

COMMENTS

JUDICIAL REFORMS IN RUSSIA: 1864 to 2014

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In 2014 we celebrate the 150th anniversary of the Judicial Reform in Russia. The 1860^s are known as a time of major reforms in various spheres of life, one of them being the Judicial Reform adopted in 1864. Before 1864 civil procedure was considered to be the classical form of inquisitorial justice¹ with active judges and passive parties. Inquisitorial procedure was a written process conducted in secret with no legal representatives in court, and with formal evaluation of evidence (otsenka dokazatel'stv). Instead of an inquisitorial procedure the Judicial Reform introduced an adversarial system with active parties and more or less passive judges, an open, oral (public) process, legal representatives, and free evaluation of evidence. So, for Russian procedure it was a revolution as it happened in other countries of Europe, which turned away from an inquisitorial to an adversarial system of justice.

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The main features of the 1864 Judicial Reform are usually considered to be the following: the judicial branch separated from the legislative and administrative branches; judges acquired an independent status; the adversarial system was introduced; proceedings became oral and public; and the appeals procedure was changed.²

¹ Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1986); *Решетникова И.В. Доказательственное право Англии и США* [Reshetnikova I.V. *Dokazatel'stvennoe pravo Anglii i SShA*] [Irina V. Reshetnikova, *The Evidence Law of England and the USA*] (2nd ed., Gorodets 1999) [hereinafter Reshetnikova, *The Evidence Law*]; and others.

² *Нефедьев Е.А. Учебник русского гражданского судопроизводства* [Nefed'ev E.A. *Uchebnik russkogo grazhdanskogo sudoproizvodstva*] [Yevgeny A. Nefediev, *Russian Civil Proceedings Textbook*] 40

Since that time the Russian procedure went through many reforms while trying to preserve the main characteristics of the Great Reform of 1864.

Much in the development of Russian judicial procedure has been changed during the so-called Soviet period after the 1917 socialist revolution. Due to objective causes the court had to take an active part in collecting and examining evidence during trial; the principle of objective truth became a standard of proof that had to be established by the court in each case.

At the same time, the principles of oral proceedings, publicity of the judicial procedure, the independence of judges and other innovations of 1864 remained the same during the Soviet period. Additionally, unique procedural mechanisms appeared, *e.g.*, the supervisory procedure that guarantees review of judicial acts at any time regardless of the date when the judicial decision entered into force. There was another innovation in the Soviet procedure – the participation of the prosecutor and public organizations in civil proceedings. These institutions can be considered similar to the existing institutions of law and public interest in England and especially in the USA.³ The Soviet civil procedure lost some adversarial features, but at the same time did not return to the classical inquisitorial procedure.

The new millennium brought new reform in civil procedure. New civil and commercial procedure codes were adopted in 2002. They developed the adversarial character of judicial procedure and used the experience of common law countries. During the last decade the adversarial character of the procedural legislation has been significantly improved.

In 2014 the new Supreme Court was created instead of the former Supreme Court and the High Commercial Court, and we are moving to unification of civil and commercial procedure codes. Despite the passage of 150 years, civil procedure is still based on the Reform of 1864. The influence of 1864 Reform on modern process can be twofold.

First, the Reform of 1864 introduced adversarial justice, including a group of adversarial principles such as an open and oral (public) process, *etc.* Modern civil procedure follows the main principles, created in 1864, and builds on them.

Second, the Reform introduced new attitudes to legal institutions (principles of civil justice, evidence, pleadings, discovery of evidence, simplified proceedings, appeals procedure, *etc.*).

(Sovetskaya Kuban 2005); Irina Reshetnikova, *150 Years of Adversarial Civil Proceedings in Russia*, 1(1) Russian Law Journal 40 (2013), available at <<http://www.russianlawjournal.org/index.php/jour/article/download/58/54>> (accessed May 18, 2015) [hereinafter Reshetnikova, *150 Years*].

³ Jeremy Cooper, *Public Interest Law. Key Guide to Information Sources in Public Interest Law* (Continuum International Pub. 1991); Burton A. Weisbrod et al., *Public Interest Law: An Economic and Institutional Analysis* (University of California Press 1978); Reshetnikova, *The Evidence Law*, *supra* n. 1, at 48–55; and others.

1. Adversarial Procedure Now and 150 Years Ago

The Judicial Reform of 1864 introduced a new process in Russia, namely, adversarial instead of inquisitorial. The main components of adversarial civil proceedings, categorized by procedural law experts at the end of the 19th and the beginning of the 20th century, exist in modern proceedings.⁴

1. *The court does not consider cases without an application of an interested party.*⁵ Also, proceedings are initiated and developed by the private parties, and not the court.⁶

Under modern civil procedure parties initiate not only proceedings, but other actions as well. So, the court can start proceedings only after having considered and granted a party's relevant petition. In commercial procedure one can see the concept of procedural risk: 'Parties to the proceedings shall bear the risk of consequences that follow if such parties take, or fail to take, procedural actions' (Art. 9(2) of the ComPC).⁷

The CivPC⁸ reflects one of the situations when procedural risk occurs, as follows:

If a party avoids taking part in the expert review process, does not provide the experts with necessary materials and documents for their review and in other cases where, given the circumstances of the case and given such party's absence, it is impossible for the expert review to be carried out, the court may, depending on which party avoids taking part in the expert review process and depending on the significance that such review has for such party, declare a fact to be either proven or disproven, where the expert review was required to establish such fact (Art. 70(3) of the CivPC).

The following new rule was recently introduced in the ComPC:

The facts that the party is relying on to support its claims or objections are considered to be admitted by the other party, if that party does not contest them or if no disagreement with such facts is revealed through other evidence supporting the objections presented with respect to the merits of the claims⁹ (Art. 70(3.1) of the ComPC).

⁴ Below it is material from Reshetnikova, *150 Years*, *supra* n. 2, at 40–45.

⁵ *Мальшев К.* Курс гражданского судопроизводства. Т. 1 [Malyshev K. *Kurs grazhdanskogo sudoproizvodstva*. T. 1 [Kronid Malyshev, 1 Civil Proceedings Treatise]] 359 (M.M. Stasyulevich 1876).

⁶ *Id.*

⁷ The Commercial Procedure Code of the Russian Federation [hereinafter ComPC].

⁸ The Civil Procedure Code of the Russian Federation [hereinafter CivPC].

⁹ *See for details Решетникова И.* Молчание – знак согласия? // Юрист предприятия в вопросах и ответах. 2011. № 12. С. 16–18 [Reshetnikova I. *Molchanie – znak soglasiya?* // *Yurist predpriyatiya v voprosakh i otvetakh*. 2011. No. 12. S. 16–18 [Irina Reshetnikova, *Silence Implies Consent?*, 2011(12) In-House Lawyer in Questions and Answers 16–18]].

A quite similar position can be seen in the Charter of Civil Procedure of 1864 [hereinafter Charter] (Arts. 444, 480, 492).

2. *The court may not go beyond the scope of the parties' claims.* The same provision is applied today; courts very rarely go beyond the scope of the parties' claims. Nevertheless, it may occur, especially when the court must determine an appropriate method to defend the infringed rights. Modern court plays quite an active role in public cases where there is a weak party (a citizen, for instance) and a strong party (a state or a state body (tax office, etc.)). In these cases the court may choose another method to protect a party that is something other than what the party requested.

3. *The court does not have to search for and take in to account facts and evidence that the parties have not presented to the court.* Currently, the court merely assists the parties in the process of gathering the necessary evidence if they submit adequately supported petitions. Also, the court has the right to allow the parties to submit additional evidence that is required to establish the facts necessary to correctly resolve the case and to ensure that the judgment is lawful and adequately substantiated; such additional evidence should be submitted prior to the commencement of the court hearing or within the term set by the court (Art. 66(2) of the ComPC, Art. 57(2) of the CivPC). However, the court played a very active role in gathering evidence until removed from that process by amendment of CivPC in 1995, and inclusion of a similar amendment to ComPC in 2002.

4. *The parties are granted the right to compete before the court when the case is being considered on the merits.*¹⁰ Competition always results from the combination of three factors: 1) opposing interests of the two parties involved in a dispute over substantive law matters; 2) the parties to the proceedings have procedural rights and the possibility to participate in the examination and evaluation of evidence; 3) setting rules of competition, under which the parties (their representatives), and not the court, would be proactive in the examination and the analysis of evidence.

It should be noted that even the 1960⁵ procedural legislation did not inhibit the adversarial nature of the proceedings. However, the competition between the parties becomes a real contest only when professional representatives are involved. This issue has not yet been settled in the modern civil or commercial procedural law.

5. *The court grants judgment based on what is found during the proceedings and based on what is proven by the parties.*¹¹ It is the competition between the parties that enables the court to come to the conclusion about the rights of the litigants that would be as strong as is necessary to resolve the case without errors (the establishment of the genuine truth).¹² It is quite difficult for Russian courts to switch

¹⁰ Raban von Canstein, Die rationellen Grundlagen des Civilprocesses und deren Durchführung in den neusten Civilprocess-Gesetzentwürfen Österreichs und Deutschlands 169 (Manz 1877) (cited by Nefediev, *supra* n. 2, at 255 n. 89).

¹¹ Nefediev, *supra* n. 2, at 32.

¹² *Id.* at 36–37.

to the adversarial standard of proof; the spirit of objective truth is still there. This is still the case, even though the grounds to set aside court rulings in appeals and cassation appeals proceedings, as well as the scope of the powers of the court and the parties to the proceedings are based on the premise that if a party discharges its burden of proof and manages to convince the court that it is right, then said party is considered to have 'won' the case.

The Reform of 1864 has created new attitudes to legal institutions; all of them cannot be covered in one article. Therefore, our focus now turns to the Evidence Law.

2. Evidence Law in 1864 and at Present

The Evidence Law was radically changed in 1864. The Russian system of justice abolished the formal evaluation of evidence and introduced the free one. The latter is the characteristic feature of adversarial system. Before the Reform the basis of the inquisitorial system of court proceedings was the formal (or lawful) evidence theory, according to which the evidence was given legal force by means of legislation (law). Therefore, judicial discretion in evaluating collected and examined evidence was not necessary. In formal evaluation of evidence some of the evidence was acknowledged complete and sufficient (for example, original written documents), the other evidence – incomplete (for example, testimonial evidence of one witness). Priority was given to a male witness over a female witness, to a noble person over a poor one, to a cleric over a secularist, *etc.*¹³ Moving from the inquisitorial system to the adversarial one Russia and other European countries abandoned the formal evaluation of evidence and introduced a free evaluation of evidence that corresponded to the spirit of adversarial court proceedings. The court could then discuss and assess the examined evidence according to inward judicial discretion. The law no longer determined the weight of the evidence. Russian procedural legislation has been applying the free evaluation of evidence theory for 150 years.

The other crucial question is the following: must the court establish the objective truth? Trying criminal cases the court is aimed at establishing the objective truth, that is, the real circumstances of the crime. As far as the civil procedure is concerned the situation in 1864 was different:

The subject of civil procedure – civil law – is subject to the parties' disposal. That's why if a litigant admits the right of the other party for claims and arguments to be correct, he confirms thereby the right of the subject in dispute disposal, so a judge even if he is convinced that the party presents the false evidence, still must consider the evidence corresponding to the

¹³ Nefediev, *supra* n. 2, at 220.

truth, because otherwise he would have violated the right of the party for subject matter disposal.¹⁴

The necessity of establishing the objective truth was not actually discussed in Soviet civil procedure. It was the main rule. Thus, the standard of proof in criminal and civil cases was the same – establishing the objective (material) truth. Though even at that time some scholars wrote about the impossibility of establishing the objective truth in some categories of cases (for example, determining paternity before the introduction of DNA testing) and no necessity to establish the objective truth because of private legal relationships between the parties.

In 1995 and in 2002 only the CivPC and the ComPC, respectively, refused the principle of objective truth and returned to the standard of proof adopted in 1864, *i.e.* establishing the formal truth based on the evidence presented by the parties. Therefore, if one party loses its right of presenting evidence or does not fulfil the burden of proof, then the court renders the decision based on the available evidence, the approach being in full compliance with the standard of proof according to 1864 Reform.¹⁵ However, it is the transition to the formal truth that is the most complicated problem for Russian lawyers.

As far as the components of modern Evidence Law are concerned, they are based on practically the same approaches as the ones in 1864 Reform:

- the decisions of the courts are binding for each other (prejudicial nature of judicial acts) (Art. 8 of the Charter, Art. 61 of the CivPC, Art. 69 of the ComPC);
- the subject of proof consists of explanations and objections of the parties (Art. 55 of the CivPC, Art. 64 of the ComPC);
- there are facts not subject to proof (well-known and presumed facts) (Art. 130 of the Charter, Art. 61 of the CivPC, Art. 69 of the ComPC);
- allocation of obligations on proof (Art. 366 of the Charter, Art. 55 of the CivPC, Art. 65 of the ComPC);
- the court does not collect evidence and bases its decision on the evidence presented by the parties (Art. 367 of the Charter, Art. 57 of the CivPC, Art. 66 of the ComPC);
- if the court considers some circumstances not to be subject to proof, the court informs the parties about said circumstances (Art. 368 of the Charter, Art. 57(1) of the CivPC, Art. 66(2) of the ComPC);
- establishing absolute and relative witness privileges (Arts. 83, 370–371 of the Charter, Art. 69 of the CivPC, Art. 56 of the ComPC);
- kinds of evidence (testimonial evidence, expert opinions, written and physical evidence) (Ch. 8 of the Charter, Art. 55 of the CivPC, Art. 64 of the ComPC);

¹⁴ Nefediev, *supra* n. 2, at 221.

¹⁵ *Id.* at 222.

- examination of evidence during trial;
- perpetuation of evidence (Arts. 82.1–82.8, 369.1 of the Charter, Arts. 64–66 of the CivPC, Arts. 72–74 of the ComPC);
- estimation of evidence (Art. 67 of the CivPC, Art. 71 of the ComPC); *etc.*

Additionally, the Charter provided for the proactivity of the parties in the process of proof. It is the parties who select the expert by mutual agreement; the court summons the witnesses at the parties' request. The basis of proof constitutes the exchange of pleadings and disclosure of evidence that have also been introduced into modern proceedings and are gradually taking root in our legal reality.

Legislation of the second half of the 19th century strictly adhered to the rule of imposing liability on the parties for omission. So, if the party did not appear at the scene for the evidence examination, said party was deprived of the right to name the consequences of this procedure action invalidation. Similar provisions are in force in modern civil procedure. Moreover, if the party did not produce evidence in the trial court, then the law limited the possibility of referring to new evidence during the appeal procedure.

According to Art. 268(2) of the ComPC:

The appellate commercial court admits the evidence if a person participating in the proceedings has proved that it was impossible to produce the said evidence in the trial court because there were reasons which did not depend upon him or her, including when the trial court denied the motion to submit evidence, and the appellate court regards these reasons excusable.

Thus, the parties involved must produce evidence in due time or they may lose an opportunity to examine said evidence during the hearings.

Moreover, the law established some legal fictions. For example, if one party could not present evidence kept by the other party, and the latter did not present it to the court, the court considered it as proven (Art. 444 of the Charter). Similar approaches exist in modern procedure, and they were referenced above (Art. 72(3) of the CivPC, Art. 70(3.1) of the ComPC). Such approach was well described by the Russian scholar Ye.A. Nefediev; *i.e.* as legislation develops, it seeks to reduce the power of the court. The purpose should be achieved by putting as little direct pressure on litigants as possible. 'Direct pressure to take certain actions is replaced with adverse consequences listed in the law that litigants may face if they fail to take such actions.'¹⁶

In addition adversarial court proceedings are inconceivable without efficient professional representatives of the parties. In modern Russian procedure there is no professional representation. In commercial courts representatives take part more often than in the courts of general jurisdiction due to the nature of the parties

¹⁶ Nefediev, *supra* n. 2, at 255.

involved (mainly these are organizations and corporations, sole proprietors). But even in this case representatives are in-house lawyers. In the courts of general jurisdiction citizens rarely apply to professional representatives trying instead to protect their interests on their own. Consequently, Russian representatives have not turned into 'legal gladiators,'¹⁷ as J. Jacob figuratively said, and the court does not look like a referee in a tennis match, as M. Zander said.¹⁸

A representative's lack of proper proactivity results in a proactive judge (asking questions while examining the evidence, *etc.*).

It should be mentioned that based on the 1864 court proceedings achievements, the Russian procedure is moving forward. The most striking manifestation is submitting pleadings to the commercial court in electronic form. Moreover, commercial courts efficiently apply simplified proceedings¹⁹ that presuppose trying and solving the case only in an electronic way. Therefore, examination of evidence is carried out in a specific manner because the parties present evidence in electronic form and it is examined out of trial.

The simplified procedure²⁰ presupposes no sittings of the court because the judge tries the case based only on written evidence. An application or a claim may be submitted in written or electronic form, and which form to choose depends on the plaintiff. Further, the law provides for a possibility to submit documents in electronic form with limited access only for the parties of the dispute. The parties submit evidence both to the court and to the other party within the time stipulated by the court. The court may take into account only such evidence as is revealed by one party to the other.

The simplified procedure in commercial proceedings may be described as:

- written proceeding, because there are no court sessions at all;
- electronic proceeding, because everything may be done through;
- electronic facilities;
- accelerated proceeding: the case must be tried during two months (ordinarily for three months);
- simplified proceeding: there are no pre-trial conferences, court sessions, *etc.*

¹⁷ Sir Jack I.H. Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* 24 (Sweet & Maxwell 1982).

¹⁸ Michael Zander, *A Matter of Justice: The Legal System in Ferment* 140 (I.B. Tauris 1988).

¹⁹ Most states have different models of simplified or accelerated proceedings. There are therefore several types of simplified and accelerated proceedings in the Russian legislation:

- *default proceedings in the courts of general jurisdiction* may be considered as a procedural measure in relation to the respondent who fails to appear in court and does not provide any valid excuse;
- *the writ proceedings in courts of general jurisdiction* are another type of simplified and accelerated proceedings used to consider a case, in accordance with which the law defines certain categories of cases which are undisputable and so the case may be resolved based on the submitted written evidence.

²⁰ In the Charter there are simplified and accelerated proceedings (Chs. 7, 7A).

When the appellate court tries the case, the court consists of one judge (usually three judges).²¹ At the same time simplified proceedings have pleadings and discovery as does every other adversarial procedure, but the electronic method is used.

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Efficient development of law is impossible without taking into account both legal national traditions and peculiarities and modern trends of the development. Studying the heritage of the 1864 Judicial Reform will contribute in future to the development of modern civil procedure, especially in the unification period.

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²¹ Irina V. Reshetnikova, *Simplified and Accelerated Proceedings in Civil Cases in Russia*, 33(1) Civil Justice Quarterly 107 (2014).

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