



THE RUSSIAN STYLE OF CIVIL PROCEDURE

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THE RUSSIAN STYLE OF CIVIL PROCEDURE

*Dmitry Maleshin**

Civil procedure¹ has traditionally been divided into civil and common law procedural systems.² While the distinctions between the two systems are not as strong today as in previous centuries, they still exist along with the controversial features associated with each.³ Under common law, two adversaries generally take charge of the procedural action, while under civil law, officials perform most of the activities.⁴

The main attributes of the classic common law procedural system are: 1) civil juries,⁵ 2) pre-trial conferences and party-controlled, pre-trial investigations,⁶ 3) trials designed as "concentrated courtroom drama [that provide] a continuous show,"⁷ 4) passive judges,⁸ 5) class actions,⁹ and 6) party-selected and paid experts.¹⁰

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¹ This Article is based on the National Report presented on Congress on Procedural Law organized by the International Association of Procedural Law (IAPL) in Kyoto, Japan, in September 2006. See generally Int'l Ass'n of Procedural Law, 2006 *Kyoto Congress: The IAPL at the Ritsumeikan University in Kyoto/Japan* (Sept. 20-23, 2006), available at <http://www.uni-regensburg.de/Fakultaeten/Jura/gottwald/internassprocedurallaw/> (last visited Nov. 5, 2007). I am grateful to the Congress' participants for their helpful feedback.

² See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 2-3 (1986) (noting that the contrast of systems is furthered by classification of common law as *adversarial* and civil law as *inquisitorial*); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672-74 (1998) (explaining that common law refers to justice systems in the Anglo-American tradition, while civil law refers to the Continental tradition derived from Roman law). But see J.A. JOLOWICZ, *ON CIVIL PROCEDURE* 175-82 (2000) (stating that no system of civil procedure can be entirely adversarial or inquisitorial).

³ DAMASKA, *supra* note 2, at 3 (noting, for example, that the twelfth-century dichotomy between adversarial and inquisitorial systems is now used by comparativists on a broader scale).

⁴ *Id.*

⁵ Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 72 (2003).

⁶ FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* §1.2, 4(4th ed. 1992).

⁷ Kötz, *supra* note 5, at 72.

⁸ JAMES ET AL., *supra* note 6, §1.2.

⁹ Kötz, *supra* note 5, at 75.

¹⁰ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985).

On the other hand, the main attributes of the civil law procedural system are: 1) the absence of civil juries,¹¹ 2) a lack of distinction between the pre-trial and trial phases,¹² 3) active judges,¹³ 4) judicial proof taking and fact gathering,¹⁴ 5) judicial examination of witnesses,¹⁵ and 6) court-selected experts.¹⁶

It should be noted that there are also other systems that are largely unrelated to either of these classical approaches, including, for example, the Japanese¹⁷ and Chinese¹⁸ systems.

The goal of this Article is to show the reader that the Russian style of civil procedure is not simply a continental or an Anglo-Saxon system possessing only classical civil and common law features; instead, a unique system possessing only features that do not exist in traditional approaches. To support this contention, this Article will outline the differences between modern Russia's system of civil procedure and the two classical procedural systems. Additionally, this Article will discuss the origins of those differences.

I. CIVIL LAW PROCEDURAL FEATURES

Before addressing what continental attributes exist in Russian civil procedure, it is necessary to note that historically Russia adhered to the civil law tradition.¹⁹ Subsequent socialist countries may or may not have been part of the continental legal family.²⁰ At the same time, there were periods when Russia moved away from the classical continental model of civil procedure.²¹

¹¹ JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 121 (1969).

¹² *Id.* at 122; see also Langbein, *supra* note 10, at 826.

¹³ Hazard, *supra* note 2, at 1673.

¹⁴ *Id.*; see also Langbein, *supra* note 10, at 824.

¹⁵ Hazard, *supra* note 2, at 1673; see also Ko'tz, *supra* note 5, at 68.

¹⁶ Langbein, *supra* note 10, at 835; see also Ko'tz, *supra* note 5, at 66.

¹⁷ See Yashuei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 767-91 (1997) (noting that the modern Japanese Code was adopted in 1890 under influence of the German Code, but was extensively amended in 1926).

¹⁸ Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 912 (2005) (suggesting that China has traditionally eschewed legal formality).

¹⁹ MERRYMAN, *supra* note 11, at 3.

²⁰ John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 781 (1989) (explaining how comparatists reject that socialist law is a separate family).

²¹ See generally Don W. Chenworth, *Soviet Civil Procedure: History and Analysis*, 67 TRANS. AMER. PHIL. Soc. 3, 3 (1977).

In the eighteenth and nineteenth centuries, the Russian tsar legislation regulated civil procedure in the civil law tradition.²² While the 1864 Russian Code of Civil Procedure has remained influential,²³ there has been a move away from this type of adjudication.²⁴ Further, the French Code influenced some procedural elements.²⁵ During the Soviet era, judges became much more active than before the 1917 Revolution,²⁶ and the majority of Russia's European neighbors were using a civil law procedural system. This model of adjudication was fairly labeled "the radical Communist solution" by Professor Mauro Cappelletti.²⁷

Today, the Russian code contains the following features of the continental system:

- The process is mainly manned by the judge
- There is no civil jury
- There is no class action
- Experts are selected by the court²⁸

Nevertheless, the contemporary Russian style is not a pure continental model of civil procedure because it also has features of the common law procedural system, as well as some other original and exceptional features.

A. *Common Law Procedural Features*

What common law features exist in the Russian system? There were two periods in the history of Russian civil justice when non-continental features were introduced in the procedure: the 1864 Code²⁹ and the 1995 amendments to the 1964 Soviet Code.³⁰

²² MERRYMAN, *supra* note 11, at 3.

²³ See Quigley, *supra* note 20, at 801 (noting that Romania still uses the 1864 civil code).

²⁴ *Id.* at 782.

²⁵ See Chenworth, *supra* note 21, at 3.

²⁶ *See id.*

²⁷ Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 849 (1971). Professor Mirjan Damaška also emphasizes that "the Soviet civil judge was expected to take vigorous control over the case." DAMAŠKA, *supra* note 2, at 202.

²⁸ See Dimitry Y. Maleshin, *Some Cultural Characteristics of the New Russian Code of Civil Procedure of 2002*, 10 ZEITSCHRIFT FÜR ZIVILPROZESS INT'L 385, 385-89 (2005).

²⁹ See Chenworth, *supra* note 21, at 6.

³⁰ See Victor B. Kozlov, *The New Russian Civil Code of 1994*, 21 SAGGI CONFERENZE E SEMINARI 2, 3 (1996).

One of the main ideas of procedural reforms in Russia was to establish the adversarial principle of civil procedure.³¹ The adversarial nature of civil procedure is a leading characteristic of the common law legal system.³² Both the 1864 and 1995 reforms included this component. Article 82,367 of the 1864 Code prohibited the court from collecting evidence.³³ As a result of the 1864 Code, the court was passive in Russia from 1864–1917.³⁴

In the 1990s, there was a remodeling of Soviet civil procedure that was continental in its basis. The changes had some common law orientation. The 1995 amendments to the 1964 Soviet Code also introduced an adversarial character to civil procedure.³⁵ The 1993 Russian Constitution proclaimed the principle of adversariness in civil procedure, and subsequent amendments were introduced to the Civil Procedural Code in 1995.³⁶ They revoked the rule requiring the court to engage in the process of proof taking without the initiative of the parties.³⁷ As a result, the emphasis in the process of proof taking was shifted from the purview of the court to the parties. The 1995 Arbitrazh Procedural Code reduced the functions of the court to a minimum. In the process of proof taking, the court did not have the right to demonstrate its initiative, and determining all the circumstances of a case depended on the full participation of the parties without court intervention.³⁸ The court's role was reduced to the unbiased guidance of the process. The 1995 amendments were effective until the adoption of the new code in 2002.³⁹

While the 2002 code has fewer common law elements than the 1995 amendments, some common law elements remain. First, the court is not obliged to collect the evidence.⁴⁰ (The present role of the judge in the process of proof taking is an exceptional provision of the new Russian civil procedure and will be discussed below). Second, the trial process includes a preliminary, pre-trial session, which is conducted primarily by the opposing parties.⁴¹

³¹ See Chenworth, *supra* note 21, at 22.

³² JAMES ET AL., *supra* note 6, at 11.

³³ Chenworth, *supra* note 21, at 8.

³⁴ See *id.*

³⁵ See Maleshin, *supra* note 28, at 386.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 62 (3d ed. 2004).

⁴¹ See *id.*

B. Exceptional Procedural Features

Several distinctive features of Russian civil procedure that do not exist in other procedural systems include:

- The role of the judge in the process of proof taking
- The role of the procurator in the civil process
- The review of judgments in the "supervisory" instance
- The original status of judicial precedent⁴²

Additionally, there are other unique features, such as the structure of the judicial system, which includes arbitrazh courts and courts of general jurisdiction,⁴³ and the specificity of the cassational instance, which allows the courts to review both questions of law and fact.⁴⁴ The above features are key elements of the Russian civil procedure system and will be addressed below.

⁴² See *id.*

⁴³ *Id.* at 50. Arbitrazh (commercial) state courts should be distinguished from arbitral tribunals, which also exist in Russia. *Id.* Arbitrazh courts are charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens. *Id.* Therefore two kinds of adjudication procedure exist in Russia: arbitrazh and civil procedure. *Id.* The Arbitrazh Procedural Code regulates arbitrazh and the Civil Procedure Code regulates civil procedure. *Id.*

Courts of general jurisdiction are divided into three levels: the Supreme Court, second-level courts and district courts. *Id.* at 73. They are headed by the Supreme Court, which is the highest judicial body in Russia. *Id.* As of 2005, the Supreme Court consisted of 125 judges. See *id.* at 76.

The second-level courts have various names depending on the territory where they are located. *Id.* at 75. The names usually coincide with the territory of the subject (state) within the Federation. See *id.* There are supreme courts of the Republics within the Federation, territory or regional courts, courts of cities of federal significance, and courts of autonomous region. See *id.* They function as the courts of first instance and also review judgments of district courts as courts of second instance. See *id.*

The lowest level of courts of general jurisdiction is the district court. See *id.* at 74. They operate in each district of Russia. See *id.* They hear cases of first instance and review judgments of justices of peace as of courts of second instance. See *id.*

There are also justice of peace courts in the Russian judicial system. See *id.* at 73. They operated in 1864–1917, and were reestablished in 1998. Justices of peace consider minor judicial cases, such as family law or real property disputes of little value. See *id.*

Arbitrazh courts are divided into four levels. *Id.* at 78. They are headed by the Supreme Arbitrazh Court. *Id.* The next level is the arbitrazh court of a circuit. *Id.* at 79. There are ten arbitrazh judicial circuits in Russia. The next level is the appellate arbitrazh court, which consists of 20 courts. The lowest level is the arbitrazh court of a state within the Federation. *Id.* at 78. There are 89 such courts in Russia.

⁴⁴ *Id.* at 75. In contrast, European civil law courts of cassation usually decide only questions of law.

The role of the judge is "undoubtedly the central problem of any system of civil procedure."⁴⁵ During the drafting of the new code of civil procedure (CCP), there was significant discussion over what role the court should play in establishing the facts of a case, as well as the process of proof taking.⁴⁶ In Russia, this question was always controversial. As a result of this discussion, the 2002 CCP moved slightly away from the principles established by the 1995 amendments regarding the court's passivity in the process of proof taking.⁴⁷ The enforcement of the 1995 amendments highlighted the danger that a court's refusal to collect evidence could have on reaching objective truth in a case. Because parties are not always able to present the necessary evidence in support of their cases, the 1995 amendments resulted in the court having to issue judgments on the basis of insufficient evidentiary proof. This resulted in many instances where the judgment was based on an incomplete understanding of the real situation.⁴⁸ As a result, the real protection of rights could not be achieved. During the drafting of the 2002 Code, the drafting committee was concerned that the 1995 changes were not functioning well.⁴⁹

Today, the court and disputing parties share an active role in the process of proof taking.⁵⁰ The allocation of this principle in legislation is a complex problem from a lawmaking point of view, and it became the main challenge for the authors of the code.⁵¹ The new code stipulates this principle in the following way: the court should determine which circumstances are important for the case and which of the parties should provide proof.⁵² As a rule, the parties bear the responsibility for presenting the law and facts.⁵³ But in a case where it is difficult for the parties to obtain and present the necessary proof, the judge can participate in the process of proof taking.⁵⁴ Therefore, the role of the court under the new 2002 CCP is greater than it was under the 1995 amendments. However, the court does not perform the function of investigation for civil cases as it did under the 1964 CCP. The substance and conceptual framework of the current CCP results in a harmonious combination

⁴⁵ MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 252 (Paul J. Kollmer & Joanne M. Olson eds. 1989).

⁴⁶ See Maleshin, *supra* note 28, at 387.

⁴⁷ See WILLIAM E. BUTLER, *RUSSIAN LAW* 232 (2d ed. 2003).

⁴⁸ Maleshin, *supra* note 28, at 388.

⁴⁹ See generally *id.* at 389.

⁵⁰ See *id.*

⁵¹ See *id.* at 388.

⁵² *Id.*

⁵³ See *id.*

⁵⁴ *Id.* at 389.

of adversarial principles based on the initiative of the parties and investigative principles based on the activity of the court. This combination, taken from different judicial models, is well suited to the unique culture of Russia and serves to successfully protect the rights of the Russian people.

The next exceptional feature of Russian civil procedure is the role of the procurator. The procurator is a unique element of the Russian legal system,⁵⁵ established by Peter I in 1722.⁵⁶ Under the 1864 Imperial Code of civil procedure the procurator could take part in a case, but only in a limited number of cases. The procurator not only played a huge role in Soviet civil procedure in Russia, but also in other Socialist countries.⁵⁷

The 1964 CCP granted the procurator a wide range of authority. He was simultaneously a participant in the case and a supervisor of the court's activities.⁵⁸ He had the ability to initiate adjudication in order to protect the rights of any person.⁵⁹ Additionally, the procurator could intervene in the process at any stage, if necessary, to protect the interests of the public or individuals and to give opinions concerning a case as a whole.⁶⁰ His purpose in the civil proceedings was to ensure that all judicial acts were lawful and well grounded.⁶¹ The tremendous power of the procurator in the Soviet civil process has been criticized by many scholars.⁶²

The code limited the role of the procurator, but he can still participate in a case. Today, the procurator has the right to initiate a case only to protect public interests or the interests of individuals who are unable to apply to the court themselves because of illness, age, disability, or other valid reasons.⁶³ With two exceptions, a procurator who initiates a case is entitled to all the procedural rights and duties of the plaintiff. The first exception is that the procurator does not have the authority to make an amicable settlement or the responsibility of paying court expenses. The second exception is that even if

⁵⁵ See HAROLD J. BEIUHAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 238 (rev. ed. 1963).

⁵⁶ See BUTLER, *supra* note 47, at 25.

⁵⁷ See generally Christopher C. Osakwe, *The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis*, 18 *TEX. INT'L L.J.* 37, 87-89 (1983).

⁵⁸ See *id.* at 88.

⁵⁹ *Id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 89.

⁶² See *e.g., id.*; JOHN N. HAZARD, *THE SOVIET SYSTEM OF GOVERNMENT*, 208-09 (1980).

⁶³ See BUTLER, *supra* note 47, at 174-75.

the procurator changes his mind after filing a petition for the protection of another person, the case will still be considered.

Another exceptional feature of Russian civil procedure is supervisory instance. Review by the way of supervision is a special procedure that allows additional re-examination of judgments that have already entered into legal force.⁶⁴ It stems from the Russian Empire legislation of the seventeenth to the nineteenth centuries. During the Soviet times, the right to apply to the supervisory court belonged only to a limited number of officials, such as chief judges and their deputies and the Procurator General and his deputies.⁶⁵ Participants of the case did not have such a right.

In modern Russia, review by the way of supervision is regulated in a different manner: it is stipulated in the Constitution and the new 2002 CCP. Review by way of supervision exists not only in appeal and cassational instances, but also in the re-examination of judgments that have already entered into legal force and that may have already been decided on cassational appeal.⁶⁶ The right to apply to the court of supervision belongs only to the participants of the case and any other persons whose rights were abused by the judgment.⁶⁷ A procurator who participated in the case is also entitled to apply to the court of supervision. Appeals via supervision may be considered only by the presidium of the Supreme Court, the military assembly of the Supreme Court, the judicial tribunal of the Supreme Court for civil cases, the presidium of the military court, or the presidium of the Supreme Court of the state within the Federation. These are the only courts that can consider appeals via supervision.⁶⁸ It is possible to appeal to a court of supervision within one year from the day when a judgment is entered into legal force.⁶⁹ Cases are considered in the court of supervision no longer than one month, except for the Supreme Court where cases may be considered for two months.

When reviewing a case by the way of supervision, the court considers only questions of law based on materials available in the case.⁷⁰ Although the supervisory instance may refuse to accept lower courts' findings of fact, it has

⁶⁴ See Maleshin, *supra* note 28, at 387.

⁶⁵ See generally Osakwe, *supra* note 57, at 91-93.

⁶⁶ See Maleshin, *supra* note 28, at 387.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *id.*

no power to establish new facts or consider new evidence.⁷¹ Generally, Russian appellate courts review the application of law by the lower courts only within the limits of the arguments contained in the appeal.⁷² However, in the interest of legality, the higher court may also go beyond the limits of the appeal. The court of supervisory instance may render a new judgment when it is not necessary to consider additional facts or evidence.⁷³

Does the possibility of reexamining judgments which have already entered into legal force conflict with the principle of *res judicata*? There are two points of view. Some scholars believe that the supervisory instance is an additional opportunity to correct the decision and rectify the judicial errors. Others emphasize that it conflicts with the principle of *res judicata*. In this context, the European Court of Human Rights position may be interesting. In *Ryabykh v. Russia*, the Court noted:

1. The case originated in an application (no. 52854/99) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Anna Ivanovna Ryabykh ("the applicant"), on 19 August 1999.
...
3. The applicant alleged that her rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 had been breached by the State's reluctance to compensate her for the financial loss she had suffered as a result of inflation, and by the fact that a compensation award made in her favour by a domestic court had been set aside under the supervisory review procedure.
...
9. On 30 December 1997 the Novooskolskiy District Court, presided over by Judge Lebedinskaya, found in the applicant's favour and awarded her 129,544,106 roubles (RUR) payable by the State treasury
10. On 28 February 1998 the judgment was set aside on appeal by the Belgorod Regional Court and the case remitted for a retrial.
...
11. On 8 June 1998 the Novooskolskiy District Court, sitting in the same composition, delivered a judgment similar to its judgment of 30 December 1997. The award, however, was readjusted to

⁷¹ See BURNHAM ET AL., *supra* note 40, at 395-96.

⁷² See *id.* at 395-400.

⁷³ *Id.* at 395.

RUR 133,963.70. No appeal was lodged against the judgment and it became final ten days later, on 18 June 1998.

12. Enforcement proceedings commenced on 18 January 1999.
...
17. On 22 January 2001 the Supreme Court granted the application for supervisory review. It upheld the reasons given by the Presidium for setting aside the judgment of 8 June 1998, but ruled that the applicant's case should not have been dismissed in full, as she had thereby been unjustly deprived of the right to seek reimbursement of the money. It also acknowledged that the applicant's right to be informed that the Presidium was reviewing her case had not been respected. The case was remitted to the Novooskolskiy District Court for a fresh examination.
...
50. In these circumstances, the Court considers that the applicant continues to have standing as a "victim" to complain that the decision of the Presidium of the Belgorod Regional Court of 19 March 1999 and the ensuing events violated her rights under Article 6 § 1.
...
52. Legal certainty presupposes respect for the principle of *res judicata* . . . , that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.
...
55. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants—

proceedings that are fair, public and expeditious—without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention

56. The Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official.
57. By using the supervisory review procedure to set aside the judgment of 8 June 1998, the Presidium of the Belgorod Regional Court infringed the principle of legal certainty and the applicant's "right to a court" under Article 6 § 1 of the Convention.⁷⁴

The European Court of Human Rights recently changed its position slightly. In *Pravednaya v. Russia*, the court noted:

1. The case originated in an application (no. 69529/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Lidiya Andreyevna Pravednaya, ("the applicant"), on 21 April 2001.
...
3. The applicant alleged, in particular, that the domestic judicial authorities had re-considered a judgment given in her favour having misused the procedure for re-considering judgments on discovery of new evidence.
...
10. On 21 October 1999, the Zayeltsovskiy District Court of Novosibirsk ("the District Court") found in the applicant's favour. It held that since the defendant had misinterpreted the Pensions Law, the applicant's pension should be recalculated with an IPC of 0.7. The Agency appealed against the judgment to the Novosibirsk Regional Court ("the Regional Court"). It alleged that the District Court had misinterpreted the Pensions Law.
11. While the appeal was pending before the Regional Court, on 24 January 2000 the Agency requested the District Court to re-

⁷⁴ Ryabykh v. Russia, 2003-IX Eur. Ct. H.R. 267, 269-78.

consider its judgment of 21 October 1999 due to discovery of new circumstances. . . .

-
16. After a fresh examination on 12 February 2001, the District Court rejected the applicant's claims in full having applied the Instruction. On 27 March 2001 the Regional Court upheld the judgment on appeal.
-
24. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania*, judgment of 28 October 1999, *Reports of Judgments and Decisions* 1999-VII, § 61).
25. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X).
-
28. This procedure does not by itself contradict the principle of legal certainty in so far as it is used to correct miscarriages of justice. The Court's task is to determine whether in the present case the procedure was applied in a manner which is compatible with Article 6.⁷⁵

The European Court of Human Rights simultaneously maintains two different positions on the Russian supervisory instance. On the one hand, the court believes that review by way of supervision conflicts with the principle of

⁷⁵ *Pravednaya v. Russia*, no. 69529/01, ECHR 2004, <http://cmiskp.echr.coe.int/tkp197/search.asap?skin=hudoc-en> (search "69529/01" in "Application Number" field; then follow "case of Pravednaya v. Russia" hyperlink).

res judicata.⁷⁶ On the other hand, the court believes that review does not infract res judicata because it is used to rectify judicial errors.⁷⁷

Another exceptional feature of the Russian civil procedure is the original status of judicial precedent as a source of Russian civil procedural law. Classical civil tradition recognizes only statutes, regulations, and customs as sources of law.⁷⁸ Historically, judicial decisions are conceived to be a source only of common law.⁷⁹

In Russia, there is no rule that rejects or acknowledges judicial precedent as a source of law. As a result, there are two notions in the Russian legal doctrine on this issue: judicial precedent may or may not be a source of law.

In fact, judicial precedents include:

- Rulings of Constitutional Court⁸⁰
- "Guiding explanations" of supreme courts⁸¹
- Ordinary judicial decisions⁸²

The legal force of judicial precedent is different and therefore should be considered differently in the terms of being a kind of source of Russian civil procedural law.

In the event the Constitutional Court declares a statute unconstitutional, a lower court will not be allowed to apply the statute to the case.⁸³ In this

⁷⁶ *Id.* § 25.

⁷⁷ *Ryabykh*, 2003-IX Eur. Ct. H.R. at 277.

⁷⁸ See MERRYMAN, *supra* note 11, at 25. At the same time, in some civil law countries, precedents became very important. See Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 147 (Lawrence M. Friedman & Harry N. Scheiber eds. 1996). In Germany, precedents are considered as an independent source of law. See REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 178 (2001). In France, many academics accept the creative, normative role of the judiciary. See, e.g., Mitchel. de S.-O-J'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 1325, 1351-55 (1995).

⁷⁹ See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 145-49 (3d ed. 2003); RUPERT CROSS & J.W. HARMS, PRECEDENT IN ENGLISH LAW 3 (4th ed. 1991); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 182 (4th ed. 1999) (1921).

⁸⁰ See BURNHAM ET AL., *supra* note 40, at 17.

⁸¹ *Id.* at 18.

⁸² See *id.* at 15-16.

⁸³ *Id.* at 17.

context, the courts apply the rulings of the Constitutional Court and consequently create judicial precedent.

"Guiding explanations" of supreme courts stem from Soviet times, when courts were required to fill gaps in legislation.⁸⁴ In contemporary Russia, the principles of the independence of judges and their subordination to law are stipulated only in the Constitution.⁸⁵ Consequently, the judges are forbidden to take into account the "guiding explanations" of higher courts. Nevertheless, judges often cite the "explanations" in their judgments. Moreover, such "explanations" are published cumulatively in book form and electronically.

In contrast, ordinary judicial decisions are not as popular in Russian legal practice as the "guiding explanations," but they are also taken into account by lawyers, advocates, and sometimes judges. Ordinary judicial decisions are also published. Even though there is no formal rule that rejects or acknowledges judicial precedent, judicial precedent is not ignored by Russian judicial practice.

II. CULTURAL AND HISTORICAL BACKGROUND

The origins of the unique type of Russian civil procedure stem from two sources—historical events and Russian culture. As described above, there were different periods in Russia's history when lawmakers introduced continental or Anglo-Saxon features of civil procedure. For example, the 1864 Imperial Code introduced the common law passivity of the court in the process of proof taking.⁸⁶ The Soviet civil procedure should be viewed as a radical solution to the continental model. In 1995, the common law passivity of the court was re-introduced, but only remained in effect until 2002.⁸⁷

One should dwell on the questions of the cultural background of Russian civil procedure, which could be defined as a fusion of collective and individualistic views. There are two widespread cultural models. The first is based on individualism; the other, on collectivism.⁸⁸ Collectivism is a moral principle that asserts the priority of the group over that of the individual, or as

⁸⁴ See BUTLER, *supra* note 47, at 93-94.

⁸⁵ See *id.*

⁸⁶ Maleshin, *supra* note 28, at 387-88.

⁸⁷ See *id.* at 388.

⁸⁸ See MARLEIS GALENKAMP, *INDIVIDUALISM VERSUS COLLECTIVISM* 15-20 (2d ed. 1993); DAVID G. MYERS, *SOCIAL PSYCHOLOGY* 44-45 (7th ed. 2001).

a social organization in which the individual is seen as being subordinate to a social collectivity, such as a state or nation.⁸⁹ Individualism is a moral principle that stresses the self-directed, self-contained, and comparatively unrestrained individual or social organization, which exists in large measure to serve and protect individuals.⁹⁰ Society, in such a situation, becomes secondary to the interests of individuals.⁹¹ In collectivism, the law aims to protect the interests of society and focuses on reaching common goals, while in individualism, the law primarily protects the interests of individual members of society. Individualism is focused on reaching individual goals.⁹² This problem was insignificant one century ago,⁹³ but it recently became important due to the process of globalization.

The Russian culture contains elements of both models; consequently, it cannot be related to only one of them.⁹⁴ In different periods of history, the Russian legislature adhered to diametrically opposing views with respect to which of these cultural models should govern Russia. Hence, rules of law were based on either individualism or collectivism, but neither view corresponds with the morals of Russian society. These newly introduced legal norms did not garner support from Russian society and caused a low level of compliance with law and order.

Disrespect of the rule of law in Russia has been noted by many scholars.⁹⁵ Such disrespect does not reflect an unwillingness on the part of Russian citizens to obey the rule of law, but rather is indicative of the conflict between the legislation and the social relations of the society. The law cannot simply be exported and imported. It is always necessary to take into account cultural specificity of a society. Montesquieu noted that "laws should comply with

⁸⁹ See DICTIONARY OF THE SOCIAL SCIENCES 78 (Craig Calhoun ed., 2002); 7 ENCYCLOPEDIA AMERICANA 238 (Int'l ed. 1997); 3 NEW ENCYCLOPEDIA BRITANNICA 435 (15th ed. 2002).

⁹⁰ See DICTIONARY OF THE SOCIAL SCIENCES, *supra* note 89, at 228; ENCYCLOPEDIA AMERICANA, *supra* note 89, at 69; NEW ENCYCLOPEDIA BRITANNICA, *supra* note 89, at 295.

⁹¹ See JACK CRITTENDEN, BEYOND INDIVIDUALISM: RECONSTITUTING THE LIBERAL SELF 77 (1992).

⁹² See JEAN-LOUIS BERGEL, THEORIE GENERALE DU DROIT [GENERAL THEORY OF LAW] 33-34 (1989).

⁹³ See FRANCESCO COSENTINI, LA SOCIETE FUTURE, INDIVIDUALISME OU COLLECTIVISME [SOCIETY OF THE FUTURE: INDIVIDUALISM OR COLLECTIVISM] 19 (1905).

⁹⁴ See, e.g., Dimitry Y. Maleshin, Правовые культуры Запада и России: вопросы взаимодействия [*The Legal Cultures in Russia and Western Countries: Issues of Interaction*], in ЗАРУБЕЖНЫЙ ОПЫТ И ОТЕЧЕСТВЕННЫЕ ТРАДИЦИИ В РОССИЙСКОМ ПРАВЕ [FOREIGN EXPERIENCE AND DOMESTIC TRADITIONS IN THE RUSSIAN LAW] 155-58 (2004); Maleshin, *supra* note 28, at 385-89 (2005); Dimitry Y. Maleshin, *O Novo Codigo De Processo Civil Russo de 2002*, 121 REVISTA DE PROCESSO 159, 159-65 (2005).

⁹⁵ See Kathryn Hendley, *Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law*, 8 E. EUR. CON. REV. 89, 94 (1999); Kathryn Hendley, "Demand" for the Law in Russia: A Mixed Picture, 10 E. EUR. CON. REV. 72, 72-77 (2001).

features of their own nation, and only in rare cases will they be applicable for another."⁹⁶ Many researchers have commented that there is a strong connection between culture and law,⁹⁷ especially civil procedural law.⁹⁸ In the modern era of globalization, this method becomes especially important.

The task of the modern Russian legislator is to conduct detailed research of the moral ideas of Russian citizens and to create rules of law that reflect the demands of both society as a whole and its individual members. Russian law should take into account both individualistic and collectivistic traditions, as well as ideas and moral views that exist in Russian society. This means that legal regulators should find a "golden mean" between two moral traditions.

This principle should also be taken into account in civil procedural lawmaking. The norms that are successful for Europe do not work properly in Russia.⁹⁹ The 1864 Code was one of the best European codes, but it was unsuccessful in Russia.¹⁰⁰ Twenty years after its adoption, the government formed a special drafting committee to prepare a new code.

Soviet civil procedure was continental in a radical sense, but the laws worked primarily on paper.¹⁰¹ One reason for this failure was the general Soviet approach to the law, in which non-legal regulation was overwhelming.¹⁰²

As for the common law initiatives of the 1990s, most of the 1995 amendments to the CCP did not work well enough. In Russia, the court could not act passively because of the widespread collective views in society.¹⁰³

⁹⁶ 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 481 (Thomas Nugent trans., 1750).

⁹⁷ See Robert Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 52-56, 80-86 (2003); DAVID NELKEN & JOHANNES FEEST, ADAPTING LEGAL CULTURES 4 (2001).

⁹⁸ See OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 53-55 (2005); JAMES ET AL., *supra* note 6, at 309-10; THOMAS MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE 5 (2006); Oscar G. Chase, *Culture and Disputing*, 1 TUL. J. INT'L & COMP. L. 81, 81-90 (1999); Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 861-70 (1997); Per Henrick Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposals on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 805-31 (1997); Stephen Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 312 (2002); Michele Taruffo, *Transcultural Dimensions of Civil Justice*, 23 COMP. L. REV. 1, 1 (2000).

⁹⁹ See, e.g., BERMAN, *supra* note 55, at 216-20.

¹⁰⁰ See Cappelletti, *supra* note 27, at 875.

¹⁰¹ See *id.* at 875-76.

¹⁰² See CHRISTINE SYPNOWICH, THE CONCEPT OF SOCIALIST LAW 55 (1990).

¹⁰³ See BURNHAM ET AL., *supra* note 40, at 7.

Therefore, the common law model regarding the role of the judge is unworkable in Russia, and the 2002 CCP changed the judge's role.

Pure civil law or common law procedural constructions do not work properly in Russia. One of the reasons is the presence of unique elements in Russian culture. Russian civil procedure thus consists of both continental and Anglo-Saxon features of civil procedure. This phenomenon is further explained when one looks at the history of Russian civil procedure and the varying degrees of success at each approach. Additionally, Russian civil procedure contains specific exceptional features that civil law or common law procedural models do not.¹⁰⁴ Therefore, Russian civil procedure does not relate to the civil law or common law procedural systems, but is instead a specific, exceptional procedural system.

III. GLOBAL CONTEXT

Similar civil procedural outlines exist in most former Soviet countries. The civil procedural law in these countries has a similar historical and cultural background. Moreover, a similar cultural framework very likely exists in other countries of middle Eurasia, as well as some of Latin America, where pure civil and common law procedural constructions are unsuccessful. Therefore, in today's world, jurists should distinguish not only civil law and common law procedural systems, but also other exceptional models. The recent evaluation of two classical types of civil procedure supports this contention. Observably, these models do not exist today, at least not in their classical sense.¹⁰⁵ The many changes to the basic principles of each combined with the blending of their characteristics have led to this situation. An excellent example of this is the recent evaluation of the judge's role in both systems.

One of the main ideas developed during the last civil procedural reform in England was augmentation of court activity. The author of the reform, Lord Woolf, announced that "litigation will be less adversarial."¹⁰⁶ "[F]uture judges will take advantage of the opportunity thus provided to play a more active role."¹⁰⁷ Major scholars accepted this idea.¹⁰⁸ Practice has shown that such

¹⁰⁴ *Id.*

¹⁰⁵ HAROLD JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 4 (1996).

¹⁰⁶ HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 5 (1996).

¹⁰⁷ J.A. JOLOWICZ, ON CIVIL PROCEDURE 385 (2000).

changes in the civil justice system have achieved successful results in England.¹⁰⁸ Such a trend has taken place not only in English doctrinal and lawmaking processes, but also in parts of Great Britain and other common law countries. Granting judges the power to participate in the process of fact gathering has become a general tendency of common law development.¹¹⁰

The need for improvement of U.S. civil procedure is one of the most popular topics amongst American legal scholars.¹¹¹ Different projects have been proposed.¹¹² As long ago as 1956, Pound articulated the passivity of U.S. judges as a disadvantage of the American civil procedure system and called the construction "the sporting theory of justice."¹¹³ Most contemporary proceduralists also propose to enhance the power of judges in the civil procedure process.¹¹⁴ "In cases involving indigents, the role of the judge should be made more central, as in the civil law system."¹¹⁵ Similar points of view have been expressed in Australia¹¹⁶ and in other common law countries.

In many civil law countries, the process can be defined as inquisitorial. The judge plays an active role in the procedural aspects of litigation. This tradition finds provenance in Ancient Roman practice.¹¹⁷ Despite proposals to decrease the activity of judges, the major European legislatures have not done so. The 1990-1991 reform of Italian civil procedure authorized judges to participate in the pleadings in a more active manner.¹¹⁸ The same trend

¹⁰⁸ See, e.g., NEIL ANDREWS, *PRINCIPLES OF CIVIL PROCEDURE* 50-51 (1994); IAN GRAINGER ET AL., *THE CIVIL PROCEDURE RULES IN ACTION* 173 (2000); ADRIAN ZUCKERMAN, *CIVIL PROCEDURE* 32 (2003).

¹⁰⁹ See PAULA LOUGHLIN & STEPHEN GERLIS, *CIVIL PROCEDURE* 7 (2004).

¹¹⁰ See OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* 1151 (2003).

¹¹¹ See, e.g., Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494-95 (1986).

¹¹² See Owen M. Fiss, *The New Procedure*, 54 REV. JUR. U.P.R. 209, 210-14 (1985); Judith Resnik, *Procedure's Projects*, 23 CIV. JUST. Q. 273, 285-92 (2004); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 162 (1994).

¹¹³ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 24-25 (1956).

¹¹⁴ See GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* 103 (1993).

¹¹⁵ *Id.*

¹¹⁶ See BERNARD CAIRNS, *AUSTRALIAN CIVIL PROCEDURE* 37-38 (5th ed. 2002); Helen Stacy & Michael Lavarch, *Introduction to BEYOND THE ADVERSARIAL SYSTEM* xi (Helen Stacy & Michael Lavarch eds., 1999).

¹¹⁷ See MAXIME LEMOSSE, *COGNITIO. ETUDE SUR LE ROLE DU JUGE DANS L'INSTRUCTION DU PROCES CIVIL ANTIQUE [COGNITIO: A STUDY OF THE JUDGE'S ROLE IN PRELIMINARY EXAMINATION DURING ANTIQUITY]* 141 (1944).

¹¹⁸ Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657, 669 (1997).

appears in German¹¹⁹ and Dutch¹²⁰ civil procedure. Judges also continue to actively participate in the process of proof taking in France,¹²¹ Belgium,¹²² and other countries of Continental Europe.

Major countries of Eurasia, after years of sweeping reforms, have also recognized an active role for judges.¹²³ Japan's 1996 Code of Civil Procedure encourages judges to become more active.¹²⁴ The 1991 Civil Procedural Law of China conforms with the traditionally wide powers of judges in the Soviet model of civil procedure.¹²⁵

Current transnational legislation contains similar provisions. European Union legislation is a good example. "The European legal landscape resembles a painting in many different shades and colours rather than a simple monochrome snapshot."¹²⁶ Cultural differences between EU members are so significant that they do not anticipate being able to adopt a single codified act for civil procedure.¹²⁷ However, the act that is valid throughout Europe, the Rules of Procedure of the Court of First Instances of the European Communities, was supplemented by provisions recognizing the Court's active role in the process of fact finding.¹²⁸ The Court now acts in a more inquisitorial manner than it has in the past.¹²⁹

¹¹⁹ See Peter Gottwald, *Civil Procedure Reform in Germany*, 45 AM. J. COMP. L. 753, 760 (1997); Langbein, *supra* note 10, at 826.

¹²⁰ W.D.H. Asser et al., *A New Balance: A Summary of the Interim Report Fundamental Review of the Dutch Law of Civil Procedure*, 8 ZEITSCHRIFT FÜR ZIVILPROZESS INT'L 329, 353 (2003).

¹²¹ See Loïc Cadiet, CODE DE PROCEDURE CIVILE 2000 [CIVIL PROCEDURE CODE OF 2000] arts. 8, 10 (20th ed. 2006); JACQUES HERON & THIERRY LE BARS, DROIT JUDICIAIRE PRIVÉ [PRIVATE JUDICIAL LAW] 795-849 (2d ed. 2002). See also JEAN VINCENT & SERGE GUINCHARD, PROCEDURE CIVILE [CIVIL PROCEDURE] 938-45 (1987).

¹²² See Gerald J. Meijer, *Belgian Civil Procedure*, in ACCESS TO CIVIL PROCEDURE ABROAD 216 (H.J. Snijders et al. eds., 1996).

¹²³ See, e.g., BELAR. R. CIV. P. 179; KYRG. R. CIV. P. 15; ARM. R. CIV. P. 49. At the same time in some of the former soviet republics, the judge is still passive in the process of proof taking.

¹²⁴ See Taniguchi, *supra* note 17, at 775; TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN 1-38 (Hans Smit ed., 2002).

¹²⁵ See BERRY FONON-CHUNG Hsu, THE COMMON LAW SYSTEM IN CHINESE CONTEXT: HONG KONG IN TRANSITION 41 (1992); Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 794 (1997).

¹²⁶ ZIMMERMANN, *supra* note 78, at 114.

¹²⁷ See Torbjörn Anderson, *Approximation of Procedural Law in Europe*, in PROCEDURAL LAWS IN EUROPE: TOWARDS HARMONISATION 55, 64-65 (Marcel Strome ed., 2003).

¹²⁸ See Rules of Procedure of the Court of First Instance of the European Communities, art. 68(4), <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigreur/tx7.pdf>.

¹²⁹ See KOEN LENAERTS ET AL., PROCEDURAL LAW OF THE EUROPEAN UNION 560-63 (2d ed. 2006).

CLOSING REMARKS

An increase of the role of courts in the civil process is occurring globally and impacting most procedural systems. The frontier between the two classical models of civil procedure has blurred, and it appears that a united procedural system is emerging. At the same time, some distinctive and unique procedural systems still exist. The Russian system is one of them. The history of Russian civil procedure through to its current form provides good examples of the legislative efforts to converge both classical systems and to create the best system for Russia. Today, as a global, unified approach to civil procedure is being developed, the Russian experience may be interesting and helpful for elaborating on the national rules of civil procedure in different countries and the evolution of international civil procedure.