Culture and Judicial Independence in Civil Procedure

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CHAPTER TWENTY-SIX

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Introduction

Several events have occurred at the turn of the century that have affected legislation as well as doctrine. They have occurred not only in the field of law, but also in other spheres: economics and culture, in the context of integration and globalization. This process affected different legal branches aside from civil procedural law: first, it affected legislation, the English Woolf reform serving as a good example; and second, it affected doctrine, as seen by the European soft slide towards several common law constructions. Dramatic legal changes in post-Soviet countries are good illustrations of this process as well.

Civil procedure in different parts of the world is under great pressure because of cultural diversity. This process became very impressive during the last decades. While legislation became very similar in Europe and Asia, there is a big gap in the real practice of civil justice between Europe and Asia and other parts of the world. Globalisation is not a good word to use with respect to law and civil procedure, although in the contemporary highly interactive and cooperative world, national frontiers in law and civil procedure become very transparent. On the other hand, national character has become much more

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glaring. As a result, civil procedure nowadays has two opposite trends: legislation becomes closer and similar, but there are many differences in real civil justice in the realization of this similar legislation. Justice in Europe, Asia and America differs from each other no less than centuries ago, even as legislation has become similar. The reason is cultural difference. It couldn't be erased even in the globalisation era. Therefore nowadays we have a unique situation: legislation is similar, but practice is different.

We can ascertain many facts and find proof that legal systems are beginning to become closer to each other. Common law is more attractive for business, while civil law is more practiced in international relations. In this situation many scholars state that previous procedural diversity no longer exists. They argue that we can find more similarities than differences.

At the same time I would like to prove that cultural diversity is continuing to be one of the most crucial factors that differentiates one procedural system from another. There are still some differences between them. They are not the same that they were in the 19th century, but they still exist. What are they? My main idea is that presently the frontier is lying not in the field of legislation or doctrine, but instead mainly in the area of practice and legal culture and what we call the spirit of law.

II Cultural Influence on Civil Procedure

Most of you I think could accept my view that civil procedural legislation in different countries begins to be very similar. Good examples are Japan as well as some other countries in East Asia. Legislation there takes its roots in the German Code of Civil Procedure of 1877. But if we are considering practice in Germany and Japan, we should also state that there are two different systems. We can't even compare them even though legislation is very similar.

What is the reason? From my point of view, the main reason is the legal culture. It differs in Germany and Japan. That's why practice is different too. Culture influences the process of law enforcement, and as a result we have different civil procedural systems. At the same time, in most classical works Japan belongs to the civil law system, but as we have ascertained the differences in legal culture, it is not correct.

The link between culture and civil procedure is the following: culture – legal culture – practice – civil procedural system. Law is a form of social control,¹ but

it is not the only one. There are some other nonlegal and informal mechanisms of social control. There is a widespread notion that the law is more effective in the societies with complex social structure. Following this point of view, we can make the interference that law is only ineffective in the “non-civilized” societies. In reality, in some societies law is not as effective as other mechanism of social control. Some mechanisms of social control, such as shaming or open disapproval, could be more effective in some societies. For example, in Japan and other countries of Asia, law is less effective in social regulation than nonlegal mechanisms. Nevertheless these countries can’t be treated as “non-civilized,” they are some of the world’s most industrialized nations. Their systems of nonlegal social control discourage antisocial conduct more effectively than any legal system. Sometimes the legal conquest was the best way to destroy the power of the previous elites.2

The problem is that some societies are more adapted for legal regulation than others. From my point of view, contemporary law as a form of social control has been created in the political, economic and social circumstances of European culture. Due to the historical expansion of Western civilization (based on the technological advantages) it was widespread all over the world. It is necessary to note that the reception of law as a form of social control wasn’t voluntary in most cases. It was enacted with external force like in most cases of common law reception 3 or with internal adaption by the “civilized” governor of continental law.

In such societies legal regulation is treated by the majority of their members as an alien element of social control.4 The majority of the members tend merely to acknowledge the existence of legal regulation, trying as long as possible to avoid any contact with the legal system. It is better for them not to be involved at all in the legal process whether one is guilty or innocent. It implies the degree of fear and even lack of confidence which these people have for legal regulation.

It is obvious in these circumstances that law as a form of social control is more effective in the societies where it was created, than in those where it was implanted as an alien element. Nevertheless, in the modern period, law is widespread all over the world as the main mechanism of social control. In some countries it is effective, in others – not. Law should reflect the social,

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economic, and political climate of the society. Law of one society differs from that of another by legal culture.\textsuperscript{5}

In Western societies it is assumed that legal behavior is the measure of moral behavior. The subject is different in collectivistic societies. There is a very big gap between the law and reality in many collectivistic societies. Japan is a good example of a collectivistic society. The Japanese tradition of emphasizing the ascendancy of the group interest over the individual interests of its members takes its root from the Confucian thought. The primacy of group interests is one of the most important pillars of Japanese society.\textsuperscript{6}

Dispute resolution is a reflection of the culture in which it is embedded; it reflects and expresses its metaphysics, values,\textsuperscript{7} psychological imperatives, histories, economics, and political and social organization.\textsuperscript{8} Western society is litigation-oriented. In contrast, traditional and collectivistic societies don't use formal dispute resolution. They prefer conciliation or mediation by moral or divine authority.

In Japan, the rates of litigation and adjudication are extremely low. The main reason for this is the desire to minimize the use of law.\textsuperscript{9} The total number of judges has not increased since 1890, so that now there is only one judge for every 60,000 persons, compared to one for every 22,000 in 1890. Disputes are generally settled out of courts. Japanese prefer conciliation and mediation, which agree with Confucian thought. Reputation is one of the mechanisms of social control. To lose face in Japan is to lose trust and cooperation and to invite ostracism – a personal and social disaster comparable to imprisonment in Western societies.\textsuperscript{10} Litigation divides the parties definitively into winner and loser; in contrast, conciliation teaches both parties their duties in order to restore harmony between them. For these reasons, litigation is not popular in Japan.

\begin{itemize}
\item \textsuperscript{8} Chase O.G., American “Exceptionalism” and Comparative Procedure, 50 American Journal of Comparative Law. (2002). P. 278.
\end{itemize}
Japan and Germany are just two of the examples. There are many others that also demonstrate the role of legal culture. Most of the national reports of our session give us concrete facts and examples.

Similar to Japan is the situation in China. Three philosophical traditions affect the legal regulations in China: the Confucian, the Legalist, and the Buddhist. According to Confucian ethics, disputes should be settled privately, involving third parties. If the disputants do bring their problem to court, the assumption is that both of them are being stubborn, uncompromising people who are unable to sacrifice their personal interests for the peace of the community. Therefore judicial proceedings are unpleasant for most people, and they try to avoid them. Moreover in China until the end of the nineteenth century, the term "rule of law" had a negative connotation.

In African societies 60% of all disputes are settled through informal means such as third party mediation by members of the family, friends, neighbors, ward heads, chiefs, etc. There are different reasons for this. First, they are scared of the legal process and try to avoid it. Second, the legal process is too time-consuming. Third, they have no confidence in the legal system. In some counties dualistic system exists. Native ethnic groups settle disputes through the use of customs, which differ from the law applied at the center.

The most significant example of how culture could affect civil procedure is the Russian legal system. Russian civil procedure is not simply a continental or Anglo-Saxon system possessing only classical civil and common law features, but a unique system possessing exceptional features that do not exist in either of these traditional approaches.

There were different periods in Russia’s history when lawmakers introduced continental or Anglo-Saxon features of civil procedure. For example, the 1864 Imperial Code introduced the common law passivity of the court in the process of proof-taking. The Soviet civil procedure should be viewed as a radical solution to the continental model. In 1995, the common law passivity of the court was re-introduced, but only remained in effect until 2002.

16 L.M. Friedman, Legal Culture and Social Development. 4 Law and Society Review. (1969) P. 32.
Disrespect of the rule of law in Russia has been noted by many scholars. However, I believe the reason for it is not unwillingness of Russian citizens to obey rules of law, but the conflict between the legislation and the social relations of the society. The law can't be simply exported and imported. It is always necessary to take into account cultural specificity of a society. Yet Montesquieu noted that “laws should be in such compliance with features of nation, for which they are made, that only in very rare cases laws of one nation might become applicable for another.” It is noted by many researchers that there is a strong connection between culture and law, especially civil procedural law. In the modern environment, in the epoch of globalization and creation of the multi-polar culture, this method becomes especially important.

The tasks of the modern Russian legislator are to conduct detailed research about the moral ideas of the Russian citizens and to create rules of law which reflect the demands of both the society as a whole and its individual members. Russian law should take into account both individualistic and collectivistic traditions, as well as ideas and moral views that exist in Russian

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society. This means that in the process of legal regulation, a "golden mean" between two moral traditions should be found.

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

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

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

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

It should be noted that similar civil procedural outlines exist in most former USSR countries. The civil procedural law in these countries has similar historical and cultural backgrounds. Moreover, I would bet that a similar cultural
framework exists in other countries of middle Eurasia as well as some of Latin America, where pure civil and common law procedural constructions are unsuccessful. Therefore, I think that in today's world, it is better to distinguish not only civil law and common law procedural systems, but also other exceptional models. The recent evaluation of two classical types of civil procedure supports this contention. It is obvious that these models do not exist today, at least not in their classical sense. The many changes to the basic principles of each combined with the blending of their characteristics has led to this. An excellent example of this is the recent evaluation of the role of the judge in both systems.

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

III Culture as Factor of Judicial Independence Diversity

The above analysis demonstrates that culture is one the most important factors that determines the specifics of civil procedure. It affects practice and forms a national character of civil procedure. That's why legal culture is the most important criteria for the civil procedure.

Using these criteria, we should sort two types of civil procedure: individualistic and collectivistic. They correlate with two widespread cultural models. The first one is based on individualism; the other on collectivism. Collectivism is defined as a moral principle that asserts the priority of the group over that of the individual or as a social organization in which the individual is seen as being subordinate to a social collectivity such as state or nation. Individualism is defined as a moral principle that stresses the self-directed, self-contained,

and comparatively unrestrained individual or social organization, which exists in large measure to serve and protect individual. Society in such case becomes the background to the interests of individuals. In collectivism, the law aims to protect the interests of society as a whole and to achieve common goals, while in individualism the law primarily protects the interests of individual members of society. It is focused on reaching individual goals. This problem was a moot point one century ago and became important presently due to the process of globalization.

In collectivistic societies, only active judges could be effective. Of course, there are cases when there are passive judges, but as a rule they are not effective. Group actions are also not very practical in collectivistic societies because they need very high self motivation. Individualistic systems are the best place for the judicial “show court hearings” with active parties and advocates.

There are different components of judicial independence: political, economic and administrative. Political guarantees mean that judges couldn’t be members of any political party. High salaries for judges are the result of economic guarantees. Administrative guarantees ban any pressure on judges. Cultural specifics influence realization of the guarantees above. Therefore, judicial independence diversity depends very much on cultural specificity of a country.

33 See, e.g. F. Cosentini, La societe future, individualisme ou collectivisme? (1905).
The Culture of Judicial Independence

Rule of Law and World Peace

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