



Russian Civil Procedure: an exceptional mix¹

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Abstract: The article deals with the main aspects of modern russian civil procedure between common law and civil law.

Key Words: Russia. Civil Procedure.

There is a large variety of legal systems. According to the classical point of view there are three dominant legal systems: civil law, common law and socialist law². At now days socialist law in its pure sense doesn't exist anymore. Moreover there is a notion that it didn't ever existed as a separate legal system and has been a member of a civil law family³. Some authors add an Islamic⁴, customary, religious and others legal systems. In 1929 a map of the world' law with sixteen different legal systems was proposed!⁵

We accept the notion that all legal systems are derived from common law or civil law⁶. There are also mixed jurisdiction. They have some characteristics. First, they should be built upon dual foundations of common-law and civil-law materials. Second, a mixture should rely to

¹ This report is based on the ideas stated in the article, published in Emory International Law Review (Volume 21, No.2, Fall 1997, P.543-562).

² Merryman J.H., *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, (1985). P.1; Chloros A.G., *Common Law, Civil Law and Socialist Law: Three leading Sytems of the World, Three Kinds of Legal Thought* in Varga C. (ed.), *Comperative Legal Cultures*. New York. (1992). P.83-97

³ Quigley J., *Socialist Law and the Civil Law Tradition*, 37 American Journal of Comparative Law. (1989). P.781-808.

⁴ Vago S., *Law and Society*. New Jersey. (2003). P.12-18.

⁵ Wigmore J.H., *A Map of the World's Law*, 19 Geographical Review. 1929. No.1. P.114; F.P.W., *The Legal Systems of the World*, 13 Journal of Comparative Legislation and International Law. (1931). No.4. P.311.

⁶ See, e.g.: Von Mehren A.T., Gordley J.R., *The Civil Law System. An Introduction to the Comparative Study of Law*. Boston, Toronto. (1977). P.3.



most of basic elements. An occasional transplant from another tradition will not create the mixed jurisdiction. Third, structure of a mixture has a specificity: private law is created on the basis of civil law tradition and public law – common law⁷.

Civil law refers to legal systems whose development was influenced by Roman law. They are codified systems. By contrast, common law is based on case law, which relies on precedents. They differ from each other by concepts, substance, structure, vocabulary, methods of legal reasoning, legal education, etc.

The area of civil procedure has also traditionally been divided into civil and common law procedural systems⁸. While the distinction between the two systems is not as strong today as in previous centuries⁹, it still exists along with the controversial features that are associated with each. Under the first system the two adversaries take charge of most procedural action, under the second, officials perform most activities.¹⁰

The main attributes of the classic common law procedural system are: 1) civil juries; 2) pre-trial conferences; 3) party-controlled, pre-trial investigations; 4) trials designed as “concentrated courtroom dramas that provide a continuous show;” 5) passive judges; 6) class actions; and 7) party-selected and paid experts¹¹.

On the other hand, the main attributes of the civil law procedural system are: 1) the absence of civil juries; 2) a lack of distinction between the pre-trial and trial phases; 3) active judges; 4) judicial proof-taking and fact-gathering; 5) judicial examination of witnesses; and 6) court-selected experts¹².

⁷ Palmer V. V. (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family*. Cambridge. (2001). P.7-10.

⁸ See, e.g. Chase O.G., Hershkoff H. (eds.), *Civil Litigation in Comparative Context*. (2007). P.3.

⁹ Jacob H., *Courts, Law and Politics in Comparative Perspective*. (1996). P.4

¹⁰ See, e.g. Chase O.G., *American “Exceptionalism” and Comparative Procedure*, 50 *American Journal of Comparative Law*. (2002). P.281-282; *The New Encyclopedia Britannica*. 15th edition. Vol.7, Chicago, 1994. P.921; G.C. Hazard, *From Whom No Secrets Are Hid*, 76 *Texas Law Review* (1998). P. 1672-1674; Jacob J.I.H., *The Fabric of English Civil Justice*. London. (1987). P.7; Jacob J. I. H., *The Reform of Civil Procedural Law and Other Essays in Civil Procedure*. London. 1982. P.24; Epstein D. (ed.), Snyder J.L., Baldwin C.S., *International Litigation: A Guide to Jurisdiction, Practice and Strategy*. (2002). P.3/6-3/8; Kokott J., *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. The Hague, London, Boston. (1998). P.2.

¹¹ See, e.g. G.C. Hazard, M.Taruffo, *American Civil Procedure. An Introduction*, (1993). P.5, 19-22, 86-104; F. James, G.C. Hazard, J. Leubsdorf, *Civil Procedure*, (1992). P.4-10; J.A. Jolowicz, *On Civil Procedure*, (2000). P.175-182; Watson G., *From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf’s interim report* in Smith R. (ed.) *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s*. (1996). P.65.



Three are also some mixed jurisdictions in the area of civil procedure, including, for example, the Japanese¹³, Chinese¹⁴, Philippines¹⁵ systems.

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

Civil Law Procedural Features

Before addressing the first question of “What continental attributes exist in Russian civil procedure?” it is necessary to note that historically, Russia adhered to the continental legal family¹⁶, including the area of civil procedure. At the same time, there were periods when Russia moved away from the classical continental model of civil procedure.

In the 18th and 19th centuries, the Russian tsar legislation regulated civil procedure in an inquisitorial manner. Lately however, there has been a move away from this kind of adjudication. Some proceduralists of that time noted that the 1864 Russian Code of Civil Procedure was one of the best in Europe¹⁷. Some procedural elements were influenced by the

¹² See, e.g. Merryman J.H., *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, (1985). P.111-123; J.Langbein, *The German Advantage in Civil Procedure*, 52 *University of Chicago Law Review* (1985), P.824, 826, 835; H. Kotz, *Civil Justice Systems in Europe and the United States*, 13:61 *Duke Journal of Comparative and International Law* (2003). P.66, 68; Elliott C., Vernon C., *French Legal System*. (2000). P.129.

¹³ See, Y. Taniguchi, *The 1996 Code of Civil Procedure of Japan – A Procedure for the Coming Century?*, 45 *The American Journal of Comparative Law*, (1997), P.767-791; Matsumoto H., *The Reception and Transmission of the Law of Civil Procedure in Japan - The Experience in Japan* in Deguchi M., Storme M. (Eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society. Legislative and Legal Educational Assistance to Other Countries in Procedural Law*. Antwerpen. 2008. P.142-143.

¹⁴ M.Y.K. Woo, Y. Wang, *Civil Justice in China: An Emperical Study of Courts in Three Provinces*, 53 *The American Journal of Comparative Law*. (2005). P.911.

¹⁵ Tan E.A., *Special Features of Comparative Procedural Law in the Philippines*, 3 *Zeitschrift fur Zivilprozeß International*. (1998). P.424-425.

¹⁶ See e.g. J.H. Merryman, *supra* note 5, at 3; J.Guigley, *Socialist Law and the Civil Law Tradition*, 37 *American Journal of Comparative Law*. No.4. (1989). P.781.



French Code. During the Soviet era, judges became much more active than before the 1917 Revolution, and more than most of Russia's European neighbors using a civil law procedural system. This model of adjudication was fairly labeled "a radical Communist solution" by Professor Mauro Cappelletti.¹⁸

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 court.

At the same time, the contemporary Russian style cannot be called 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.

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 Code and 1995 amendments to the 1964 Soviet Code.

One of the main ideas of procedural reforms in Russia was to establish the adversarial principle of the procedure. The adversarial nature of the procedure is a leading characteristic of the common law legal system¹⁹. It was the scope of the 1864 reform, as well as of 1995 reform. As a result, the 1864 Code forbid the court from collecting proof (art. 82,367 of the Code). The court was passive in Russia from 1864-1917.

In the 1990s, there was a remodeling of Soviet civil procedure which was continental in its basis. The changes had some common law orientation. The 1995 amendments to the 1964

¹⁷ See e.g. E.A. Nefediev, *Учебник русского гражданского судопроизводства [Handbook on the Russian civil procedure]*, (1909). P.30.

¹⁸ M. Cappelletti, *Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe*, 5 Michigan Law Review. Vol.69. (1971). P.879. Professor Mirjan Damaska also emphasizes that "The Soviet civil judge was expected to take vigorous control over the case" (M.R. Damaska, *supra* note 3, at 202).

¹⁹ J. Fleming, G.C. Hazard, J. Leubsdorf, *Civil Procedure*, (1992) P.4.



Soviet Code also introduced the adversarial character to the civil procedure. The 1993 Russian Constitution proclaimed the principle of adversarial procedure in the civil procedure and subsequent amendments were introduced to the Civil Procedural Code in 1995. They revoked the rule requiring the court to engage in the process of proof-taking without the initiative of the parties. As a result, the emphasis in the process of proof-taking was shifted from the purview of the court to the purview of the parties. The functions of the court were reduced to a minimum in the 1995 Arbitrazh Procedural Code. The court didn't have the right to demonstrate its initiative in the process of proof-taking. Determining all the circumstances of a case became dependent on the full participation of the parties without court intervention in the process of proof-taking. The part played by the court was reduced to the unbiased guidance of the process. The 1995 amendments were effective until the adoption of the new code in 2002.

Under the 2002 code, the Russian civil procedure now has fewer common law features than it had under the 1995 amendments. At the same time, it still contains some common law elements. Firstly, the court is not obliged to collect the evidence. (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.) Secondly, the trial process includes a preliminary, pre-trial session, which is conducted mainly by the opposing parties.

Exceptional Procedural Features

What are the exceptional features unique to the Russian civil procedure system? There are several distinctive features of the Russian civil procedure that do not exist in other procedural systems. They 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;
- Original status of judicial precedent.

Additionally, there are other unique features, such as the structure of the judicial system, which includes arbitrazh courts and courts of general jurisdiction²⁰; and the specificity of



the cassational instance, which may review both questions of law and fact.²¹ The above features are key elements of the Russian civil procedure system and will be elaborated on below.

The role of the judge is, “undoubtedly the central problem of any system of civil procedure...”²². During the drafting of the new code of civil procedure (CCP), there was a lot of discussion over what role the court should play in establishing the facts of a case, as well as the process of proof-taking. In Russia this question was always controversial. As a result of this discussion, the 2002 CCP has moved slightly away from the principles established by the 1995 amendments regarding the court's passivity in the process of proof-taking. The enforcement of the 1995 amendments highlighted the danger that a court's refusal to collect evidence could have on reaching an objective truth in a case. Because parties are not always able to present the necessary evidence in support of their case, 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. As a result, the real protection of rights, could not be achieved. During the drafting of the 2002 Code most of district courts reported to the Drafting Committee that the 1995 changes don't work well enough.

Today, the court and disputing parties share an active role in the process of proof-taking. The allocation of this principle in the legislation is a complex problem from a lawmaking point of view and has become the main challenge for the authors of the code. This principle is stipulated in the new code in the following manner: the court should determine which circumstances are important for the case and which of the parties should provide the proof. As a rule, the parties bear the responsibility for presenting the law and facts. 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. Therefore, the role of the court under the new 2002 CCP is greater

²⁰ Arbitrazh (commercial) state courts should be distinguished from arbitral tribunals, which also exist in Russia. Arbitrazh (commercial) courts are charged with settling economic disputes and courts of general jurisdiction - disputes between individual citizens. Therefore two kinds of adjudication procedure exist in Russia: arbitrazh and civil procedure. The first one is regulated by Arbitrazh procedural code and the second – by Civil procedural code.

²¹ In contrast to many European civil law countries where courts of cassation usually decide only questions of law.

²² M. Cappelletti, *The Judicial Process in Comparative Perspective*, (1989). P.252.



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 harmonic combination of adversarial principles based on the initiative of the parties and investigative principles based on the activity of the court. I believe that 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 procurator. Procurator is a unique element of the Russian legal system²³. It was established by Peter I in 1722²⁴. Under the 1864 Imperial Code of civil procedure he could take part in a case, but only in a limited number of cases. He played a huge role in the Soviet civil procedure not only in Russia, but also in other Socialist countries²⁵.

The 1964 CCP granted the procurator a wide range of authority. He was simultaneously a participant of the case and a supervisor of the court 's activities. He had the ability to initiate adjudication in order to protect the rights of any person. Additionally, the procurator could intervene in the process at any stage, if necessary, to protect the interests of the public or individuals and give opinions concerning a case as a whole. His purpose in the civil proceedings was to ensure that all judicial acts were lawful and well-grounded. The tremendous power of procurator in the Soviet civil process was a moot point and has been criticized by many proceduralists²⁶.

Under the acting code, his role has been modified and limited, 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

²³ See, H.J. Berman, *Justice in the U.S.S.R. An Interpretation of Soviet Law*, (1963). P.238.

²⁴ See, W.E. Butler, *Russian Law*, (2003). P.25.

²⁵ See, e.g.: Manko R., *Is the Socialist Legal Tradition "Dead and Buried"? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure* in Wilhelmsson T., Paunio E., Pohjola A. (eds.), *Private Law and the Many Cultures of Europe*. (2007). P.92-94; Stalev J.S., *Българско гражданско процесуално право [Bulgarian Civil Procedural Law]*, (1979). P.375-380.

²⁶ See, e.g. C. Osakwe, *The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis*, 18 Texas International Law Journal. (1983) P.87-89; J.N. Hazard, *The Soviet System of Government*, (1980), P.208-209.



because of illness, age, disability or other valid reason. A procurator who initiates a case is entitled to all the procedural rights and duties of the plaintiff with two exceptions. The procurator does not have the authority to make an amicable settlement or the responsibility of paying court expenses. If the procurator changes his mind after filing a petition for the protection of another person, the case will still be considered. As of 2004, 5990 cases were initiated in the arbitrazh courts by procurators. Of those, 510 (8%) were resolved in favor of the procurator.

Another exceptional feature of Russian civil procedure is supervisory instance. Review by the way of supervision is a special procedure that allows additional reexamination of judgments, which have already entered into legal force. It stems from the Russian Empire legislation of XVII-XIX centuries.

During the Soviet times the right to apply to the supervisory court belonged only to the limited number of officials such as chief judges and their deputies and the Procurator General and his deputies, etc. Participants of the case didn't have such right. 8618 decisions were revoked by the way of supervision in 1980. In contrast, 12500 – in 1989.

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. It exists in addition to appealing and cassational instances and allows to reexamine judgments which have already entered into legal force and which may have already been decided on cassational appeal. 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. 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 presidium of the Supreme Court, by military assembly of the Supreme Court, by judicial tribunal of the Supreme Court for civil cases, by presidium of military court, by presidium of the Supreme Court of the "subject" (state) within the Federation. It is possible to appeal to a court of supervision within one year from the day when a judgment is entered into legal force. 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 on the basis of materials available in the case. Although the supervisory instance may refuse to accept lower courts findings of fact, it has no power to establish new facts or consider new evidence. As a general rule, the court verifies "the correctness of the application and interpretation of norms of material law and norms of procedural law by the courts of first and cassational instance" only within the limits of the arguments contained in the appeal. 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. Some 300000 appeals are considered by the courts of general jurisdiction in the way of supervision yearly. 15215 decisions were abolished in the supervisory instance in 1996, 20270 – in 2002. It is 1/3 of all abolished decisions. In contrast, 17482 decisions were abolished in the supervisory instance in 2004 (after the adoption of the new CCP). It is 20% of all abolished decisions. The Russian Supreme Arbitrazh Court receive about 20000 appeals yearly at supervisory instance. In 2004 it received 19935 appeals and just 240 of them reached trial session.

The possibility to reexamine the judgment, which have already entered into legal force is a moot point. Does it 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 errors²⁷. 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*, no. 52854/99, 24 July 2003²⁸ it simultaneously maintains two different positions on the Russian supervisory instance. From one hand, it believes that review by the way of supervision conflicts with the principle of *res judicata* (art. 52, 55-57 of *Ryabykh v. Russia*, art.25 of *Pravednaya v. Russia*). From other hand, it doesn't infract it because it is used to rectify judicial errors (art. 25,28 *Pravednaya v. Russia*, art. 52 of *Ryabykh v. Russia*).

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

²⁷ See, e.g.M. Treushnikov, *Grajdaski process [The Civil Procedure]*, (2006). P.552.

²⁸ The European Court of Human Rights web site www.echr.coe.int



only statutes, regulations and customs as sources of law²⁹. Historically judicial decisions are conceived to be a source only of common law³⁰.

In Russia, there is no any rule, which reject or acknowledge judicial precedent as a source of law. As a result there are two notions in the Russian legal doctrine on this issue: judicial precedent could be or couldn't be a source of law.

In fact, judicial precedents comprise:

- Rulings of Constitutional Court;
- “Guiding explanations” of supreme courts;
- Ordinary judicial decisions.

The legal force of these precedents is different and they should be considered differently in the terms of being a kind of source of Russian civil procedural law.

Constitutional court could declare a statute as unconstitutional and the court can't apply this statute to the case. In this context, the courts apply the rulings of Constitutional court and consequently use judicial precedent.

“Guiding explanations” of supreme courts stem from the Soviet times, when they were required to fill gaps in the legislation. In contemporary Russia the principles of the independence of judges and their subordination only to law are stipulated in Constitution. Consequently, they are forbidden to take into account the “guiding explanations” of higher courts. But in fact, they often cite the “explanations” in the judgments. Moreover, such “explanations” are published cumulatively in book form³¹ and electronically.

²⁹ See, e.g. J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, (1985). P.23. At the same time in some countries of civil law precedents became very important recently (See, e.g. W. Wiegand, *Americanization of Law: Reception or Convergence?*, in L.M. Friedmann, H.N. Scheiber (ed.), *Legal Culture and the Legal Profession*, (1996). P.147. In Germany, they are considered as an independent source of law (See, R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*, (2001). P.178). In France many academics accept the creative normative role of judiciary (See, e.g. M. de S.-O-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104:1325 *Yale Law Journal*, (1995). P.1351-1355.

³⁰ See, e.g. R. Pound, *The Spirit of the Common Law*, (1999). P.182; B. Bix, *Jurisprudence: Theory and Context* (2003). P.145-149; R. Cross, J.W. Harris, *Precedent in English Law*, (1991). P.3.

³¹ See, e.g. Сборник постановлений Пленумов Верховного Суда СССР и РСФСР (Российская Федерация) по гражданским делам [Collection of Decrees of Plenums of the Supreme Courts of the USSR and RSFSR (Russian Federation) with Regard to Civil Cases], (2001);



Ordinary judicial decisions are not so “popular” in Russian legal practice as the “guiding explanations”, but they are also taken into account by lawyers, advocates and sometimes judges. Moreover, they are also published³².

Summarizing this abstract, I would like to say that even though there is no formal rule, which reject or acknowledge judicial precedent, in fact it is not ignored by Russian judicial practice.

Cultural and Historical Background

In my opinion, 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. 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.

One should dwell on the questions of the cultural aspect and background of the Russian civil procedure, which could be defined as a fusion of collective and individualistic views. There are two widespread cultural models. The first one is based on individualism; the other on collectivism.³³ Collectivism is defined as a moral principle that asserts the priority of the group over that of the individual or, as a social organization in which the individual is seen as being subordinate to a social collectivity such as state, or nation.³⁴ Individualism is defined as a moral principle that stresses the self-directed, self-contained, and comparatively unrestrained individual or social organization, which exist in large measure to serve and protect individual.³⁵

³² Судебная практика по гражданским делам [Judicial Practice with regard to Civil Cases], (2004).

³³ See, e.g. D.G. Myers, *Social Psychology*, (2001); M. Calenkamp, *Individualism versus Collectivism*, (1993); M.H. Thompson, *Individualistic and Collectivistic Liberty*, 37 *Journal of Philosophy*. No.14. (1940). P.382-386.

³⁴ See, Graig Calhoun (ed.), *Dictionary of the Social Science*, (2000). P.78; *The Encyclopedia Americana. International edition*, Vol.7. (1997). P.239; *The New Encyclopaedia Britannica*, Vol.3. (2002). P.453;

³⁵ See, Graig Calhoun (ed.), *Dictionary of the Social Science*, (2000). P.228; *The Encyclopedia Americana. International edition*, Vol.15. (1997). P.69; *The New Encyclopaedia Britannica*. Vol.6. (2002). P.295.



Society in such case becomes the background to the interests of individuals.³⁶ In collectivism the law aims to protect the interests of society as a whole and to achieve common goals, while in individualism the law primarily protects the interests of individual members of society. It is focused on reaching individual goals.³⁷ This problem was a moot point one century ago³⁸ and became important at nowadays due to the process of globalisation.

Law is a form of social control³⁹. But it is not the only one. There are some other nonlegal and informal mechanisms of social control. There is widespread notion that the law is more effective in the societies with complex social structure. Following this point of view we can make the interference that law is not effective only in the non “civilized” societies. In reality not in all societies law is effective as other mechanism of social control. Such mechanisms of social control as shaming or open disapproval could be more effective in some societies. For example, in Japan and other countries of Asia law is less effective in social regulation as nonlegal mechanisms. Nevertheless these countries can’t be treated as non “civilized”, they are ones of the world’s most industrialized nations. Their systems of nonlegal social control discourage antisocial conduct more effectively than any legal system. Sometimes the legal conquest was the best way to destroy the power of the previous elites⁴⁰.

The problem is that some societies are more adaptive for legal regulation than others. From my point of view, contemporary law as a form of social control has been created in the political, economical and social circumstances of the European culture. Due to the historical expansion of Western civilization (based on the technological advantages) it was widespread all over the world. It is necessary to note that the reception of law as a form of social control wasn’t voluntarily in most cases. It was made with external force like in most cases of common law reception⁴¹ or with internal adaption by “civilized” governor of continental law.

³⁶ See, J. Crittenden, *Beyond Individualism. Reconstructing the Liberal Self*. (1992). P.77.

³⁷ See, e.g. P. Sandevour, *Introduction au droit*. (1991); J.-L. Bergel, *Theorie generale du droit*, (1985).

³⁸ See, e.g. F. Cosentini, *La societe future, individualisme ou collectivisme?* (1905).

³⁹ Pound R., *An Introduction to the Philosophy of Law*. New Haven. 1925; Vago S., *Law and Society*. New Jersey. 2003. P.4, 19; Cairns H., *The Theory of Legal Science*. New York. 1941. P.22.

⁴⁰ L.M. Friedman, *Legal Culture and Social Development*, 4 *Law and Society Review*. (1969) P.43.

⁴¹ See, e.g.: Purdy J. M., *Common Law and Colonized Peoples*. Aldershot. (1997).



In such societies legal regulation is treated by the majority of their members as an alien element of the social control⁴². The majority of the members tend merely to acknowledge the existence of the legal regulation, they try as far as possible to avoid any contact with legal system. It is better for them not to be involved at all in the legal process whether one is guilty or innocent. It implies the degree of fear and even lack of confidence which these people have for the legal regulation.

It is obvious in these circumstances that law as a form of social control is more effective in the societies where in was created than in those where it was implant as an alien element. Nevertheless in the modern period law is widespread all other the world as the main mechanism of social control. In some countries it is effective, in others – not. Law should reflect the social, economic and political climate of the society. Law of one society differs from that of another by legal culture⁴³.

I believe that the Russian culture contains elements of both cultural models: collectivism and individualism. Consequently, it cannot be related to only one of them.⁴⁴ In different periods of history, the Russian legislature adhered to diametrically opposing views on referring Russia to one of these cultural types. Hence, rules of law were based on individualism or on collectivism. Neither the first nor the second correspond with the moral 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.⁴⁵ However, I believe the reason for it is not unwillingness of Russian citizens to obey rules of law, but the

⁴² See: Oloruntimehin O., *The Status of Informal Social Control and Dispute Resolution – An analysis of African Societies* in Sebba L. (ed.), *Social Control and Justice*. Jerusalem. 1996. P.332-342.

⁴³ Vago S., *Law and Society*. New Jersey. (2003). P.3.

⁴⁴ See D.Y. Maleshin, *Some Cultural Characteristics of the New Russian Code of Civil Procedure of 2002*, 10 *Zeitschrift für Zivilprozess International*. (2005). P.385-389; D.Y. Maleshin, *O Novo Codigo De Processo Civil Russo de 2002*, 121 *Revista De Processo*. (2005). P.159-165.

⁴⁵ See, C. Hendley, *Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law*, *East European Constitutional Review*. Vol. 8. (1999) P.94; C. Hendley, *“Demand” for the Law in Russia – A Mixed Picture*, 10 *East European Constitutional Review* (2001) P.72-77; V.A. Tumanov, *О правовом нигилизме [On the legal nihilism]*, *Советское государство и право [Soviet state and law]*, No.10, (1989). P.21.



conflict between the legislation and the social relations of the society. The law can't be simply export and import. It is always necessary to take into account cultural specificity of a society. Yet Montesquieu noted, that "laws should be in such compliance with features of nation, for which they are made, that only in very rare cases laws of one nation might become applicable for another"⁴⁶. It is noted by many researchers that there is strong connection between culture and law⁴⁷ and especially civil procedural law⁴⁸. In the modern environment, in the epoch of globalization and creation of the multi-polar culture, this method gets especially important.

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

This principle should also be taken into account in civil procedural lawmaking. The norms that are successful for Europe do not work properly in Russia⁴⁹. The 1864 Code was one of the best European codes, but it was unsuccessful in Russia⁵⁰. Twenty years after its adoption, a special drafting committee was established to prepare a new code.

⁴⁶ [Montesquieu], *De l'esprit des loix, ou du rapport que les loix doivent avoir avec la Constitution de chaque Gouvernement, les Meurs, le Climat, la Religion, le Commerce, &c. A quoi l'Auteur a ajoute des recherches nouvelles sur les Loix Romaines touchant les successions, sur les Loix Francoises & sur les Loix Feodales.* (M.DCC.XLIX).

⁴⁷ See, e.g. R.C. Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, Harvard Law Review. Vol. 117. (2003). P.52-56; 80-86; D.Nelken, J.Feest (ed.), *Adapting Legal Cultures*, (2001), P.4.

⁴⁸ Works reflecting this approach include: O.G. Chase, *Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context*, (2005); O.G. Chase, *Culture and Disputing*, 7 Tulane Journal of International and Comparative Law (1999) P.81-90; O.G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 American Journal of Comparative Law, Vol.4, (1997), P.861-870; M. Taruffo, *Transcultural Dimensions of Civil Justice*, 23 Comparative Law Review (2000); S.N. Subrin, *Discovery in Global Perspective: Are We Nuts*, 52 DePaul Law Review, (2002), P.312; T.O. Main, *Global Issues in Civil Procedure*. (2006). P.5. The importance of this issue was also emphasized on different conferences. See, e.g. XII Word Congress on Procedural Law, Mexico, September 2003; Colloquium of the International Association of Procedural Law, Tulane University, October 1998; Colloquium of the European University Institute, Badia Fiesolana, May 1977 (See, M. Cappelletti (ed.), *New Perspectives or a Common Law of Europe*, (1978)).

⁴⁹ See, e.g. H.J. Berman, *Justice in the U.S.S.R. An Interpretation of Soviet Law*, (1963). P.216.

⁵⁰ See, M. Cappelletti, *supra* note 10, at 875



The Soviet civil procedure was continental in its radical sense, but the laws worked primary on paper. One of the reasons for this failure was the general Soviet approach to the law, where non-legal regulation was overwhelming⁵¹.

As for the 1990's common law initiatives, it is necessary to say that most of the 1995 amendments to the CCP did not work well enough⁵². In Russia, the court could not be passive because of the widespread, collective views in the society. Therefore, the common law model regarding the role of the judge is unworkable in Russia and the judge's role has been changed in the 2002 CCP.

The Russian example is not the one of the cultural influence on the civil process. There are several ways how culture affects law and civil procedural law. First of all, not all societies use a western style of formal legal system. Traditional societies rely mostly on custom. Second, law is inseparable from the interests and goals of concrete peoples. Therefore the respect of the law by members of the society should be based on a clear understanding of the nature of the legal practice.

In Western societies it is assumed that legal behavior is the measure of moral behavior. The subject is different in collectivistic societies. There is a very big gap between the law and reality in many collectivistic societies. Japan is a good example of a collectivistic society. The Japanese tradition of emphasis the ascendancy of the group interest over the individual interests of its members takes its root from the Confucian thought. The primacy of the group interests is one of the most important pillar of the Japanese society⁵³. In China until the end of the nineteenth century, the term "rule of law" had a negative connotation⁵⁴.

Dispute resolution is a reflection of the culture in which it is embedded⁵⁵, it reflects and expresses its metaphysics, values⁵⁶, psychological imperatives, history and economic, political

⁵¹ C. Sypnowich, *The Concept of Socialist Law*, (1990). P.155.

⁵² See M.K. Treushnikov, *supra* note 15.

⁵³ Kim C., Lawson C. M., *The Law of the Subtle Mind: the Traditional Japanese Conception of Law* in Varga C. (ed.), *Comparative Legal Cultures*. New York. 1992. P.282.

⁵⁴ Bracey D. H., *Exploring Law and Culture*. Long Grove. (2006). P.35

⁵⁵ Chase O.G., *Law, Culture, and Ritual. Disputing Systems in Cross-Cultural Context*. New York. 2005. P.2.



and social organization⁵⁷. Western society is litigation-oriented. In contrast, traditional and collectivistic societies don't use formal disputes resolution. They prefer conciliation or mediation by moral or divine authority.

In Japan the rates of litigation and adjudication are extremely low. The main reason for this is the seek to minimize the use of law⁵⁸. The total number of judges has not increased since 1890, so that now there is only one judge for every 60000 persons, compared to one for every 22000 in 1890. Disputes are generally settled out of courts. Japanese prefer conciliation and mediation, which agree with Confucian thought. Reputation is one of mechanisms of social control. To lose face in Japan is to lose the trust and cooperation and to invite ostracism – a personal and social disaster comparable to imprisonment in Western societies⁵⁹. Litigation divides the parties definitively into winner and loser, in contrast, conciliation teaches both parties their duties in order to restore harmony between them. For these reasons litigation is not popular in Japan .

The same situation is in China. Three philosophical traditions affect the legal regulation in China: the Confucian, the Legalist, the Buddhist⁶⁰. According to Confucian ethics disputes should be settled privately, involving third party. If the disputants did bring their problem to court, the assumption was that both of them were stubborn, uncompromising people who were unable to sacrifice their personal interests for the peace of the community. Therefore judicial proceedings are unpleasant for most people and they try to avoid them⁶¹.

In African societies 60% of all disputes are settled through informal means such as third party mediation by members of the family, friends, neighbors, ward heads, chiefs, etc⁶². There

⁵⁶ Chase O.G., *American "Exceptionalism" and Comparative Procedure*, 50 American Journal of Comparative Law. (2002). P.278.

⁵⁷ W.L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 Law and Society Review. (1974). P.63.

⁵⁸ Kim C., Lawson C. M., *The Law of the Subtle Mind: the Traditional Japanese Conception of Law* in Varga C. (ed.), *Comperative Legal Cultures*. New York. (1992). P.275, 290-294.

⁵⁹ Black D., *Sociological Justice*. New York, Oxford. (1989). P.85.

⁶⁰ Lee L.T., Lai W.W., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist* in Varga C. (ed.), *Comperative Legal Cultures*. New York. (1992). P.225-247.

⁶¹ Bracey D. H., *Exploring Law and Culture*. Long Grove. (2006). P.35



are different reasons for this. First, they are scared of the legal process and try to avoid it. Second, the legal process is too time-consuming. Third, they have no confidence in the legal system. In some counties dualistic system exists. Native ethnic groups settle disputes through the use of customs, which differ from the law applied at the center⁶³.

Both the Jewish and Islamic laws allow judge to abstain form pronouncing judgment in certain cases. In Jewish law the judge must as a rule reach the proper decision in accordance with his responsibility towards God but without fear to the consequences of his decision. When a judge is suspicious of the plaintiff's intentions he should refrain from judgment. The same rule is in Moslem law: when the judge feels unable to come to a correct decision on the basis of the evidence offered, he is allowed to abstain form the judgment⁶⁴.

Therefore culture is one of the most important factor that determines the specificity of civil procedure. The best example of this reciprocal influence is the Russian civil procedure.

Closing Remarks

Pure civil law or common law procedural constructions do not work properly in Russia. One of the reasons is the unique elements of the Russian culture. For this reason, Russian civil procedure consists of both continental and Anglo-Saxon features of civil procedure. They are further explained when one looks at the history of Russian civil procedure and the varying degrees of success different approaches obtained. Additionally Russian civil procedure contains specific exceptional features which are not found in civil law or common law procedural models. Therefore, I would like to conclude that Russian civil procedure does not relate to the civil law or common law procedural systems, but should instead be viewed as a specific, exceptional procedural system.

⁶² Oloruntimehin O., *The Status of Informal Social Control and Dispute Resolution – An analysis of African Societies* in Sebba L. (ed.), *Social Control and Justice*. Jerusalem. 1996. P.338.

⁶³ L.M. Friedman, *Legal Culture and Social Development*, 4 *Law and Society Review*. (1969) P.31.

⁶⁴ Rabello A.M., *Non Liqueur: From Modern Law to Roman Law* in Rabello A.M., Zanotti A. (eds.), *Developments in European, Italian and Israeli Law*. Milan. (2001). P.361-362.



It should be noted that similar civil procedural outlines exist in most former USSR countries. The civil procedural law in these countries has similar historical and cultural background. Moreover, I would bet that a similar cultural framework 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, I think that in today's world, it is better to 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. It is obvious that these models do not exist today, at least not in their classical sense⁶⁵. The many changes to the basic principles of each combined with the blending of their characteristics has led to this. An excellent example of this is the recent evaluation of the role of the judge in both systems.

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 have 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, as well as its current form provide a good example 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 elaboration the national rules of civil procedure in different countries as well as for evolvement of international civil procedure.

⁶⁵ H. Jacob et al., *Courts, Law and Politics in Comparative Perspective*. (1996). P.4