CHALLENGES OF AND RESPONSES TO VARIOUS LEGAL MECHANISMS FOR THE HARMONIZATION OF CIVIL PROCEDURE IN EURASIA

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Law is a cultural phenomenon of society. An analysis of the evolutionary process is key to understanding the positive principles and categories of legal thinking. Legal mechanisms created in unique circumstances become contradictory elements for the existing judicial practice of foreign legal systems. In accordance with modern reality and the tendencies of contemporary society, the problems of globalization determine the necessity of the analysis, which will be to consider whether it is possible to find the most effective adoption mechanisms for legal rules and practice through a process of harmonization. In the framework of current research, we have tried to answer the questions arising in relation to new tendencies in civil procedure through the prism of comparative research. The majority of adaptation mechanisms are formulated by unique legal experience in a distinct system. The influence of moral and cultural traditions, and the economic and political individuality of each society shape the outcome that allows new instruments to work in legal and procedural systems. This paper's focus is methods of legal harmonization and adaptation of procedural law on the level of transnational communities. To provide a picture as complete as possible, we give a description of modern tendencies of social integration, the current strategy of legal transplant and a comparison of methods of harmonization in the territory of post-Soviet Union countries and in Europe.

Keywords: harmonization; Commonwealth of Independent States; European Union; legal transplant; globalization process; soft law.

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One of the most urgent manifestations of social integration, interaction between states, and mutual participation in social creativity is the movement towards close legal cooperation; a clear expression of this trend at present is the creation and activity of integrated associations. European integration has a history of more than sixty years.

The process began in specified areas of material law, which later transformed into procedural rules. At first, the trust and cooperation between European judicial systems was limited in order to retain their individual features. Then, as a result of the creation of a common economic space, European law and European civil procedure emerged. The legal integration of the Commonwealth of Independent States (CIS) is following a similar path. It is worth recalling the end of the 20th century and the beginning of the 21st century when a transition from a unified legal system to cooperation between states with the aim of integration proceeded in the territory of the former USSR. This process later influenced European integration.

As in the European Union (EU), it is now not only necessary for CIS countries to remember the common historical roots of their civil processes but also to begin to trust one another. The basis of cooperation and mutual understanding in the field of civil proceedings can be found, at least in the countries of continental Europe, in the common sources of civil procedural law, in the Romano-canonical models that formed the "procedural order of communication" for many European territories before the codification period. One of the driving forces for harmonizing the national judicial systems of modern states was the globalization of the economy and the desire to increase economic and social welfare through international trade.

This article focuses on the transformation of civil justice in the context of European and Eurasian integration in of the current period of globalization. The described phenomenon is misinterpreted as a social-cultural process of the integration of humankind. It is actually first and foremost an economic information mega-trend ("The Globalization of Nothing" in the terminology of G. Ritzer). In accordance with foregoing, this is understood as the globalization of economies and the localization of culture, which may be characterized with help of definition "glocalization" (coined by British sociologist R. Robertson). The main point of "glocalization" is the indivisibility of the "global" and "the local."

The history of law tends to demonstrate the tendency of nations to enter into mutual communication on for reasons associated with both unity and diversity. Moreover, the history of philosophy of law has proven that the common interest in the pursuance of social integration and, from a wider perspective, to social art, cannot to be explained in narrow frames of society.

The researcher is forced to find explanations beyond the empirical, asserting the existence of a social sphere of higher ideals. There are ideals based on a system of values related to the "spiritual reality" of culture (*Kulturwirklichkeit* (German) – approx. trans. Cultural reality) (in law, justice is an absolute value; another essential aspect of law is its expediency, as well as its stability). Only a specific interpretation of universalism can aid in understanding the changing reality of national civil justice systems, i.e. universalism, not only as a cognitive, but also as a moral concept requiring that the best be sought from all people. Legal universalism, on the other hand, bears very little relation to the above. This is the reason why we talk about globalization as regards culture as a source of the global unity with reservations. The explanation for this is the idea that unity is the product of historical development.

The reality today is that the globalization processes are characterized as real social reasons for the convergence of legal systems. This tendency is particularly evident in different systems of procedural law.

A watershed moment for legal scholarship has been the combination of two areas of contemporary civil procedure research:

1) Research into development patterns in civil procedure concerning tendencies of internal changes which arise in every type of legal system;

2) Research into factors affecting patterns of transformations occurring in the area of dispute resolution.

According to international research, the regularity rules are not the products of static or dynamic evolution. They are a consequence of the extremely high degree of uncertainty that characterizes the social and, especially, legal reality (associated with collective symbols and values). Regular rules in this area are understood only as "chances" (Weber), or "opportunities" and "trends" (Gurvich), the realization of which is limited by a large degree of unpredictability.

Finally, economic globalization and integration has increased in Europe and other countries since the fall of the Iron Curtain. The world has entered a new dimension. But it was, first of all, a transformation of life outside the national courtrooms.

The question is how much this transformation affected civil procedure, which, in the opinion of M. Cappeleti and the Russian authors of the Model Civil Procedure Code, already needed deep changes. The foregoing issue will be covered later. For now, it is sufficient to state that a sense of crisis has arisen in a lot of national procedural systems since the beginning of 21st century. This has been accompanied by attempts to implement a new approach to civil procedure.

This conclusion has been reached with the help of more than one factor. It is the result of several external and internal processes which take place in the court system. Nevertheless, in this local example we can see the general trend of the cyclical nature of history. The important process is a new social context–changing methods of communication between people, so the requirement for "deep transformation" is taken forward at a different level.

International research has demonstrated, that:

– Convergence is now a phenomenon not only of specific geographical spaces and political and institutional entities (Europe, South America), but also a worldwide tendency in the development of law in general (even if states are included in this global process de facto without being a part of an integration association);

– Civil procedural law is traditionally in the focus of modern development in EU countries and states in the post-Soviet space within the framework of the Eurasian Economic Union (EAEU);

– There is an internationalization of processes, a mix of various types of legal procedures;

– There is a growing desire of participants and authorities of the association to control the scope and speed of this phenomenon.

Consequently, we must nevertheless recognize that, with regard to international organizations, the convergence of civil procedural law of the member countries is more effective competition between them. Exacerbating the problem is that the one complete system includes inconsistencies in its elements.

This is complicated by the fact that every international organization and every system of law influencing these organizations should be understood as a microcosm of legal regulation. That means contradictions take place inside the same type of society. The problem is highlighted in the famous researches by A.J. Toynbee, S.P. Huntington, and P. Sorokin.

The national models of justice in modern countries are influenced by different local factors, such as the underlying structure, principle and historical traditions of civil justice, and judicial culture, i.e. the culture of judges, attorneys/advocates, court officers and litigants.

The idea of keeping abreast of advancements in technology is about reforming civil justice.

1. Transformation of Civil Procedural Law in the Post-Soviet Union Space

Considering regular rules as trends that should be established separately across the scale of each integration society, we believe that it can be possible to formulate some results of the development and approximation of civil procedural law, which should be considered only as a working hypothesis.

Moreover, the phenomenon of convergence of legal and procedural systems, especially in the post-Soviet space, has not been subjected to comparative research in-depth enough to allow us to confidently talk about specific tendencies.

The diversity of contemporary judicial systems in Europe and Eurasia–largely due to the nation-state–has contributed to the regulation, codification and the building of civil procedure structures exclusively relating to sovereign authority at the national

level. With the dissolution of the Soviet Union there was a loss of a unified Soviet legal and procedural system. The first integration in the USSR was the CIS.

As we know, the CIS usually is understood as a model of diversification, not as a model of cooperation. Nevertheless, the necessary level of convergence of national legislatures was adopted in the Statute of 1993.

Most modern researchers classify the socialistic legal model and soviet model of civil procedure as a Civil Law legal system. As for Soviet legal thought, it was characterized in the relevant period of time as not having the qualitative identity of scientific knowledge but being an inevitable continuation of classical tradition. However, its development in specific Soviet conditions was hampered by a strong ideological foundation.

At the same time, the basis of civil procedure doctrine and basis of the theory of administrative justice were formulated in Soviet science. It is not correct to talk of the complete absence of influence of foreign jurisprudence on the advancement of Soviet procedural science. Experience gathered by procedural doctrine (which was considered one of the less ideological spheres of law) has not only ensured the implementation of reforms by newly formed states but still serves as an appropriate basis for effective multicultural discourse and productive discussion. In this regard, the accession of some states to the Council of Europe has become a prerequisite for a qualitatively new development of civil procedural law.

In this context it is incorrect to talk about the non-effect of foreign legal knowledge and legal thinking on Soviet procedural research. At the same time, the bases for civil procedure doctrine and administrative justice theory were formulated by soviet legal science taking foreign practice into consideration. Within this framework, the experience gathered by procedural doctrine (was deemed one of least ideologically charged areas of law) allowing for the realization of necessary legal reforms in newly formed states. Moreover, it has become a basis for transnational dialog and fruitful discussion.

In addition, after the dissolution of the Soviet Union, separate republics retained Soviet legal rules of civil procedure. In almost every CIS and Baltic country, Soviet civil procedure rules remained in force over the course of many years. The first civil procedure code distinguished from Soviet law was adopted in Estonia in 1993. Russia and Lithuania were two of the last states to adopt new codes.

The active steps taken to change national civil procedure legislatures in the post-Soviet space, which took place under a CIS framework in the first years of the intergovernmental organization (1997–2002) (the organization cooperated with 10 post-Soviet republics in Eurasia, i.e. Azerbaijan, Armenia, Georgia, Kazakhstan, Moldova, Kyrgyzstan, Turkmenistan, Uzbekistan, Belarus, and Russia), reflected the struggle to retain historical identity. This can be proven not only by reconstitution of forms, principles terminology judicial methods and techniques, but by the extraordinary volume of legal materials considered in previous legal acts.[1]

[1] The Model Code of Civil Procedure for States Parties to the Commonwealth of Independent States (2003).

As well as reforming the judicial system, the above process aimed to:[2]

– Extend judicial competence to civil, labor, family conflicts and administrative cases;

– Adapt the adversarial principle and the principle of free exercise of material and procedural rights by the parties to legal proceedings for the national legislatures. Previously, in legal practice the principles were only accepted as a theoretical provision and "ideologically" covered up for inquisitorial procedure;

– Simplify the judicial process, through the transfer of cases for consideration by judges alone by fixing the rules of correspondence and order proceedings;

– Strengthen the role of the courts of second instance in reviewing judicial acts.

With regard to the problem of convergence (harmonization) and unification of the civil procedure legislation of the CIS countries, the foregoing changes can be added to the following.

In addition to the movement towards the community, due to the extreme complexity of the modern legal and procedural system, the tendencies of this system are moving towards the adoption of procedural codes of a more unique (national) nature.

Along with this, the regular rules of change that could be observed at the turn of the century reflect the desire for reception (transplant) of the provisions of the judicial procedures of European states. Moreover, this was to be achieved through an amalgam of Romano-Germanic and Anglo-Saxon law. This is because foreign specialists and experts were involved in research for the aims of legislative process. As an example, Azerbaijan's CPC was developed in cooperation with the Council of Europe on the basis of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The commentary on the provisions of the Code was prepared with the help of the German Society for Technical Cooperation (*Deutsche Gesellschaft für Technische Zusammenarbeit GmbH* (*GTZ*)).

The same fate befell the Civil Procedural Code of Georgia in 1977.[3] This led to the fact that the latter immediately largely departed from the traditions of the "Soviet (socialist)" procedural law with the aid of direct adoption several provisions of German ZPO.

Legal transplant (including the transplantation of legal norms, principles and definitions) is an instrument used by every country in the world. Legal transplant of norms from a foreign legal system is the most user-friendly and soft method of adaptation to changed social circumstances. We know that the collision of the

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[2] *Вершинин А.П.* Реформирование гражданского и экономического процессуального права в странах СНГ (основные направления и проблемы) // СНГ: реформа гражданского процессуального права: материалы Международной конференции [Alexander P. Vershinin, *Reforming Civil and Economic Procedural Law in CIS Member States (Principal Directions and Problems)* in *CIS: Reform of Civil Procedural Law: Materials of the International Conference*] 15 (M.M. Boguslavsky & A. Trunok (eds.), Moscow: Gorodets, 2002).

[3] Civil Procedure Code of Georgia (Apr. 7, 2020), available at https://matsne.gov.ge/en/document/download/29962/92/en/pdf.https://matsne.gov.ge/ru/document/download/29962/92/ru/pdf

civil law tradition and the common law tradition took place in the 20th century. The research based on a comparison and collation of European civil procedure systems substantiate that, despite reforms, the attempts to adopt legal mechanisms resulted in the discordance and ineffectiveness of transplanted legal norms. Paradoxically, the legislative amendments led to many more contradictions between the procedural systems of Finland, the UK, Germany, and Norway than between three different legal traditions–the Scandinavian legal tradition, the common law legal tradition and the civil law legal tradition.

In particular, in the process of convergence of the civil process in the EU, a "clash" occurred between the continental legal tradition (majority) and the common law countries (minority). As a result, the common law tradition failed. The judicial practice of the International Court of Justice excluded procedural institutions which did not correlate with the conception of European Civil procedural law from the legal regulations of the European Union.

As a result of the convergence of two well-known civil procedure forms, substantive changes occurred not only in the procedural rules of common law, but also in the continental law tradition. The relevant examples are an active promotion of new forms of judicial protection adapted for the process class actions by the European Commission (for instance, civil action for damages by consumer protection agency or class actions for unrestricted competition) despite the negative reaction of some civil law states. In this case, the issue is the realization of the class action model, which was time-tested by the common law tradition. However, it should be taken into account that, under this same scenario, theoretically, the general doctrinal model of civil procedure is made more difficult. Nevertheless, this kind of interpenetration of legal traditions in conjunction with large-scale scientific projects (the work of M. Storme's group) led to the fact that the law of neighboring EU Member States was no longer perceived only as an "object of scientific research" but also became a part of common European legal culture.

So all states have enough experience to know not to rush the use of the most pervasive instrument of legal convergence since the Roman era, i.e. legal transplant.

It is important to understand that the conclusion that the need for a major transformation in civil justice is not a question of nation or religion but one of worthwhileness and practicability (R. von Jhering), was not reached in one go.

The development of comparative legal research fully confirmed this idea during the last decades. All cases of legal transplant, including the examples of German procedural law (German legal experts were the leading foreign advisers) prove that the development of procedural law is not a question of nations but a question of appropriateness and practical needs. Using elements of procedural law created in non-native legal traditions is possible only in the context of meta- or extra-legal factors.

The legal systems of CIS countries have as many similarities as differences. The similarities are commonly explained by the same historical roots of civil procedure

in CIS countries. There is not a state in the CIS that has not made efforts to renew its civil procedure legislation.

Russian legal literature states that the civil justice of these countries developed in the similar socio-economic and political conditions at least from the second half of the 18th century and before the Dissolution of the Soviet Union in the 90s of the 20th century. Prof. D. Maleshin rightly points out that, despite the existing sociocultural differences, the development within one state allowed the procedural systems of the regions to enrich and complement each other.[4] This statement, among other things, is based on the simple fact that one of the important unifying elements of the civil procedure systems in the CIS space is the Statute of Civil Procedure of 1864. According to contemporary sources, the Statute was considered one of the best European civil procedure codes of the time. It laid down new principles for the organization of civil proceedings (adversarial, expansion of oral hearings, etc.). The Russian Empire received a completely new system of legal proceedings, as well as a completely new judicial system.

The Soviet system of civil procedure was based on a uniform system of courts. There were model laws of the USSR and on the judicial system, and on legal proceedings, for example, the Basics Law of civil proceedings introduced in 1961. At the same time, the laws of the Soviet republics in the sphere of legal proceedings were different although their bases were the same. The regional specifics of legal proceedings were laid down during the imperial period.

From comparative studies, it turns out that the existing differences between the civil procedure systems in each CIS country did not affect the existence of general development tendencies. This is largely due to the existence of common institutional similarities, a common model of civil process and basic principles of legal order, as well as the common desire for unification that arose in most socialist countries in the recent past.

As for individual CIS countries, the procedural legislation of which has acquired a distinctive character, one can observe the tendency for most countries to join international agreements in the field of international civil procedure (for example, the Convention on Civil Procedure (the Hague, 1954), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague, 1965), the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague, 1970) linked with the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms.

This served as an impetus for the CIS Interparliamentary Assembly to draw attention to issues relating to the harmonization and unification of the civil procedural law of the CIS countries. In this context, we should remember that at

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[4] Dmitry Maleshin, *The Russian Style of Civil Procedure*, 21(2) Emory International Law Review 543, 558 (2007).

the turn of the 21st century in the territory of the CIS countries there was observed a unification of the civil process of the Member States, which was retained from the time of the former single legal space, in conjunction with the desire of most of them to become part of the world (European) community. In this context, there have been attempts to revive the "model regulation" (soft law).

In this regard, at the end of 1999, states, inspired by trends in the international procedural community, decided to develop a Model Code of Civil Procedure through the CIS Interparliamentary Assembly. The "Concept and Structure of a Model Code of Civil Procedure for States Parties to the Commonwealth of Independent States" was adopted in 2003.[5] According to the initiators of the project, it "fits into the process of international unification of the civil process very well." At the same time, even the key words "prerequisites for modernization" in the title prove that the authors presumed convergence through the prism of reforms, and not as creating a uniform legal space in CIS countries.[6]

In addition, by that time more than half of the Commonwealth states had updated their procedural legislation. However, the idea and preliminary conceptual justifications of the future project were supported by national parliaments, the Economic Court of the CIS, the Supreme Courts, and well-known lawyers of the Commonwealth states.[7]

Moreover, the project had to express the desire of the Commonwealth countries to preserve the traditional proximity of national civil justice systems to ensure their interaction and further development based on modern scientific and methodological conceptions of the law-making process and a universal pragmatic reference model.[8]

The authors of the project believed that its implementation would allow one of the key areas of legislation to be adapted according to modern socio-economic realities, procedural doctrine and new international standards for the democratization of justice. The authors are guided by the Russian Statute on Civil Procedure of 1864 and German *Bürgerliches Gesetzbuch* of 1877 in determining the content and volume of the future code.[9]

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[5] It was adopted by the Resolution of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States of 16 June 2003 No. 21-6.

[6] B. Lapin and N. Chechina were the authors of the Conception and structure of the Model Code.

[7] *See Лапин Б.Н.* О проблемах реформирования гражданского судопроизводства в странах СНГ // Журнал российского права. 2000. № 9. С. 97–111 [Boris N. Lapin, *On the Problems of Reforming Civil Proceedings in CIS Countries*, 9 Journal of Russian Law 97 (2000)].

[8] This was reflected in statute acts conventional law and international agreements. *See Лапин Б.Н.* О концепции проекта Модельного кодекса гражданского судопроизводства для стран Содружества Независимых Государств [Boris N. Lapin, *On the Concept of the Draft Model Code of Civil Procedure for States Parties to the Commonwealth of Independent States*] in *CIS: Reform of Civil Procedural Law*, *supra* note 2, at 30, 32.

[9] *Id*. at 48.

2. The Experience of Model Legal Regulation and its Particular Importance

The authors of the project presumed the repetition of Soviet ideology (which established a strong correlation between procedural norms and material norms) was the reason for general problems reflected in the procedural codes of CIS Member States (Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Russia, and Uzbekistan) in force at that point in time. In their opinion, one and the same model of judicial proceedings could not be used for all case types. Different circumstances of cases, using different reliefs and remedies applied by courts, can determine various court proceedings used for different case types. The result of these ideas is a more effective judicial procedure for the procedural enforcement of civil law, commercial law, financial law, labor law and other areas of material law.[10] The discussions about civil procedure as actions based on goals have led to passive and isolating judicial procedure. In addition, the authors of the project were faced with the question: "Who needs to decide a dispute?" On the one hand, a final judicial decision is important for the parties of the dispute but, on the other, the state is interested in the correct and uniform application of judicial procedures, and meting out justice.

The state of procedural legal relations for assessing the social effectiveness of a trial is a serious matter that is important for researchers. The role of procedural formalism as a phenomenon in the dispute resolution system has been discussed for decades. In the Soviet model of judicial protection of rights, procedural forms have their own purpose.

They are nothing more than the rules of the game, which determine the order of the procedural actions, and must be strictly observed. The peculiarity of the judicial form of protection is that it is more adapted to the establishment of the actual circumstances of the case and more regulated. As a result of this, it guarantees the establishment of the truth, the protection of the rights and effective implementation of disciplinary functions; and it is used for monitoring the correct implementation of all other forms of protection.

Finally, judicial protection provides direct public enforcement of obligations constituted by court decision. The exercise of the constitutional right of meaningful access to the courts should be possible for every citizen whose subjective rights or legal interests were violated.[11] These primary elements of procedural reform are

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[10] This is about the Chapter 7 of the Model Code of Civil Procedure for States Parties to the Commonwealth of Independent States.

[11] *See Чечот Д.М.* Субъективное право и формы его защиты / *Чечот Д.М.* Избранные труды по гражданскому процессу [Dmitry M. Chechot, *Subjective Right and the Ways of its Protection* in Dmitry M. Chechot, *Selected Works on Civil Procedure*] 78–79 (St. Petersburg: Publishing House of St. Petersburg State University, 2005).

reflected in civil procedural principles, such as the principle of access to justice, the principle of equal protection of the law, the principle of adversarial procedure, the principle of party disposition (the disposition principle), the principle of independence and impartiality of the judiciary.

In this regard, the detailed structure of judicial enforcement is one of the special aspects of the Model Code. The Model Code includes sections such as § 1 "The Application of Legislative and Other Regulatory Acts"; § 2 "The Application of Acts of Official Interpretation of Legislative and Other Regulatory Legal Acts, General Principles, Judicial Precedents, Business Practices and the Practice of Habit"; § 3 "The Application of General Principles and Norms of International Law." In the context of the convergence of procedural law and order, it is interesting that provisions which relate to the application of acts of the CIS Economic Court, the European Court of Human Rights and other international courts are reflected in the norms of the Code (Arts. 223–225, 239 of the Code). Here, first and foremost, we mean a legislatively built up logical chain of application of law, principles of interpretation of legal rules and practice and established limits of judicial discretion. In this sense, a unified approach is an important element of convergence. In the same sense, the existence of a common approach to the internal application of acts of international courts (e.g. the CIS Economic Court and the European Court of Human Rights) is an important factor in the process of creating a legal space within an integration organization.

The significance lies in the fact that all national courts of the Member States are connected by a uniform mechanism for the application of acts of international courts. However, legal practice in the CIS space has taken a different path in relation to the question of the consequences of violations of human rights and fundamental freedoms found by the European Court of Human Rights in a decision on a civil case. Therefore, according to Russian law, these facts are considered new circumstances and are the basis for the revision of the judicial acts which entered into force by virtue of part 4 of Article 392 of the Civil Procedure Code of the Russian Federation (hereinafter the RF CPC), part 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation (hereinafter the RF APC). By contrast, according to the law of Armenia, Article 228 of the Civil Procedure Code of Armenia[12] makes no mention of this ground for reviewing at all. According to Articles 431-1.2.2 of the Civil Procedure Code of Azerbaijan,[13] this basis is included in the category of new circumstances, but the Code provides for a special procedure for reviewing (Arts. 431-2 and 431-3 of the Civil Procedure Code).

It should be noted that the project was aimed at finding successful ways of managing civil procedures within the framework of an integration association since

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[12] Civil Procedure Code of Armenia (Apr. 7, 2020) available at http://www.parliament.am/legislation.php?sel=show&ID=1918&lang=rus#5.

[13] Civil Procedure Code of Azerbaijan (Apr. 7, 2020) available at http://www.jguard.ru/images/attaches/228/gpk_azerb.txt.

the very beginning. In this regard, and in the opinion of the developers themselves, the presence of a legal glossary in the codified act should allow contradictions and errors in the perception of legal values to be overcome and make legal definitions uniform for application not only to judicial, but also to other, jurisdictions. The list of terms should include definitions such as: access to court; civil suit and administrative suit; suit in the public interest; litigants; claimant; defendant; legal representatives; interested parties; disinterested parties; legal costs; legal objections; arbitration procedure; fast-track procedure; stages of civil procedure; preliminary trial; litigation and evidence.

Taking into account the international character of the Model Code and the practical significance of a number of its sections, the terms used in the international civil process were included in Annex No. 2 of the Code (Chs. 58 and 60 of the Code). At the same time, the main parts thereof were borrowed from reputable scientific sources, including foreign sources. In order to be convinced of the meaning of the authentic interpretation of general concepts of international civil procedure, it suffices to recall the problem of admissibility and the limits of interpretation of certain terms of the civil process by the highest judicial authorities within EU legal practice. Thus, the European Court of Justice, recognizing that it does not have the competence to determine the content of the public order of an EU Member State, highlighted that

> [it] nevertheless has the authority to control the limits of judicial discretion in accordance with which the judge ... can refer to this concept for non-recognition of a decision of foreign court.[14]

Russian procedural doctrine highlights that otherwise a process with a foreign participant (including a CIS Member State), in which questions arise from the international civil process, presumes various interpretations of common terms, not only in courts of different integration organizations, but also between the courts of a single state.[15] Moreover, uniform terminology may be absent in the procedural legislation of one country. For example, the international civil process term "*forum prorogatum*" is enshrined in Article 404 of the RF CPC as "prorogatory agreements" but, at the same time, it is called an "agreement on competence" in Article 249 of the RF APC. The term could sometimes be misleading, because Article 404 of the RF CPC

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[14] *See Крохалев С.В.* Категория публичного порядка в международном гражданском процессе [Sergei V. Krokhalev, *Category of Public Order in International Civil Procedure*] 472 (St. Petersburg: Publishing House of St. Petersburg State University, 2006).

[15] *See Брановицкий К.Л.* Сближение (гармонизация) гражданского процессуального права в рамках Европейского союза и на постсоветском пространстве (сравнительно-правовой аспект) [Konstantin L. Branovitsky, *Rapprochement (Harmonization) of Civil Procedural Law Within the European Union and in the Post-Soviet Space (Comparative Legal Aspect)*] 399 (Moscow: Statut, 2018).

does not impose requirements for the form of an agreement about the jurisdiction of cases with a foreign party to a dispute and does not include a condition of validity such as compliance of the concluded agreement with the exclusive jurisdiction of a foreign state.[16] In any case, including legal terminology in the Model Code glossary is due to the desire to eliminate uncertainties in interpreting legal terms, and understanding the meaning, "spirit" and "letter" of the law, as applied to determining the forms and mechanisms of social control over judicial discretion. In this regard, it is appropriate to recall that, until 2017, only Article 1 of the Civil Procedure Code of Belarus of 1999 and the Economic Procedure Code of the Republic of Belarus of 1998 contained a list of basic terms and their definitions among CIS countries. Furthermore, Article 2 of the Civil Procedure Code of Kyrgyzstan contains a kind of legal glossary of terms and concepts.

Russian legal science also presents an approach that insists on the need to supplement the basic national legal acts on civil justice (the RF CPC and the RF APC) with special articles containing definitions of terms used. The experience of the Code of Civil Procedure of Belarus is, unfortunately, not mentioned in such cases, and the guidelines are the Civil Procedure Rules of England and Wales (the Civil Procedure Code of 1908) and the Civil Procedure Code of Quebec, Canada (CCQ). Among the issues to which particular attention was paid in the Model Code was the law of evidence (Chapter 6, consisting of 110 articles (Arts. 112–222)). In legal science, this "main legal institution of civil process" is the focus of Russian researchers' interests in the context of the unification of the civil process in the post-Soviet space to this day. In this regard, there were proposals to adopt a separate Model Law on Evidence of the Eurasian Economic Community (EurAsEC) at the time.[17] According to the authors of the project, the need for detailed regulation of the fundamental questions of evidence was associated with the nature of the adversarial procedure. The point was that the institution was regulated rather schematically in some of the procedural laws which were in force at the time in CIS countries. For example, the Civil Procedure Code of Azerbaijan contained only 6 articles (Arts. 76–82).

However, the modern evidentiary process cannot function without a common usage of presumption of facts; presumptive evidence and privileges; reliable ways to provide proofs; and to determine the criteria for their relevance and admissibility. The authors were faced with the task of changing the standard of proof: to replace

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[16] *See Богданова Н.А.* Соглашения о международной подсудности в отечественном правопорядке // Арбитражный гражданский процесс. 2017. № 2. С. 28–32 [Natalia A. Bogdanova, *International Jurisdiction Agreements in Domestic Legal Order*, 2 Arbitrazh and Civil Procedure 28 (2017)].

[17] *See Нахова Е.А.* К вопросу о перспективах гармонизации доказательственного права в арбитражном судопроизводстве в процессуальном законодательстве стран – участниц ЕврАзЭС // Арбитражный и гражданский процесс. 2013. № 5. С. 18–22 [Elena A. Nakhova, *On the Prospects of the Harmonization of the Laws of Evidence in Arbitration Proceedings in the Procedural Legislation of the Countries of the EurAsEC*, 5 Arbitrazh and Civil Procedure 18 (2013)].

finding the objective/absolute truth of the civil process with achieving the "maximum possible credibility" of establishing facts in the process.[18] In turn, some provisions of the Model Code in the field of evidence law almost directly refer to the Statute on Civil Procedure of 1864 (Arts. 367 and 368 of the Statute). It is intended, first and foremost, that provisions contain instructions for courts regarding unclear circumstances of a case, according to which evidence must be presented by the litigants.

When debating the meaning and significance of such regulation (pre-revolutionary and model), some Russian researchers reasonably compare it to the principle of judicial management in the foreign adversarial procedure systems and the corresponding responsibility of judges to give an explanation to the parties.[19] To clarify this, it should be added that, in the 1890s, F. Klein attempted to form a model of a civil process in which the establishment of objective truth and the use of effective case management would be two non-mutually exclusive goals.

It was a time when old areas of legal science found recognition of their autonomy. In the beginning of 20th century, Russian legal expert V. Ryazonovsky (author of the book "Unity of Procedure") said that material aspects of conservative legal doctrine cannot correctly describe the specific characters of procedural branches of law.

The passage of time has already proven that there was nothing else left but to completely change one's attitude to the debate about the place of objective/absolute truth in the judicial process. In this case, only by realizing that they often had ideological prerequisites and that, in the relevant context–especially during the Soviet period of the development of procedural science–one can see that, in extreme cases, these ideological requirements could overshadow the issue of the goals of the procedure. But following this line of reasoning in legal science (both Russian and foreign) indicated not only the importance of the legal and ideological factors in the development of law. Our ideas about that the legal and procedural system, legitimation, the role of judges, legislators and legal scholars should be based not only on a monistic and hierarchical scientific approach, but on an interdisciplinary, pluralistic and communicative approach. That is why modern jurisprudence proclaims the thesis that the problem of the development of the national order of the judicial process in the modern world needs a comprehensive study in a comparative context. But this requires a methodological shift in more than one sense.

This short digression shows that, in the context of this communicative perspective, it is now becoming apparent that in the past and present, and well into the future, the main principles of organization and work of civil justice are connected with the idea of the role of judges. Modern foreign process researchers have paid special attention

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[18] Lapin 2002, at 39.

[19] *Брановицкий К.Л.* Понятие и значение судебного руководства рассмотрением дела по существу в гражданском процессе Германии // Закон. 2014. № 4. С. 177–186 [Konstantin L. Branovitsky, *Definition and Meaning of Judicial Management of the Merits in German Civil Procedure*, 4 Law 177 (2014)].

to the question of whether the concept of the proper role of a judge influences the model of European civil justice and, in particular, its structure. It is enough to point out that a system in which the judge is expected to actively provide clarifications and identify key issues under dispute requires a model in which the judge can actively participate in the proceedings during the all stages of the litigation.

This is a manifestation of the idea of civil proceedings as a joint effort of the court and the parties. In this regard, it is entirely appropriate to state that a change in the structure of civil proceedings would probably also require, at least to some extent, reform of the central concepts. In particular, clarification as a concept does not require an investigation by the judge. This is also reflected in PTCP Principles 10.3, 10.4, and 22. The judge, therefore, must find a new role that is different from the investigative and passive role of the judge.

In this regard, the provisions of the Model Code, in which an attempt is made to establish standards of proof are of undoubted interest. The latter is understood as a procedure, ordered by the Model Code, for obtaining, researching, selecting and evaluating evidence submitted to the court and accepted thereby for final decision making. It is impossible to imagine from the point of view of modern Russian jurisprudence, or from the point of view of Western law, that the rules for the selection and evaluation of evidence are strictly established and regulated by law.

It is appropriate to mention a vicious circle, which, in practice, leads only to a misunderstanding of the mechanism for adopting a court decision by the parties to a case: the procedural laws of many CIS countries contain terse language about the sufficiency of proofs (Art. 67 of the RF CPC; Art. 7 of the RF APC; Art. 88 of the Civil Procedure Code of Azerbaijan; pt. 6 of Art. 68 of the Civil Procedure Code of the Republic of Kazakhstan; Art. 241 of the Civil Procedure Code of the Republic of Belarus), and, after the foregoing, they indicate the principle of free evaluation of proofs based on inner conviction (Art. 71 of the RF APC; Art. 88 of the Civil Procedure Code of Azerbaijan; pt. 1 of Art. 53 of the Civil Procedure Code of Armenia; pt. 1 of Art. 76 of the Civil Procedure Code of Kyrgyzstan, and Art. 241 of the Civil Procedure Code of the Republic of Belarus).

A number of experts who research this issue explain the detailed elaboration in the Code of problems of evidence and proof not only being due to the desire to prepare model regulation for CIS countries; they also associate this with the fears of that period of time regarding the transition to an adversarial model of judicial proceedings. Other authors expressed fears about the implementation of the ideas of adversarial procedures and the disposition principle in procedures or the categories of cases arising from administrative legal relationships and special proceedings cases.[20] Subsequently, this kind of concern regarding the extension of the principles of an adversarial nature of legal proceedings to the scope of administrative procedure

[20] Vershinin 2002, at 17.

in some CIS countries was essentially resolved. At the same time, the Russian legal researchers point out the differences existing here between the substantive and the formal approach, which is already visible in comparison with the tasks of administrative procedure.

Under the formal approach, the list of tasks "traditionally" (following civil proceedings) includes: a duly conducted and timely trial and decision on administrative cases; consolidating legality and preventing violations in the area of administrative and other public relationships, etc. (Art. 3 of the Administrative Procedure Code of the Russian Federation). With a different approach, the main task is only the protection of the rights, freedoms and interests of individuals, and the rights and interests of legal entities in the field of administrative (public law) relationships, from violations by administrative authorities and their officials (Art. 4 of the Administrative Procedure Code of Kyrgyzstan[21]). In terms of proceedings principles, the difference in approaches is also obvious: the preservation of adversarial procedure principles (Art. 14 of the Administrative Procedure Code of the Russian Federation) versus the complete rejection of adversarial trial (Art. 12 of the Administrative Procedure Code of Kyrgyzstan).

The principle of objective investigation replaces the principle of adversarial trial in administrative proceedings according to the law of Kyrgyzstan. It involves the preliminary investigation of all the factual circumstances of the case by the court, regardless of the explanations, statements and proposals of parties to the case, the evidence submitted and other materials. The court takes evidence itself on its own initiative or based on the requests of parties to the case. At the same time, as the authors of the Model Code themselves noted, it will significantly improve the procedural codes, strengthen its adversarial principles, create conditions for timely and qualitative development of procedural relationships, and make the actions of judges and other participants of proceedings more predictable in the Commonwealth states.[22] In professional circles, there is no doubt that the developers of the Model Code sought to prepare a modern model act of civil justice, combining samples of pre-revolutionary and foreign doctrine. In the opinion of the authors themselves, the Code is comparable to the Russian Statute on Civil Procedure of 1864 or the German *Bürgerliches Gesetzbuch* of 1877.

In general terms, it should be noted here that the 1864 Statute on Civil Procedure was a unique act. It absorbed rules from different sources (pre-reform Russian law, Polish and Lithuanian acts, Swedish norms, and regulations from Central Asia and the

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[21] Administrative Procedure Code of Kyrgyzstan (Apr. 7, 2020) available at http://cbd.minjust.gov.kg/act/view/ru-ru/111520/20?mode=tekst.

[22] *Лапин Б.Н., Чечина Н.А.* О проблемах реформирования гражданского судопроизводства в странах Содружества Независимых Государств // Правоведение. 2000. № 4. С. 145 [Boris N. Lapin & Nadezhda A. Chechina, *On the Problems of Reformation of Civil Procedure in CIS Member States*, 4 Jurisprudence 131, 145 (2000)].

South Caucasus).[23] The work to develop an integral act for socially different regions and different socio-cultural groups was continuing even after its adoption (due to being in force more than 30 years, about 700 changes, additions and amendments were adopted). From this point of view, there is no equivalent of this act in the world. In this context, only attempts by a modern European legislator to develop a unified code of civil procedure for a united Europe are mentioned in Russian literature with reference to the similarity of conditions. However, according to Prof. C.H. van Rhee, even if they succeed in adopting a uniform code, "uniform rules, of course, do not guarantee their uniform interpretation and application in practice."[24]

3. Transformation of Civil Procedural Law in the European Union and the Post-Soviet Union Space: Equality and Diversity

It is no surprise that some authors understand the common principles of procedural law (Statute on Civil Procedure of 1864) and Soviet Civil procedural doctrine as a prototype for the Eurasian legal (civil procedure) space. Foreign legal experts declare with some confidence that the phenomenon of *ius commune* should be understood as a prototype for the modern European legal space

Comparative legal research has shown the creation for the basis for integrity of European society under the egis of reversion to *ius commune*. A number of commentators speaking on this issue in connection with the development of the Model Code of Civil Procedure at the CIS Interparliamentary Assembly describe this phenomenon through a social metaphor–a "common procedural basis" that has long been hidden behind territorial features. As a clarification, we should add to that this return is not only because there are principles of universal value that relate primarily to human rights. Today, the procedural doctrine recognizes that civil proceedings should be in the interests of 21st century society. We suppose that it is not correct to presume everything shared by all humankind has been formulated at a global level. In any case, all universals of culture not only have their own history, but also their own geography. As for the approximation of civil procedural law in the European space, as a general rule, it was carried out by intensifying integration and legal processes. While in the post-Soviet space, the dynamics were not so obvious. Thus, recent studies of European procedural systems discuss the "Europeanization" of the civil process, and the implementation of common minimum standards. They point out that the creation of authority to evaluate national justice systems, such as the Council of Europe's European Commission on the Effectiveness of Justice (CEPEJ), as well as the idea of mutual trust, encourages states to compare their laws and regulations with national

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[23] *See* Dmitry Maleshin, *Overview of Russian Civil Justice*, 3(4) BRICS Law Journal 42, 45 (2016).

[24] Cornelis H. van Rhee, *Civil Procedure: A European Ius Commune?*, European Review of Private Law 589, 606 (2000).

legal sources of other states that are perceived as best practices for succeeding in the effectiveness of justice. In addition to membership of international organizations, procedural transplantation is becoming an indispensable mechanism. In accordance with international studies, it appears that judicial reforms in various types of civil procedure are examples of mutual enrichment, when reforms in each country are clearly inspired and based on the reforms or strategy of other countries.

A high rate of activity by states was observed only during the very beginning of the CIS. At this stage, the scientific community in the field of civil procedural law faced the same task of changing ideas about the model of civil procedure, its principles, goals, etc.

Inter-republic scientific exchange, which was created inside the USSR continues to exist as inter-state scientific exchange between independent countries. The economic integration in the EurAsEC, and later the EAEU, in no way influenced the process of integration in the sphere of civil procedure.

It is appropriate to recall that it was at the level of the CIS constitutional documents that ideas were voiced about the need to bring laws in to closer alignment and eliminate differences in the legal regulation of individual participating states; rapprochement was included in the political agenda. New organizational forms of integration were available to replace the CIS. This thesis is relevant for the members of the CIS, which decided to continue economic and legal integration. As for forms and processes of transformation in the sphere of civil justice, the perception of many researchers (and the authors of this article) is that the judicial system of modern states is understood as a polycentric model which is characterized by differentiated strategies based mainly on perceptions of the purposes of trial.

Landscapes of global civil justice, especially in Baltic and CIS countries, undoubtedly demonstrate unity and, at the same time, diversity. In the 21st century, key factors in many reforms in different parts of the world have been proportionality, access to court and management, while the traditional procedural doctrine focused almost exclusively on the civil (material) model of justice (i.e. on the accuracy of decision-making, fair trial and the sequence of judicial decisions). Furthermore, as follows from the text of this article, this is not a completely new approach. The "new theory of justice" of Lord Wolfe in England and Wales is considered the most authoritative and striking example in this sense.

At the same time in Russian legal discourse the idea of creating a general legal doctrine based on the conception of judicial law exists. Finally, many post-Socialist countries tried to change the structure of their civil procedure. In this regard, one should pay attention to similar directions of phased reforms of procedural legislation in all countries of the post-Soviet space, as the reform was carried out not only by way of borrowing the experience of neighboring countries, but also on the basis of the desire to perceive global trends. However, in spite of judicial reforms, traditional civil procedure doctrine and the conservatism of official legal theory has kept things the same.

Conclusion

We can safely assume that judicial and ADR reforms in a lot of countries are linked to current social changes in society and technology. It should be agreed that civil procedural law of modern countries and integrated associations in Europe and Eurasia could be faced with unprecedented difficulties. At the same time, although public dissatisfaction with the work of the modern judiciary has increased, the rapid and adequate adaptation of the judiciary to the requirements of new social realities in most countries has occurred at a rather modest pace or not at all. Therefore, the stakes are high. The need to discuss this issue through a broad international scientific discussion is becoming increasingly apparent. In this context, we should not to forget that development of legal reality promotes knowledge as a social phenomenon. Since the founding of the University of Bologna (11th–12th centuries)–along with other determinants such as economic (integration), linguistic, cultural components–knowledge has been a factor in changes in the field of dispute resolution in several aspects.

On the one hand, if collective intellectual perceptions in conjunction with moral values are the most important elements of law, their variations are caused by changes in judicial beliefs and behavior. For example, the harmonization of civil procedural law has led to changes in comparative civil procedure. It is important to note that this has been accompanied by an idea about adoption of the thesis of "best practice" for model regulation. In contrast to traditional uses of comparative law, knowledge promotion in the sphere of civil process as the most important part of civil procedural law has become one of the substantive points of the analysis. In a similar vein, excessive emphasis on legal rules is even less justified in the sphere of procedural law, which is focused on acts by authorities, parties and lawyers.

On the other hand, knowledge acts as a factor that causes changes in law in a more focused and more effective way. It influences methods of acceptance of mechanisms of dispute resolution and formal sources of law. Even for preparing citizens to solve their problems, whether legal or not, the upbringing and intellectual education of leading academics, lawyers and judges is of great importance in the development of legal reality. The role of law as a factor of knowledge is very limited. Unfortunately, the global trend of "collectivization" in the sphere of civil justice described by M. Cappelletti[25] is still more likely to exist in speeches, programs and theoretical research than in daily life. The same things were relevant for ADR in the recent past.

As a final but no less important point: collective psychology indirectly effects law through religion, knowledge and even economy, ideology, and traditions. A leading expert on procedural law, M. Storme, raised this issue in relation to the application

[25] Mauro Cappelletti, *La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile)*, 27(3) Revue internationale de droit comparé 571 (1975).

of a theory of morphic resonance in civil procedural law. He has described the direct influence of this phenomenon on the development of civil procedure through the role of the International Association of Procedural Law (IAPL) in this context. This state of psychology contributes to the achievement of excellence in the theory and practice of procedural law.

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