NEW RUSSIAN CODE OF CIVIL PROCEDURE OF 2002: SOME CULTURAL SPECIFITIES OF PROOF-TAKING*

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The new Russian Code of Civil Procedure, adopted in 2002 and entered into force from February 1, 2003, has become an important step in the development of legal culture in Russia.

The Code combines the traditions of Russian law-making, the results of comparative studies, the results of preceding judicial practice and the specificities of a cultural character. The Code of Civil Procedure (further CCP) has been created on the base of the new Russian Constitution of 1993, the most important international acts relating to protection of civil rights (Declaration of Human Rights of 1948, European Convention of Protection of Human Rights of 1950) and takes the practice of the European Court for Human Rights in Strasburg into account.

During its drafting, the experience of civil procedure regulation of many foreign countries, both having a codified system of rights and not having such (FRG, France, U.S.A., Great Britain, etcetera), was taken into account.

The CCP has a historical succession. It is based on traditions which were earlier set by the Russian Statutes of Civil Proceedings of 1864, the Codes of Civil Procedure of 1923 and 1964, and also on scientific concepts of Russian scientists (A.F. Kleinman, M.A. Gurvich, A.A. Dobrovolsky, N.A. Chechina and others). At the same time the new code contains a number of distinctive features which are dictated, in the first

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place, by the economical and social development of modern Russia, by material rights and the cultural specificity of modern Russian society.

Two culturological models are most widely spread in the world. The first is based on individualism, the second on collectivism. We assume that Russian culture combines in itself features of both models and accordingly cannot be unambiguously related to one of them. In collectivism, the law is directed primarily to protection of the interests of the society as a whole, the state, to the achievement of collective purposes, while in the case of individualism, the laws protect, in the first place, the interests of a certain member of society, are oriented to the performance of individual purposes.

Russian lawmakers in different historical periods had opposite views on whether Russia belonged to one or another culturological type. Therefore, the legal system in our country developed either on the base of individualistic ideology or on the base of collectivism. So, for instance, at the end of the XIXth, beginning of the XXth centuries and during the last decade, the lawmaker had the aim of renewing the Russian legal system by introducing legislation created on the base of many postulates of the Rome and West European law and based on the principle of individualism. As distinctive from this, the legislation of the Soviet Union was based primarily on the principles of collectivism. However, neither the first nor the second legal models correspond by themselves to the moral principles of Russian society.

A striking example of constantly changing viewpoints of a Russian lawmaker on the social-cultural nature of domestic rights is the history of the creating of the CCP of 2002, which went on for about ten years. In the process of preparation, the most attention was given to two positions. Some authors advocated the introduction of some European principles of law into the Russian legislation without any significant changes. Other authors, to the contrary, wanted to retain many institutes of Soviet law, which were based primarily on collectivistic views. The Soviet CCP of 1964 was in force for more than ten years in Russia with new social-economical and political conditions. The new conditions are characterized in that, in contrast to the former principles, the priority of human rights and freedom in respect to other social values was vested in the Constitution of 1993 (article 2 of the Constitution), as was the recognition and protection of different forms of property in equal measure: private, state and municipal (article 8 of the Constitution) and etc. Under the influence of the new conditions,

substantial amendments, significantly renovating the code, were introduced therein in 1995. First of all, the amendments related to the adversarial character, norms on disposition and other institutes. During the development of the new code it was possible to evaluate the action under modern conditions of both norms of Soviet law based on collectivism and norms created on the base of individualistic conception. We presume that the authors of the code were able to find a kind of "golden mean" and put an effective combination of individualistic and collectivistic viewpoints at the base of the new code. The Russian Code of Civil Procedure of 2002 in full measure takes the main cultural specificities of Russian society into account.

During evaluation of the development of civil procedural legislation in modern Russia, the difference between its judicial system and the judicial system of the majority of other countries has to be taken into account. In the Russian Federation disputes following from civil legal relationships are given consideration by two types of courts: courts of general jurisdiction and commercial courts. In accordance with a general rule, disputes with the participation of natural persons are given consideration in courts of general jurisdiction, and with the participation of legal entities and disputes following from entrepreneurial activity, in commercial courts. The procedure in courts of general jurisdiction is defined in the Code of Civil Procedure and in commercial courts, in the Code of Arbitral Procedure (further CAP). The CAP was adopted and entered into force in 2002. The two judicial systems were formed in Russia in a historical manner, even though the existence of two subsystems is not unquestionable in Russian legal science.

There are also distinctions in respect to proceedings. We have the stage of reconsideration of judicial decisions, which have entered into legal force, as a matter of control ("supervisory procedure"). It is possible to re-examine only those judicial awards which have come into effect. The following persons are entitled to appeal to a court within one year from the date when a judicial award came into force: parties to the case, other persons if their rights and legal interests are infringed by judicial awards, and (if a prosecutor took part in examination of the case) officials of the prosecutor's office. A case may be re-examined only by courts of Russian Federation members, the Presidium of the military district court, the Panel of Civil Judges of the Russian Federation Supreme Court, and the Panel of Military Judges of the Russian Federation Supreme Court. Cases are examined collectively. The necessity of this stage is explained by several reasons.

Courts of appeal instance and of cassation instance check the legality and validity of decisions appealed against by persons participating in the case. However, the time limit for making an appeal is not long. Furthermore, the situation may exist when a decision that has entered into legal force is illegal. Finally, consideration of a case by courts of appeal instance and cassation instance does not always provide correction of a judicial error. These circumstances show that the stage of reconsideration of judicial decisions is an additional warranty of protection against infringement of the rights of persons and organizations.

During the drafting of the new CCP, lengthy discussion was conducted in respect to determination of the part played by the court in the establishment of facts of the case, in the process of collecting and obtaining proof. In Russia the question of the degree of activity of a court in a civil process was virtually always discussable as in science and in practice ambiguous decisions were taken. This problem is closely related to the general cultural specificities of Russian society. If the civil judicial system is built on the base of the individualistic conception, the activity of the court is minimal. The task of gathering evidence in that case lies on the parties, since the lawmaker proceeds from the personal maturity of the parties and, as a consequence, their activity in the resolution of disputes. If however the collective model lies at the base of the civil judicial system, the parties may conduct themselves in a civil process in a rather passive manner. Therefore the lawmaker intensifies the role of a court in the collection of proof.

The Soviet CCP of 1964 regulated the process in an investigative aspect. Even in the case of complete passivity of the parties, the court studied all the details of the case. The court was obliged, without limiting the study to the presented materials and explanations, to take all measures stipulated by law to obtain a thorough, complete and objective elucidation of the real circumstances of the case, the rights and obligations of the parties (article 14 of the CCP of 1964). In each case the court not only carried out an objective assessment of the presented evidence but also ensured the presence of those confirmations which are necessary to issue a correct and justified decision. The court was forced to independently exercise initiative in the gathering of evidence.

The Russian Constitution of 1993 proclaimed the principle of adversarial character in civil court proceedings (article 123). In 1995 corresponding amendments were made in the CCP, which revoked the norm obliging the court to engage in the collection of evidence without the initiative of

the parties. As a result, the accents in the process of obtaining proof were shifted from the activity of the court to the activity of the parties. In the case where the persons participating in the case did not perform or performed in an incompetent manner their obligations in respect to obtaining proof could result in those persons being subjected to unfavorable legal consequences. The activity of a court was reduced to the minimum in the Code of Arbitral Procedure of 1995. The court in that case was not supposed to manifest initiative on its own. The only way to establish circumstances of the case should be to become an adversary of the parties during the presentation and study of the evidence, without the court's intervention in process of proof-taking. The part played by the court consisted of an unbiased guidance of the process. The practice of using these norms by the commercial courts showed that a complete refusal of the court to collect evidence may result in that the attainment of an objective truth is not possible. The parties are not always in a state to present the necessary evidence. The court is forced to issue a decision on the basis of insufficient confirmations and in a number of cases such a decision will be contrary to the actual situation. As a result, the main object of the civil process-real protection of an infringed right, cannot be achieved. Judicial practice has shown that realization of the idea of adversary with the court playing a passive role is not advisable in Russia. A court cannot be neutral, attentively listen to the parties and resolve the dispute only in accordance with the presented evidence.

The new CCP has moved slightly deviated from the principle of the court's non-interference in the evidence-collecting process. At present there is a peculiar combination of initiative of the parties and court activity, that has been established in the law. The expression of this principle in concrete articles is a relatively complex problem from a juridical point of view that has become the main problem of the authors of the code. The new CCP (chapter 6) determines in the following manner the authority of the court in the process of obtaining proof. The court establishes which circumstances have a meaning for the case, which of the parties should provide the proof. The court has the right to invite the persons participating in the case to present additional evidence, verifies the relativeness of the presented proof to the case under consideration, makes a final establishment of the content of the questions in respect to which a conclusion of experts should be obtained, may at his discretion assign an expert if it is not possible to resolve the case without the conclusion of experts. In the case

where it is difficult for persons participating in the case to present the necessary proof, the court assists in the demand and collection thereof.

Thus, the role of the court in accordance with the new CCP is somewhat intensified as compared with the amendments of 1995, but at the same time the court does not take on itself the function of investigation in a civil process as was done in accordance with the CCP of 1964. The CCP of 2002 was developed on the base of a harmonic combination of adversarial principles with the active role of the court in the process of collecting and demanding proof.

It should be noted that the lawmakers of come countries, the legal systems of which are traditionally based on individualistic principles, are not satisfied with the existing nonparticipation of the court in the process of collecting proof. In view of this, attempts have been taken recently to cardinally change the role of the court in a civil process. Thus, the reform of civil legal proceedings carried out in 1998 in England and Wales has the necessity of intensifying the activity of a court as one of its main priorities. Some authors from other countries have also spoken in favor of presenting the court with additional functions in respect to collecting and demanding proof. The reason for such changes in our opinion lies in the change of the general cultural development of European countries, which is strongly influenced by collectivistic ideas. The legislation of these countries which intensifies the role of the court has been adopted recently and it is still too early to decide whether the increase of the activity of the court will be effective in countries where the individualistic model of behavior was most widely used.

The Russian lawmakers during a lengthy period of time attempted to find a good combination of individualistic and collectivistic views in legislation on civil legal proceedings. Substantial experience has been accumulated. In different periods the court has virtually not participated in the collection of proof and all the initiative was given to the parties. Such a legal construction turned out to be ineffective. During another period of time, the role of the court was excessively increased, the court performed the function of investigation in the civil process. Such a variant was not favorable either. The new Russian CCP of 2002 established a kind of "golden mean" between the activity of the court and the initiative of the parties in the process of proof-taking. We hope that such a situation will in full measure take the social-cultural specificities of the Russian society into account and make it possible to protect the infringed rights of citizens and organizations in the best manner.