procuratorial organs are allowed to conciliate and mediate, it is easy to generate power for rent seeking and flourish a corruption. Therefore, the author suggests that we should strictly restrict the mediation and reconciliation of procuratorial organs. Only in this way, we can maintain the credibility of the procuratorial organs, as well as the credibility of the trial results of the court, as the state organ of China in the civil public interest litigation.

Secondly, in the aspect of the burden of proof, some scholars believe that in the civil public interest litigation, the form of infringement is not standardized, opaque, at the same time, the professionalism of the tort technology and the secrecy of the production process make it very difficult for the procuratorial organs to obtain evidence in such cases. Therefore, it is suggested that the burden of proof be inverted, that is, the main burden of proof is borne by the defendant.[8] The author thinks this proposal is a little

inappropriate. In the distribution of the burden of proof, it should be fully considered that the procuratorial organ has strong evidence collection ability as a state organ. If it aggravates the burden of defendant's proof, it may cause the defendant's side to question the fairness of the trial. The provision of Article 19 of the Method: "People's Procuratorate brings up civil public interest litigation, towards the proposal of litigation's request which based on fact or the opponent's opinion which based on facts, and the fact that the procedure before proceeding should be fulfilled, evidence should be provided to prove, except as otherwise stipulated by law." This provision extends the principle of distribution of traditional burden of proof that "He who is affirming must prove", considering about the difficulties of the procuratorial organs in investigating and collecting evidence in such civil public interest litigation, and also considering simultaneously about the advantage of evidence collection for the defendant, of course it is worth affirming. In addition, it is suggested that the procuratorial organs should enjoy the power to investigate the outsiders or litigants for performing the trial supervision duties. Besides, the scope of the investigation is limited to the matters related to the performance of the trial supervision duties.

Thirdly, the litigation obligations of procuratorial organs should be limited. As a state organ, the procuratorial organ represents the public interests in such civil public interest litigation cases. If the procuratorial organ is required to undertake the litigation obligations of the general plaintiff, it is not only harmful to the authority of the procuratorial organs, but also easy to fail the enthusiasm of procuratorial organs to initiate civil public interest litigation, and then it is not beneficial to protect the social public interests. Firstly, the defendant's right of counterclaim should be limited. In such civil public interest litigation, the defendant should not be given the right to counterclaim. Secondly, the procuratorial organ raises civil public interest litigation without paying litigation costs. In order to solve the problem of litigation costs under such circumstances, it is suggested that take the infringer's fine of the social public interest as a basis, establish a special fund to support civil public interest litigation. The litigation costs of such cases can be paid by the funds in the special fund. [7] Finally, the procuratorial organ does not bear the liability of losing the lawsuit and making up for the loss caused by the party to the defendant by applying for the state compensation. Article 18 and Article 55 of the Method have made the corresponding provisions on the related problems of the defendant's right of the counterclaim and the cost of litigation. However, the liability of the procuratorial organ for losing the lawsuit has not yet stipulated, and the author suggests that it should be supplemented and perfected in the formal legislation in the future.

#### ***3.4. Suitable Adjustment of Procuratorial Organ Performs the Duties of Trial Supervision***

The balance of civil litigation structure must not be affected by the special status of the procuratorial organ, otherwise, it will be an unfair trial. The provision of the

second paragraph of Article 22 of the Method: "The procurators found that the trial activities were illegal, they should be awaited for adjourned or after the end of a trial, and the procuratorial proposal shall be put forward in the name of the People's Procuratorate." This regulation will adjust the trial supervision of procuratorial organs in such cases to post supervision.

Post supervision means that if the court has illegal and disciplinary action in the process of litigation, the procuratorial organ should put forward in a special way after the adjournment of the court or after the court trial. In such civil public interest litigation, the power of trial supervision of procuratorial organs, as mentioned before, it is impossible to override the court's jurisdiction. Therefore, it is only necessary to adjust the time of procuratorial organ to perform the trial supervision duties for post-supervision, can it avoid the negative influence on the trial work of the court because of the execution of the trial supervision power and ensure that the procuratorial organs to perform the trial supervision power given by the constitution in accordance with the law. [9]

In addition, on the issue of the initiation of trial supervision procedures, the author thinks that we should distinguish between different situations. If a superior procuratorial organ finds a judgment and ruling that a lower court has already entered into force, it shall be governed by the provisions of the civil procedure law. No matter who is the winner of this result of a judgment, a protest should be put forward in accordance with the law to correct it. If the procuratorial organ of the same level find out that the judgment and ruling of the same level court already takes effect and stipulated in the civil procedure law, no matter who win the court case is, can only request the upper procuratorial organ into a protest, but cannot make a procuratorial proposal towards the same level court; if the defendant is not satisfied with the court's judgment or ruling, the trial supervision procedure can be started by appealing to the court or the procuratorial organ at a higher level, but cannot appeal towards the procuratorial organs at the same level, otherwise, it will not only be harmful to the protection of the rights of the defendant, but the legal status of the procuratorial organs may also once again fall into conflict.

#### ***3.5. Strengthen the Supervision of Procuratorial Organs in Fulfilling the Duties of Trial Supervision***

In such civil public interest litigation, strengthen the working process in supervision of procuratorial organs in fulfilling the duties of trial supervision can effectively prevent the abuse of the power of judicial supervision and prevent from bringing the negative impact on the trial work of the court, which cannot only maintain the sanctity of the judicial supervision power, but also guarantee the fair and justice of the trial result. The following methods can be taken in detail:

Firstly, establish and improve the internal supervision of the procuratorial system. Special departments can be set up, in such civil public interest litigation, within the procuratorial organs to supervise the cases in which the departments in charge of litigation work or the procuratorial organs at the

lower level perform the duties of trial supervision. The greatest advantage of self-supervision within the procuratorial system is that it can detect and correct the mistakes of the relevant procuratorial organs in performing the duties of judicial supervision in time and maintain the credibility of the procuratorial organs' trial supervision power.

Secondly, establish and improve the supervision of state power organ. The procuratorial organs are responsible for the state power organ which creates them. Therefore, it is legitimate for state power organ to supervise procuratorial organs in fulfilling their duties of trial supervision. The supervision of the state power organ belongs to the external supervision, and the establishment of effective external supervision can ensure that the procuratorial organs, in such civil public interest litigation, run the judicial supervision power given by the constitution properly.

Finally, strengthen the supervision of the whole society. Public interest litigation involves a wide range of social public interests, so citizens, news media, etc. shall have the right to supervise the working process of the procuratorial organs in performing the duties of trial supervision in such civil public interest litigation. As far as social supervision is concerned, the method of its exercise will reflect the problems of the procuratorial organs in fulfilling their duties of trial supervision to the special supervision departments within the procuratorial organs or state power organ. It will further investigate the procuratorial organs' performance of trial supervision duties, and provide prompt feedback and promulgation of the investigation results.

#### 4. Conclusion

In China, the establishment of the procuratorial organ has become the main body of public interest litigation, the legal status, mission and functions of procuratorial organs must be adjusted accordingly. Among them, the coordination of the procuratorial organs' responsibilities and civil public interest litigation is the core of theoretical research and the most urgent need of procuratorial practice.

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