

## 150 YEARS OF ADVERSARIAL CIVIL PROCEEDINGS IN RUSSIA

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*The 1864 Judicial Reform proclaimed adversarial procedure in Russia. Last reforms of civil procedure in Russia go forward. The article deals with comparative analysis modern civil procedure and main characters of the Reform 1864 with reference on foreign civil procedure and national court practice.*

*Key words: adversarial procedure; judicial reforms in Russia; active parties; court practice.*

The 1864 Judicial Reform will celebrate its 150th anniversary in 2014. Adversarial proceedings, which were introduced a long time ago, in 1864, have gone through a number of reforms. The 1918 Decrees on the Court<sup>86</sup> and the judicial reform of the 2000s<sup>87</sup> could be deemed the most crucial of the reforms. Have we managed to preserve and further develop the main concepts that were introduced into Russian civil proceedings 150 years ago? Or does the existing adversarial nature of the civilistic process differ significantly from the adversarialism proclaimed 150 years ago?

The 1864 Judicial Reform transformed Russia's then inquisitorial civil proceedings into adversarial proceedings. It is notable that it was not merely an introduction of

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<sup>86</sup> After the 1917 socialist revolution the judicial system existing at the time, as well as the bar, were abolished. Quite a few lawyers refused to work in the socialist state. As a result, parties often had to represent themselves and the court had to take an active part in the collection and examination of evidence in specific cases. This was reflected in the procedural law. The standard of proof was the principle of objective truth, which had to be ascertained in each case. Objective processes resulted in the Soviet civil proceedings losing some adversarial features, but at the same time they did not return to the classic inquisitorial form.

<sup>87</sup> In 2002, new procedural codes were adopted: the Code of Commercial Court Procedure and the Code of Civil Procedure. They were based on the adversarial principle and introduced new concepts (exchange of pleadings, disclosure of evidence) that gave parties an active role in the process of proof.

the adversarial system, but a real shift towards a new system of proceedings,<sup>88</sup> given that adversarialism as a system of proceedings is much wider than adversarialism as a procedural principle. Adversarial proceedings as a system of proceedings are based on a number of principles: oral proceedings instead of proceedings in writing, public proceedings instead of secret, and adversarialism instead of inquisition. Unlike inquisitorial proceedings, adversarial proceedings suggest that the parties are represented in court and are proactive, and that the court has a passive role in the collection and examination of evidence.

The following is usually considered to be the main features of the 1864 Judicial Reform: the judicial branch separating from the legislative and administrative branch; judges acquiring an independent status; adversarial system being introduced; proceedings becoming oral and public; the appeals procedure being changed.<sup>89</sup>

What, in the opinion of procedural law experts in the end of the XIX and the beginning of the XX century, were the components of adversarial civil proceedings in Russia? And how do these components correlate with modern proceedings?

*The 1864 Judicial Reform established an important rule of adversarial judicial proceedings – that ‘the court does not consider cases without an application of an interested party.’<sup>90</sup>* Thus, proceedings are commenced and develop at the instigation of private parties, and not the court.<sup>91</sup> In contemporary procedural law the above-mentioned rule is usually associated with the principle of dispositive actions. The Code of Commercial Court Procedure of the Russian Federation (hereinafter, the RF ComPC) and the Code of Civil Procedure of the Russian Federation (hereinafter, the RF CivPC) of 2002 adhere to the principle of dispositive actions in all respects, as both civil and commercial court proceedings are commenced only after a statement of claim (an application) is filed. Moreover, it is for the parties not only to commence proceedings, but also to initiate other actions. For example, the court can order discovery in a case only after it considers and grants a party’s relevant petition.

In his analysis of the notion of civil process, YeA Nefedyev notes that, 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.’<sup>92</sup> In other words, more than 100 years ago

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<sup>88</sup> Two justice administration systems have emerged: the inquisitorial system and the adversarial system. The inquisitorial system became popular primarily in continental Europe, including Russia. Academics offer other classifications of civil proceedings (see eg KL Branovitsky, AG Kotelnikov, and IV Reshetnikova, *Civil Proceedings Abroad: Textbook for Students on a Masters Course* (Norma 2013); DYa Maleshin, *Methodology of Civil Procedural Law* (Statut 2010).

<sup>89</sup> YeA Nefedyev, *Russian Civil Proceedings Textbook* (first published 1900, Sovetskaya Kuban 2005) 40.

<sup>90</sup> K Malyshev, *Civil Proceedings Textbook*, vol 1 (MM Stasyulevich 1876) 359.

<sup>91</sup> *ibid*

<sup>92</sup> Nefedyev (n 89) 255.

YeA Nefedyev pointed out the most important feature of the lawmakers' approach to reflecting the adversarial system: the court does not compel parties to the proceedings to take specific actions, but failure to take them results in negative consequences for the parties, which are established by law. In modern proceedings this notion is reflected in 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' (pt 2 of art 9 of the RF ComPC). Thus, procedural risk is a natural component of the principle of adversarialism.

The theory of procedural risk<sup>93</sup> is based on the premise that, in choosing its mode of behavior, a party that has rights and obligations acts independently, takes risks associated with such actions and may face negative consequences. The main negative consequence is that the party loses the case or fails to achieve a certain intermediate procedural goal (for example, in connection with a petition etc.). The RF CivPC 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' (pt 3 of art 79 of the RF CivPC).

An interesting rule has recently been introduced in the RF 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 claims' (pt 3.1 of art 70 of the RF ComPC). This example illustrates the presumption of 'tacit recognition': a party that does not wish to contest the other party's objections or claims is deemed to have admitted such facts.<sup>94</sup>

The examples above reflect procedural consequences for the parties that do not take actions set out in the law.

*As a result of the 1864 Judicial Reform, the court may not go beyond the scope of the parties' claims.* The same provision applies today; courts very rarely go beyond the scope of the parties' claims. It may nevertheless occur, especially when the court has to determine an appropriate method of defending infringed rights. The best example is filing an application with a commercial court to contest an action (or an omission) of a territorial body of the Registration Service (*Federal Service of*

<sup>93</sup> For a more detailed discussion concerning the procedural risk see IV Reshetnikova, 'Theory of the Procedural Risk' (2012) 6 *Zakon* 117, 117–122.

<sup>94</sup> See for details IV Reshetnikova, 'Silence Implies Consent?' (2011) 12 *Yurist predpriyatiya* 16–18.

*Government Registration, Cadastre and Cartography, Poreecmp*). When considering the case, the commercial court establishes that there is a dispute over a certain right and begins to consider it in accordance with the rules of action proceedings. This is usual practice in commercial courts.<sup>95</sup> In other words, the commercial court gets proactive and goes beyond the scope of the claimant's demands.

Courts of general jurisdiction chose a different route: 'If an application is filed with the court and it is established that there is a dispute over a certain right that the court is competent to consider, the judge shall defer the processing of the application and shall clarify to the claimant that it is necessary to file a statement of claim based on the provisions of arts 131 and 132 of this Code. If this results in the limits of the court's jurisdiction being breached, the judge shall refuse to accept the application' (pt 3 of art 247 of the RF CivPC). At the time when an application is filed it is not always possible to determine the nature of the dispute. If it is established later that the case concerning public law relationships is in fact a dispute over a certain right, the RF Supreme Court in its plenary session (in a previous draft of the document<sup>96</sup>) recommended to apply, by analogy, a rule regulating similar relationships in special proceedings: 'If an application is filed or a case is considered under the rules of the special proceedings and it is established that there is a dispute over a certain right that the court is competent to consider, the court shall issue a ruling in which it shall refuse to consider the application and shall clarify to the claimant and other interested parties that they have the right to have the dispute resolved in action proceedings' (pt 3 of art 263 of the RF CivPC).<sup>97</sup> This provision of the Ruling of Plenary Session of the RF Supreme Court is currently abolished.

In the above-mentioned situation we can see a certain degree of competition between adversarial proceedings (which restrict the court's right to go beyond the scope of the claims presented) and the court's proactivity in the interests of procedural economy. At the same time the parties' rights and lawful interests are not prejudiced if both parties are informed that the court intends to consider the case in accordance with the rules of action proceedings. If the court so informs the parties, the parties may then choose how to proceed. Thus, the claimant may withdraw its claim and the proceedings will terminate, or may agree with the court and pursue the case to the end. The route chosen by commercial courts and courts of general jurisdiction is aimed at settling legal conflicts, and the court's proactivity prevails over adversarialism.

<sup>95</sup> See for details the following document of the RF HCC (Higher Commercial Court of the Russian Federation, BAC PΦ): Ruling of the Presidium of the RF HCC No 913/11 dated 28 June 2011. Similar rulings: Ruling of the Presidium of the RF HCC No VAS-10761/11 dated 20 September 2011 and others.

<sup>96</sup> Ruling of the Plenary Session the RF Supreme Court No 2 dated 20 January 2003 'On Certain Issues Arising in Connection with the Code of Civil Procedure of the Russian Federation Being Adopted and Becoming Effective'.

<sup>97</sup> Incidentally, a similar rule can be found in the RF ComPC – pt 3 of art 217. It provides for a possibility to refuse to consider the application to establish legally significant facts.

*Another feature of adversarial proceedings of the XIX century is that the court does not have to search for and take into account facts and evidence that have not been presented to the court by the parties.* It is not difficult to see that this provision solely concerns facts, ie the process of proof, but does not concern legal rules.<sup>98</sup> At the same time the court may ask the parties and witnesses questions, point to the lack of evidence of material facts of the case and offer the parties to provide missing evidence if they wish to do so (art 368 of the 1864 Civil Proceedings Charter).<sup>99</sup> A similar rule is included in modern procedural codes. For example, pt 2 of art 66 of the RF ComPC states as follows: 'A commercial court has the right to offer parties to the proceedings to submit additional evidence that is required to establish facts necessary to resolve the case correctly and to ensure that the judgment is lawful and is adequately substantiated, such evidence to be submitted prior to the commencement of the court hearing or within the term set by the court'. The RF CivPC has a similar provision (pt 1 of art 57).

As early as 1995 the court of general jurisdiction was 'removed' from the process of gathering evidence (as a result of amendments to the RF CivPC), and in 2002, a similar rule was included in the new RF ComPC and the RF CivPC. Nowadays, the court merely assists the parties in the process of gathering the necessary evidence if they submit adequately supported petitions. However, there are some deviations from this principle in the procedural law. For instance, unlike the position in the laws regulating the procedure in commercial courts, in civil proceedings the court has retained its right to involve an expert at its own discretion (art 79 of the RF CivPC).

*The parties are granted the right to compete before the court when the case is being considered on the merits.*<sup>100</sup> Competition always results from the combination of three factors: (1) opposite interests of the two parties involved in a dispute over substantive law matters; (2) the parties to the proceedings having procedural rights and a possibility to take part in the examination and assessment 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 ought to be said that even the 1960s procedural legislation did not inhibit adversarialism in the proceedings. However, due to the lack of professional representatives and the application of the principle of proactivity in the Soviet times the court (whether it liked it or not) had to be proactive enough to carry out an 'investigation' in a civil case. Nowadays, despite the fact that civil case procedure remained virtually the same, judges interfere in the examination of evidence less often and allow the parties to do that.

We have to note that the terms on which the parties are to compete during a hearing are laid down at the pre-trial stage, which has also become adversarial (disclosure of evidence, participation in the preliminary hearing etc).

<sup>98</sup> See for details IV Reshetnikova, 'Judicial Reforms of the Civil Proceedings in the 19th and 21st centuries' in DA Medvedev (ed), *Codification of the Russian Private Law* (Statut 2008) 307–333.

<sup>99</sup> Malyshev (n 90) 359–361.

<sup>100</sup> R von Canstein, *Die rationellen Grundlagen des Civilprozesses* 169 (cited by Nefedyev (n 89) 255).

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. Still, professional representatives more often take part in commercial court proceedings due to the nature of the parties involved in them (legal entities take part in these proceedings through their representatives).

*In adversarial proceedings the court grants judgment based on what is found during the proceedings and based on what is proven by the parties.*<sup>101</sup> *It is the competition between the parties that enables the court to come to a 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).*<sup>102</sup>

The above-mentioned provisions fully reject the principle of objective truth that was taken out of the RF CivPC in 1995 and out of the RF ComPC in 2002, and the court's proactivity in the process of proof. As a result, this has become an issue of the standard of proof which is closely connected with the parties' burden of proof in the proceedings. In US and English proceedings, the standard of proof is understood to be a criterion according to which the judge renders a judgment in the case. These criteria are different in civil and criminal proceedings. In *Davies v. Taylor* it was emphasised that the standard of proof in civil cases is the balance of probabilities: if some evidence shows a balance in favour of it happened then it is proved that it did in fact happen.<sup>103</sup> The purpose of the standard of proof is not to establish the truth. Rather, it is a certain measure of evaluating whether the parties have successfully discharged their burden of proof.

It is quite difficult for Russian courts to switch 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 such party is right, such party is considered to have 'won' the case.

It is remarkable that the features of adversarial proceedings introduced in 1864 and pointed out by Russian procedural law experts K Malyshev and YeA Nefediev and German scholars O Bülow, Canstein and others in the end of the 19th century and the beginning of the 20th century are the same as the innovations introduced into modern Russian proceedings.<sup>104</sup> These same features served as a basis for the court proceedings

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<sup>101</sup> R von Canstein (n 100) 32.

<sup>102</sup> Nefediev (n 89) 36–37.

<sup>103</sup> R Eggleston, *Evidence, Proof and Probability* (2nd edn, Butterworths 1983) 132; [1974] AC 207.

<sup>104</sup> See eg TS Taranova, *The Implementation of the Adversarial Principle in Civil Proceedings: Synopsis of the Candidate's Dissertation* (Minsk 2001); VV Samsonov, *Adversarialism in Civil Procedural Law: Synopsis of the Candidate's Dissertation* (Saratov 1999); SA Shishkin, *Adversarialism in the Judicial Mechanism of the Civil Rights Protection: Synopsis of the Candidate's Dissertation* (Moscow 1996); and others.

system of the countries with classic adversarial proceedings (Great Britain, the USA and others).<sup>105</sup> At the same time, the current reform does not copy the 1864 reform, as Russian legislation incorporates experience that was accumulated over the course of the development of both Russian and foreign legal proceedings. The 1864 Judicial Reform took into account, first and foremost, France's codification experience and, to a lesser degree, Austrian and Prussian legislation. The procedural codes of the XXI century have borrowed a lot from English and American laws. The distinctive feature of the current reform of civil proceedings is a search for, and an introduction of, various forms of out-of-court settlement of disputes, as well as reconciliation of parties.

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<sup>105</sup> See for details IV Reshetnikova, *Law of Evidence in England and America* (2nd edn, Gorodets 1999) 9–36.