

Preclusion Effect of Untimely-Raised Issues: In Pursuit of Fairness or Efficiency?

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Abstract

Taiwan adopted a landmark reform to abolish the traditional continental system's episodic hearings and to move towards a concentrated proceeding in the 2000 Amendments to the Taiwan Code of Civil Procedure. To implement this reform, a duty is imposed on parties to expedite the proceeding and the court can preclude any materials submitted in violation of this duty. Since the preclusion effect of untimely-raised issues significantly influences case outcomes, how to apply this new mechanism becomes controversial. Most Taiwanese scholars, relying upon the German theories, place great emphasis on the value of efficiency in justifying this preclusion effect as well as in interpreting relevant rules. This article challenges this line of reasoning and argues that fairness is also an important, even more important, value underlying this preclusion effect. To preclude a party from untimely raising a new issue is not merely for the purpose of pursuing efficiency, but is also for the purposes of protecting the opposing party from surprise as well as of ensuring fairness. This article further demonstrates that switching the emphasis from efficiency to fairness will have broad implications for applying this preclusion effect and will lead to more sensible

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conclusions. Finally, this article proposes a theoretical framework under which the value of efficiency can be preserved without impairing the basic rights of the litigants and without undermining the value of fairness.

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