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DISCRETIONARY JUSTICE DEVELOPMENT. MINDFULNESS. QUANTUM THEORY

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Discretio est discernere per legem quid sit justum.
The Roman Legal Maxim

In a single drop of ditchwater,
some people can see whole crowded cities and,
thus, observe large segments of life.
Hans Christian Andersen

I KEEP six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.
I send them over land and sea,
I send them east and west…
R. Kipling

Abstract: As a result of a very little body of academic research on the influence of judicial discretion on civil justice, there is the question if judicial discretion should be an important component of civil justice reforms. The question is crucial, as there are still many forces against discretionary justice and little attention to comprehensive study the phenomenon of judicial discretion. The paper provides answers three questions: Why discretionary justice? Why the development of comparatve discretionary justice? Why through mindfulness and quantum theory? We pay attention on interconnections of problems of different branches of law and on an interdisciplinary context. This article is designed to explore the problem of discretionary justice in a new and innovative way. We intend to create a space of reflection and communication

where salient questions of discretionary justice and its context(s) can be re-negotiated from a variety of disciplinary perspectives, and re-connected with other disciplins. It is designed to enhance a re-location of the essay of discretionary justice among other sciences and can thus allow to develop innovative research agendas in multidisciplinary constellations beyond just a legal focus. Here we use , inter alia, "The judgments of the European Court of Human Rights in the civil procedure of the Russian Federation" of A.R. Sultanov,"Helgoland" of Italian physicist Carlo Rovelli, coming out in September 2020.

Keywords: civil justice reform, comparative discretionary justice, development, mindfulness, quantum theory

The Subject

Being lawmaker, decision-maker, exercising discretion, doing justice, one has to be like a rock, but flexible, flowing like running water. Everyone has to share the bread of justice! Because when someone suffers from injustice, from the caused damage (material and non-material), only such bread should be for him. What an unspeakable word to refind well-being! "For him", who suffers, who desires justice! Here we are starting with mindfulness, to bring your attention back to identify and deal correctly with any ethic issue: thirst, do no harm to anyone, that is directed towards justice and also towards: ***"Discretio est discernere per legem quid sit justum" (Discretion is the selection of that which is just by the law).***

Why? Because many countries have made a transition to improving justice. The focus of the reforms debate has broadened from the goal of procedural efficiency to the procedural guarantees of fair trial. Acknowledging that Civl Justice reform is a vast topic, this paper focuses on discretionary justice and its development, and the creation of mechanisms for the best discretion's practice. We are going to return to mindfulness and quantum theory to explain the civil justice reform and judicial discretion.

The subject **consists of three** ***Why:***

— ***Why*** Discretionary Justice?
— ***Why*** Comparative Discretionary Justice Development?
— ***Why*** through Mindfulness and Quantum Theory?

Why Discretionary Justice?

Let me suppose that *the Roman legal maxim-epigraph "Discretio est discernere per legem quid sit justum"*[1] consists of the following points:

1. Discretion deals with legal consciousness;

[1] Latinskie Juriditeskie Izreteniya (Roman Legal Maxims). Moscva, 135 (1996).

2. Legal consciousness deals with justice;

3. Justice deals with discretion;

4. Discretion should mean justice.

Courts administer *justice* in all advanced nations of the world.

Courts play a central role in both the legal and political processes in many countries. Legal actors have a stake in making sure that legal processes and procedures are perceived as legitimate, both by the general population who might use the legal system, and by the professionals who operate it. A relatively constant series of issues about whether courts provide justice and are fair, efficient, serve to structure alongstanding debate about how courts exercise discretion.

The exercise of judicial discretion ***should*** mean ***justice***. However, in judicial practice it means either beneficence or tyranny, either reasonableness or arbitrariness, injustice, as well.

Judges in the Russian Federation indicate surely that judicial discretion associates with justice, only.

Justice is so much dominated by judicial discretion. Why?

Let us link our opinion with Russian civil procedure:

(1) much discretionary justice is now governed by rules; individualized justice is often better;

(2) much discretionary justice is because the lawmaker does not know how to formulate imperative, precise rules[1].

In modern Russia and Europe the judicial discretion is the cornerstone of court activity. Judicial discretion is a mystery as for general public so for legal practitioners and law professors, largely.

Hitherto the dichotomy "discretion — justice" remains one of the little studied space in the jurisprudence literature. Long time the judicial discretion was criticized in European and Russian scientific world. It was assumed that each legal problem had one legitimate solution.

The phenomenon of discretion has not been examined exhaustively in European, Russian juridical literature. Signs and reasons of discretion are not defined. Some legal scholars questioned the legality of discretion[2]. Until now comprehensive comparative legal study of judicial discretion has not been done. There is a cautious attitude to discretionary justice in Russia and Europe. First of all this is connected with the danger of arbitrariness. Most critics of judicial discretion focus on such risk of abuse or tyranny and give short shrift to competency concerns. We suppose it's the mistake. We study the phenomenon of discretionary justice through other tools.

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[1] *Papkova O.A.* Usmotrenie Suda (Judicial Discretion). Moscva, 12 (2005).

[2] See: *Starykh U.V.* Usmotrenie v nalogovom pravoprimenenii (Discretion in tax law application). Moscva, 27 (2007).

Our inquiry is not into the question of what is injustice (abuse, tyranny etc), we concentrate on the discretionary aspect of justice. How much discretion should judges have to do justice, to balance procedural efficiency and procedural guarantees of fair trial?

Our subject is judicial discretion for particular parties.

Our concern is limited to the exercising judicial discretion to balance procedural efficiency and fair trial.

Sometimes we turn to injustice. Because the promise for improving the quality of justice is surely greatest in the areas where injustice is located; those areas, in the language of Russian civil procedural law, are the ones involving ***formal*** and ***unreviewed*** judicial discretion exercise.

"Formal" means procedure in the courtroom according with the procedural legal norms.

"Unreviewed" means lack of a check by a superior authority.

"Judicial discretion exercise" means court choice activity: a judge has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

Let us present you some typical injustices, linked with judicial discretion exercise in Russian Procedure:

B. wrote and published the article in the newspaper that the Judge O. was a mouthpiece of the Mayor of the city. The Judge O. brought the claim for compensation for moral damage *versus* B in a court. The court sought from B. to O. 20 million. According to the Article 1101of Civil Code RF (hereinafter — CCRF) in determining the amount for compensation for moral damage, the court should consider the requirements of reasonableness and justice. In the judgment the court did not motivate the reasons justifying the full satisfaction of the claim.

The Small Enterprise (SE) and The Limited Liability Company (LLC) concluded the contract under which the SE should put a line for the production of casein, the LLC should ship the butter. The SE complied with its obligation. The butter was not supplied. The SE brought a lawsuit against the LLC for the performance of the obligation in kind and recovery of the fine specified in the contract (5 percent of the contract sum for each day of the delay) in the amount of 2,290,750,000 rubles. The court reduced the fine and recovered 229 075 000 rubles on the ground of disparity between the fine and violation of the obligations (Article 333 CCRF). The court did not apply the category of equity as a general principle of attribution, set out in the Article 1 CCRF. The justice was not done.

The Limited Liability Company (the landlord) and the Bank (the tenant) entered into the lease of non-residential premises. The landlord went to court with the claim against the tenant to recover arrears of rent. The court requested the landlord to submit additional evidence, including the deed of transfer, certificates

of payment of electricity and utilities. The landlord did not get additional evidence. The court rejected the claim, stating that the plaintiff acted in a bad faith and failed to provide the evidence to delay the process. However, there won`t such actions in the conduct of the party. The court found a bad faith in the conduct of the plaintiff without any proof. The result was injustice.

The Bank extended the credit to the Closed Joint Stock Company (CJSC) under the credit agreement. The credit was not returned by CJSC in time. The Bank brought a suit for recovery of the credit`s debt, interest for its using, an increased interest rate for the credit use, penalties for late payment of the debt on the loan and interest. The court found those requirements valid. That led to injustice, as the creditor used the rights granted by the contract in a bad faith, requiring the simultaneous application of named types of liability. Recovery of penalty and increased interest, both, was improperly.

In conducting the case the court defined that the defendant paid the sum of money for the house on the contract of sale just under a testimony. By virtue of article 162 CCRF, written evidence is admissible in such case. Court carried injustice.

B. brought a claim for the recognition of privatization of the apartment. Sister B. filed a statement on the privatization and died. Privatization Contract was not designed. The court rejected the claim, stating that the death of B. constituted a waiver of the privatization. Court violated the article 56 Code of Civil Procedure of RF. The court did not specify the circumstances relevant to the case, did not indicate which party must prove them. As a result the injustice was done.

Arbitrazh courts, reducing the penalty or the amount of liabilities, refer to the Article 333 of the Civil Code of RF or Article 404, respectively, not justifying in judgment why the amount is decreased.

Scarcity and unregulated social life, undeveloped market gave rise to the routine legal practice and negated the need of such delicate and complex institution as judicial discretion. And M.S. Studenkina wrote: "Regarding the issue of discretion, we can`t answer the question unambiguously whether the court discretion is purely negative or highly positive phenomenon. What fate should it have in the future?"[1] M.V. Baglay comments, judicial discretion existed in the past, and is particularly necessary now, "but ,unfortunately, nobody wrote about it to help us in taking advantages of that complex tool"[2].

Yes, the specialists are agree: judicial discretion existed, exists and will exist. And there is the pervasive assumption that trial judges *per se* can do a good job

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[1] Pravoprimenenie v Sovetskom Gosudarstve (Law Application in Soviet State). Moscva, 47, (1985)

[2] *Baglay V.M.* Vstupitel`nay stat`y k: *Barak A.* Sudeyskoe usmotrenie (Introduction to: *Barak A.* Judicial Discretion). Moscva, 8 (1999).

of exercising discretion. Some supreme judges and lawmakers favor maintaining and even expanding broad case-specific discretion, arguing that trial judges have the necessary expertise and experience to tailor procedures to the needs of particular cases. So, regarding RF I.Drozdov notes that "Judicial discretion is a cornerstone of a judge`s job. Judges are the qualified and experienced professionals who have to resolve any legal situation. Judges must be trusted, no other way"[1].

This assumption is empirically and practically unsupported and at best highly questionable. In fact, judges face serious problems fashioning case-specific discretion to exercise well in the highly strategic environment of litigation, and these problems deserve serious attention.

Imagine hiring a manager to oversee a workplace where the employees are committed to achieving diametrically opposite results, encouraged to pursue their own self-interest and not the interests of the firm, and allowed to use a wide range of strategic tools to achieve their ends. Even the best manager is likely to have great difficulty managing such a fractious workplace environment. Indeed, when we think of an effective manager, we think of someone coordinating and inspiring employees hired to work for a common goal and usually eager to do so.

It would be helpful for a good job of exercising discretion, doing justice in individual cases to have a clear working definition of judicial discretion.

The Judicial Discretion Concept

Now, the Judicial Discretion concept is extremely difficult to define.

Currently in Russian, European jurisprudence the unified approach to the definition of judicial discretion has not been developed. Legal scholars define judicial discretion as the conceptwhich includes: a freedom of a court[2], a discretionary power[3], an authority[4], a law application activity, the choice of several legal alternatives. Each of these provisions is controversial.

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[1] *Drozdov I.* Sudejskoe usmotrenie — kraeugolnii kamen` sudejskoj rabotii (Judicial Discretion is the cornerstone of a judge`s job), Zakon № 1, 10 (2010).

[2] *Barak A.* Sudeyskoe Usmotrenie (Judicial Discretion), Moscva,14 (1999), *Abushenko D.* Sudebnoe Usmotrenie v grazhdanskom I arbitrazhnom processe (Judicial Discretion in Civil and Arbitrazh Proceedings), 6 (1999), The Ruling of the Constitutional Court of Russia on January 25. № 1-P (2001).

[3] In Russia, judicial power shall be exercised only by the courts (Article 1 of the Federal Constitutional Law "On the judicial system of the Russian Federation"). So, the judge's discretion may be considered as an integral part of the judiciary. Article 5 of the Act states that courts exercise judicial power independently, subject only to the Constitution and the law. In connection with this, in our view, in the Russian jurisprudence literature a discretion may be defined as an authority of a court or law applicable activity.

[4] *Barak A.* Opt. cit., 13, *Bonner A.* Primenenie Normativnykh aktov v grazhdanskom processe. (Application of Legal Acts in Civil Procedure), Moscva. 42 (1980)$ *Abushenko D.* Opt. cit. P. 143–144.

In our opinion in Russian civil procedure the judicial discretion is ***the law rules application's*** activity[1]. Number of Russian scientists has the same opinion[2].

The phrase "application of law" may be used to designate employment of a legal rule to aid in the decision of a specific case. E. Vaskovsky[3] wrote that the summing up is a kind of syllogism in which the major premise is a legislative rule and little things are the facts of this particular cases, and conclusions, arising from them[4].

We specified that ***t****he law norms application* involves three steps:

1) legal analysis of the case's circumstances, and

2) analysis of legal norms, and

3) the interpretation of the law.

In our opinion the judicial discretion is carried out in two operations:

(1) legal analysis of the case's circumstances and (3) in the interpretation of the law.

We intend to single out ***the key elements of the judicial discretion definition*** and to justify our position, comparing it with the views of Russian and foreign specialists.

In our opinion***, the key elements of the judicial discretion concept*** can be the following:

1) judicial discretion exercise is provided by legal norms;

2) judicial discretion is carried out in procedural form;

3) judicial discretion should be motivated;

4) the choice is the key element of judicial discretion;

5) the choice is bounded by limits[5].

The elements of this concept need the special emphasis.

1. The proposition that judicial discretion is set by legal norms is especially important. It includes everything inside of ***"the general and specific limits"*** of the court activity[6]. This phraseology is necessary so the judicial discretion seems il-

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[1] *Papkova O.* Opt. cit. P. 211–214.

[2] *Bonner A.* Opt. cit., 42, *Abushenko D.* Opt. cit. P. 12.

[3] *Vaskovsky E.* (Waśkowski, 1866–1942) was famous Russian and Polish civil and procedural lawyer and judge.

[4] *Vaskovskiy E.* Rukovodstvo k tolkovaniu I primeneniu zakonov (prakticheskoe posobie) (Guide to Interpretation and Application of the Laws (Textbook), Moscva, 6 (1997).

[5] *Papkova O.A.* Opt. cit. P. 39–40.

[6] We mean the provision which enables constitutionally protected rights to be partially limited, to a specified extent and for certain democratically justifiable purposes. A limitations clause also seeks to prohibit excessive restrictions on rights that may, because of their purpose, nature or extent, be harmful to a state. The European Convention on Human Rights (ECHR), the Constitution, the main provisions of civil, familhy, civil procedural (etc) codes, are just some of the most influential examples of rights instruments that explicitly address their own limitation. Many of the rights guaranteed to the

legal or of questionable legality (as we've mentioned above). A. Barak notes that discretion is not there, where the choice is done between legitimate and illegitimate opportunities (...) The choice is not determined by its feasibility, but by its legality[1].

2. The judicial discretion should be exercised in the procedural form. The primary source of judicial discretion is the Constitution, the Procedural norms follow (for civil law countries).

There are two main ways of judicial discretion exercise in Russian civil procedure:

— Civil Procedural norms delegate judicial discretion directly, or – they facilitate judicial discretion indirectly by using intentionally vague language that invites flexible interpretation.

Perhaps, the Article 150 Civil Procedural Code of the Russian Federation (hereandafter CPC) is the most notable example of a rule delegating broad judicial discretion directly. Article 150 authorizes judges to hold pretrial stage and to"take appropriate procedural action" with respect to a wide range of preparatory matters (points 1–13)[2]. Discretion in case management extends to the appointment of litigation in complex cases, sequencing of issues, timing of pretrial stage and trial, and much more. As for settlement promotion, a judge can choose from a diverse menu of options depending on his settlement philosophy, including offering a preliminary assessment of the merits, interviewing parties privately, meeting with parties with or without their lawyers, recommending settlement ranges, nudging parties in the direction of compulsory joinder. There are some legal constraints, to be sure, but they are extremely loose. Moreover, the Article does not specify the weights to be assigned to the different factors or tell judges how to strike the balance in close cases. These critical normative judgments are left for the trial judge to make in individual cases.

Furthermore, the term "discretion" may or may not include the judgment that goes into finding facts from conflicting evidence and into interpreting unclear law.

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citizens of democratic countries must be limited or qualified — or the scope of rights narrowed — in order to prevent conflicts with other rights or with certain general interests. A well-drafted court activity prevents these limits, qualifications or restrictions from being taken too far or from being misapplied. However, legislators may decide to make some rights absolute since violating them to any extent under any circumstances would be inhumane and might invite broader violations. The exercise of certain rights (such as the right to a fair trial, freedom from judicial abuse, etc) is integral to citizenship in a democratic society. The protection of fundamental rights against arbitrary or excessive infringements is an essential feature of constitutional government, which is recognized both in international human rights law and in many national constitutions.

[1] *Barak A.* Sudeyskoe usmotrenie (Judicial Discretion). Moscva, 1999. P. 15–16.

[2] It specifically contemplates judicial discretion in case management and settlement promotion. What limited guidance the rule supplies is cast in terms of highly general goals that offer little constraint, such as "actual loss of time" and "in urgent cases".

3. If judicial discretion is embodied in a Court Ruling, ***it should be motivated.***

Article 6 of the European Convention on Human Rights enshrines the duty of judges to make reasonable judicial acts. European lawyers note that the requirement of motivation of judicial decisions is part of the unified principle of justice[1].

The practice of Russian and Italian courts demonstrates that the implementation of discretion in the modern civil procedure or motivated poorly or not motivated at all.

4. It deals with a ***judicial choice***: what to do or to do nothing or to do nothing now.

Let you know that the most definitions of judicial discretion include the category of ***choice.*** The basic judicial discretion definition is the act of making a choice in the absence of a fixed rule and with regard to what is fair and equitable under the circumstances and the law.

Therefore some Russian scientists raise the question whether the use of judicial discretion is necessary. Thus, N.Rassahatskaya believes that any Russian legislation should have strong terminology. The codes of RF should not have such notions as "reasonable limits", "sufficient time ", etc, so their application does not improve justice[2].

We believe that at its core, judicial discretion has to do with the choice. Beyond this, a precise definition is elusive. Part of the confusion results ***from differences of perspective.***

From ***a psychological perspective***, judicial discretion refers to a subjective perception or belief of a judge that she\he has freedom to choose.

From ***a sociological perspective***, discretion might refer to an empirically observable regularity in which judges make authoritative choices without being checked.

This essay focuses on ***the scientific (mindfulness, quantum theory) perspective***.

5. Here we consider ***the choice limits of formal judicial discretion***.

So, ***judicial choice in Russian civil procedure has the following special limits fixed by legal norms***:

— ***List of the conditions set forth by alternative legal norms***.

For example, the Articles 144 Arbitrazh Procedure Code of the Russian Federation and 216 Civil Procedure Code of the Russian Federation define the conditions, by which the court has the discretion to suspend the proceedings.

— ***Special conditions set out in relatively-definite legal norms:***

"relevant circumstances", "valid reasons", "interests of the child", "the circumstances relevant to the proper consideration of the case", "claims and objections of those involved in the case", "the degree of moral suffering","the other circumstances", and so on.

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[1] Access to Civil Procedure Abroad. (H. Snijders eds. 1996), London, 25.

[2] *Rassahatskaya N.* Problemy sovershenstvovaniya grazhdanskogo processualnogo zakona (The Problems of Civil Predure Law's Improvement), Tver, 59 (2000).

— ***The categories of equity, good faith, expediency, reasonable, morality.***

Courts are faced with difficulties in these categories application.

For us it's clear that trial judges *per se* can't do a good job of exercising discretion.

It would be helpful at the outset to have a clear working ***judicial discretion's variety***.

The Judicial Discretion's Variety

Let you know that in jurisprudence literature little attention is paid to the study of ***the judicial discretion's variety***. Thus, according to A. Bonner, the main factor having the significant impact on the judicial discretion kinds is the legal norms variety. A. Bonner identifies four types of judicial discretion.

The first is a specification of subjective rights and duties.

The second type of discretion is the use of optional rules.

Third type involves the use of evaluative attributes and concepts.

The fourth type is the application of legal rules containing expression: "the court may"[1].

D. Abushenko offers another classification. He believes that the types of judicial discretion are the certain legislative constructions. Scientist proposes the following division:

1. Alternative type: the court selects from several legitimate options, contained in the legal norm.

2. Frame type: the court is limited to clear-cut boundaries.

3. Mixed type[2].

In our opinion, the classification of judicial discretion may hold for various reasons. It is not correct to set the goal of creating a comprehensive list of examples of discretion. What variety would be correct?

Importantly, the discretion varieties must express the essential features, the advantages of judicial discretion and discover the features, the flavor and the effects of the phenomenon.

One of the essential features is ***discretionary justice for individual parties***.

Discretionary Justice for Individual Parties

Without trying to draw precise lines, we concern primarily with a portion of discretion in justice — with that portion of discretion which deals with justice, and with the portion of justice which influences on individual parties.

We carefully examine the efficacy of case-specific discretion: why and when general rules can be superior, and urges rulemakers to draft rules to control the discretion exercise. Encouraging quality settlements and producing quality jud-

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[1] *Bonner A.* Opt. cit. P. 44.

[2] *Abushenko D.* Opt. cit. P. 11.

gments will be both important objectives in achieving this overall purpose. These two objectives conflict, however, and balancing them entails complicated quality tradeoffs. This is significant because trial judges are likely to have special difficulties striking an optimal balance on a case-specific basis.

It is no easy matter to decide on the optimal degree of discretion or create rules to achieve it. Obviously, some measure of discretion is both inevitable and desirable, though currently judges do not enjoy the broad discretion.

We propose that law should justify how much discretion to delegate and in what form.

It's clear that trial judges *per se* can't do a good job of exercising discretion. Plus the judicial discretion is complicated by ***pressures***, often.

Pressures on Judicial Discretion

In our study of discretionary justice we have found that discretion is indispensable to modern judiciary and that the elimination of discretion can't be the cure for injustice[1]. But we also found that often judges exercise the improper discretion. Discretionary justice is often complicated by ***pressures, personalities and politics***[2].

In Russia judicial power still remains seriously dependent, firstly, from the executive power.

Guarantees of court independence exist almost only on paper. Insufficiency of such guarantees predetermines the pliability of judicial discretion to ***pressure from the law enforcement and state security agencies***.

Famous Russian journalist and writer Leonid Nikitinsky published his novel TAINA SOVESHATELNOI KOMNATY, 2013 (JURY ROOM SECRET, 2013). In this book the reporter stressed the episodes of taping by secret service of the jury room in the court building as well as phone conversation of judges.

Within the civil justice reform, it is necessary to resolve a whole number of problems connected with professional activities of judges. The personnel problem is the most important one.

Why Comparative Discretionary Justice Development?

The comparison of legal systems has for a long time been an essential branch of legal development. It has become even more important and relevant in era of globalization. It has been done but does it work?

To ***the moment Judicial Systems of the most European countries are perceived to be in crisis***. Various strategies have been employed to fight this problem. The

[1] *Papkova O.* Opt. cit. P. 43–44.

[2] Ibid. P. 64–199.

popular strategy is the introduction of new rules of civil procedure. Reorganising the courts is another approach. A change in legal collective mind is a third option. This option is advocated in this article.

Here our main concerns are:

— judicial reform usually aims, *inter alia*, to improve quality of justice;
— judicial reform shows a choice of procedural model for improvement quality of justice;
— judicial reform can increase or decrease the judicial discretion.

How much discretion should a trial judge have to design procedures for a given lawsuit? This is a difficult and important question for civil proceduralists today.

Russian judges exercise extremely broad and relatively unchecked discretion over many of the details of civil litigation. They have extensive power to manage cases, and broad, often unreviewable power to promote settlements. Even when a procedural rule includes decisional standards, those standards often rely on expansive judicial discretion to make case-specific determinations. Indeed, it is only a slight exaggeration to say that court procedure can be largely the trial judge's creation, subject to minimal judicial review. Our central question is what can be done to assure that the judicial discretion¡s exercise means justice. More precisely, the central inquiry is what can be done that is not now done to minimize injustice from exercise of judicial discretion. The answer is, in broad terms, that we should do much more than we have been doing to be sure that necessary judicial discretion means justice. The goal is not the maximum degree of controlling, structuring, and checking; the goal is to find the optimum degree for each judicial discretion in each set of circumstances to do justice.

We agree that the comparative lawyer cannot restrict his field narrowly. More than any other academic, he must be prepared to find new topics for discussion and research[1].

We examined two dominant types of legal procedure used in adjudication: the first attributes significant power to the parties in conducting the case (so-called "adversarial"); the other enhances the role of the judge in the use of case management (so-called "non-adversarial")[2].

There is today an increasing interest in mixed legal family systems in Europe. For instance, Jan Smits published the monograph "THE MAKING OF EUROPEAN

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[1] *Lawson F. H.* The Field of Comparative Law, 61 Jurid. Rev. 16 at 36 (1949).

[2] In an overly simplistic generalization, the common law tradition, derived from England, features adversarial litigation culminating in a trial, whereas the civil law tradition, derived from Rome, features an inquisitorial litigation. But the term inquisitorial, created for the criminal proceedings, suggests a too pervasive role of the judge in the conduct of the case (without significant powers for the parties) and can not correctly identify the characteristics of the existing model in the civil proceedings. Thus, in order to prevent improper overlaps, we will refer to it as non-adversarial system.

PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM". Jan Smits said that mixed legal systems will provide "inspiration". Furthermore, Andrew Harding told us that all Eurocentric comparatists fall into the "legal families trap". He said that, "Legal families tell us nothing about legal systems except as to their general style and method"[1].

Of course, an increase of the court role in the civil process is occurring globally and impacting most procedural systems. The frontier between the two classical models of civil procedure has blurred, and it appears that a united procedural system is emerging. At the same time, some distinctive and unique procedural systems still exist. The Russian system is one of them.

The Russian Constitution 1993 proclaimed the principle of adversarial character in civil court proceedings (article 123). In 1995 corresponding amendments were made in the CCP. The activity of a court was reduced to the minimum in the CAP 1995. The court in that case was not supposed to manifest initiative on its own. The only way to establish circumstances of the case should be to become an adversary of the parties without the court`s intervention in the process. The practice of using these norms by the arbitrazh courts showed that a complete refusal of the court activity may result in injustice. During the drafting of the new CCP, lengthy discussion was conducted in respect to parties' discretion. The Soviet CCP 1964 regulated the process in an investigative (non-adversarial) prospective. We assume that Russian legal culture combines in itself features of both procedural models and accordingly it cannot be related to one of them[2]. In our opinion, in modern Russia according with the CCP 2002 there is a peculiar combination of parties' discretion and court's discretion, which have been established in the law[3]. The expression of this principle in concrete articles is a relatively complex problem for discretionary justice. The CCP (chapter 6) determines in the following manner the authority of the court *inter alia* in the process of obtaining proof. So, the court exercises discretion and establishes which circumstances have a meaning for the

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[1] *Harding A.* Global Doctrine and Local Knowledge: Law in South East Asia. 2002. (51) International and Comparative Law Quarterly, 36 at 51.

[2] *Pastukhov V.* Chto lyudyam ne nravitsya v rossiiskom pravosudii? (What do persons not like in the Russian Justice?). Rossiiskaya Yustitsiya (The Russian Justice). 1998, No. 8. P. 22–23.

[3] In different historical periods Russian lawmakers had opposite views on whether Russia belonged to one or another procedural model. Therefore, the legal system of Russia developed either on the base of adversarial model or on the base of non adversarial system. So, for instance, at the end of XIXth, beginning of the XXth centuries and during the last times, the lawmaker had the aim of renewing the Russian legal system by introducing legislation created on the base of many postulates of the Rome and based on adversarial procedural model. As distinctive from this, the legislation of the Soviet Union was based primarily on the non-adversarial system. However, neither the first nor the second procedural model corresponds by itself to the principles of Russian society.

case, which of parties should provide the proof. The court has discretion to invite the persons participating in the case to present additional evidence, to verify the relevance of the presented proof to the case under consideration, to make a final establishment of the content of the questions in respect to which a conclusion of experts should be obtained, may at his discretion assign an expert if it is not possible to resolve the case without the conclusion of experts. Thus, in accordance with the CCP the role of a court is somewhat intensified, but at the same time a court does not seek the ogective truth in a trial as was done in accordance with the CCP 1964. The CCP 2002 was developed on the base of a combination of adversarial model with the role of court's discretion. So, the Russian CCP 2002 established a kind of "golden mean" between the discretion of the court and the initiative of the parties. It is to examine could such situation to improve quality of discretional justice.

The history of Russian civil procedure provides good examples of the legislative efforts to converge both classical systems and to create the best national system.In our opinion, the experience of Russia is consequently of great importance for the future developments of Comparative law.

Our task is not to examine the structures of the adversarial process and of the non-adversarial process; instead, we assume that each reader knows it`s conception. We link the objectives underlying the models, their main features with the degree of judicial discretion that ensures its proper exercising.

INTERNATIONAL COMPARISON suggests that several procedural systems are gradually converging towards a similar model. In many cases the problem of an efficient and speedy development of the ordinary civil procedure has been solved by vesting the judge with more discretion to manage the case to increase flexibility:

a) he exercises discretion (especially) in the preparatory phase of the proceedings;

b) generally, he can exercise discretion to order inquiries *ex officio*.

One of the steps in our inquiry into how to improve the quality of discretionary justice is to establish links between legal system and discretionary justice.

In "USMOTRENIE SUDA (JUDICIAL DISCRETION)", we wrote one sentence that now seems to deserve repetition with ever greater emphasis: "The strongest need and the greatest promise for improving the quality of justice to individual parties in the entire judicial system are in the areas where court decision necessarily depend more upon discretion than upon rules and where judicial review is absent"[1].

Et sic, we are going to identify as the achievements of the judicial reforms as their negative tendencies in the field of discretionary justice in Russian Federation and abroad.

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[1] *Papkova O.* Opt. cit. P. 11.

It seems appropriate to turn to the questions we put before:

What has been done? Is everything needed to be done to improve the quality of justice in each country? Was the judicial discretion identified correctly? Are additional measures and corrections required?

What has been done to minimize injustice from judicial discretion

Here our tasks, being limited by the discretionary aspects of justice, include:

1) the basic theoretical analysis of the major civil (commercial) procedure developments in Russia and abroad, *viz:*

a) improvement of the civil procedural legislation, of the judicial system;

b) influence of the European Convention on Human Rights and the Rulings of European Court of Human Rights on discretionary justice (in Russia).

2) the initiatives of Transnational Civil Procedure:

a) Harmonisation mechanism in Russia;

b) Harmonisation mechanisms in the EU Member States.

1) The basic theoretical analysis of the major civil (commercial) procedure developments in Russia and abroad

a) Improvement of the civil procedural legislation, of the judicial system

We are going to start our comparative study from the limited data on the civil procedure reforms.

ENGLAND. The English civil procedure was greatly modified by the Civil Procedure Rules 1998 (CPR), which came into force in April 1999. They established a true code of civil procedure: an exceptional instrument for a common law country.

This reform, a general and organic reform project, has introduced several principles quite different from those of the traditional adversarial system. In his "Access to Justice Report" Lord Woolf concluded that to avoid the excesses of the past there is now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts.

Lord Woolf's reforms were initially intended to help reduce the cost and time courts spent on civil proceedings. He identified in his original report that the three critical issues facing the civil justice system at the time were costs, delays, and complexity. To combat the problems that he saw as being prevalent with the system, Lord Woolf proposed changes to the ways of the standard procedure landscape such as:

1) litigation to be as often as is possible;

2) there should be an increase in the usage of ADR[1] and similar such alternate methods of dispute resolution;

[1] Alternative Dispute Resolution Procedure. It is common for construction disputes to be referred to ADR — such as: Adjudication, Mediation, Expert determination.

3) the costs of litigation should be more affordable for the general public which would make it so that those of lower financial ability would be able to pursue a lawsuit on an equal or similar level to those with higher means;

4) litigation as a process would become less complex;

5) the methods of litigation would become less time consuming, and would, therefore, lead to swifter justice.

The entire idea behind the proposed reforms was to make the system more approachable and user-friendly. Accordingly, the CPR entrusts the control of litigation to the judge.On the matter of case management, Article 3.1 of this law covers the powers of the court. They include:

1) extend or reduce the time for a parties compliance;
2) adjourn or bring forward a case hearing;
3) place a conference on hold to await evidence;
4) deciding the order of the issues in the trial.

The goals of the change have been realized. However, there have been questions raised as to the effectiveness of the reforms.

UNITED STATES. Also in the United States, another country dominated by the principles of the common-law tradition, there have been similar changes made since 1970 (and earlier). Though to a lesser extent in comparison with the English system, the judge (so-called managerial judge) now exercises the discretion in the conduct of the case, especially in the preparatory phase and in alternative dispute resolution.

The reason for this transformation has not been a specific reform — as in England — but the long and complex evolution of the US civil litigation. Over the years, advocates and policymakers have suggested a range of approaches to reforming the civil justice system, including guaranteeing legal representation in certain additional classes of civil cases; lifting restrictions on providers of civil legal aid — which includes a broad range of civil legal services — who receive public funding; and expanding opportunities for law students, attorneys, advocates, and paralegals to provide pro-bono services and representation to clients in need. Several jurisdictions have adopted some of these ideas, including New York City, which now provides a right to counsel for low-income tenants facing eviction in housing court. Some states such as Utah use a licensed paralegal practitioners model that allows highly trained paralegals to provide more affordable legal assistance. Despite these important efforts, the need for civil justice reform remains lesser known than the vital criminal justice reform work being done today.

Below are five guiding principles that american policymakers should consider when crafting innovative and effective measures for making the civil justice system fairer, more accessible, and more inclusive. Although the below list is not exhaustive, all civil justice reforms should aim to further one or more of the following goals:

1) clivil justice reform must be an all-of-government approach;

2) legal aid should be available to everyone;
3) civil justice reforms must reflect the system's interconnected nature;
4) civil justice reform proposals must reflect cultural competency;
5) rules governing civil proceedings must be fair and compassionate[1].

The modern federal judiciary has hit a crisis point that requires changes to how the courts operate and how cases are brought before them, according to a report from the Center for American Progress[2].

SPAIN. The most significant reform of Spanish civil procedure was the *Ley de Enjuiciamento Civil* (LEC), which entered into force on January 8, 2001 and introduced a new Civil Procedure Code. This reform, influenced by German civil procedure, is an historic event for the administration of justice in Spain, because it replaced the flawed and archaic LEC of 1881, that lacked a systematic structure.

The new Spanish code sets up a model of ordinary procedure centered on the oral hearings and resolving the matter in an expeditious manner. In contrast to the traditional predominance of the written procedure with its reliance placed primarily on the attorney's briefs and documentary evidence, the LEC aims to conduct civil proceedings in Spain on a largely oral basis.

On 10th October, the Law 37/2011 on Measures for Facilitating Procedures was adopted[3]. This law, which entered into force on 1st November 2011, continues the line of procedural reforms already initiated in response to the exponential rise in litigation in recent years.

As its name suggests, its main objective is the incorporation of certain measures to facilitate the proceedings in civil, criminal and contentious and administrative orders. Therefore, Law 37/2011 introduces measures that are designed in order to guarantee the fundamental rights of citizens, to optimize processes, to delete or substitute unnecessary procedural steps or to limit the abusive use of court action.

The measures taken to speed up the civil procedure can be positively evaluated because they will help to shorten the duration of the processes and improve their overall effectiveness. However, the reform has not been broad enough. As before, there remain many areas where processes can be further accelerated and simplified.

ITALY. Now there are a lot of problems in the area of judiciary in Italy. So, in Italy, on January 31, 2010, hundreds of judges boycotted the beginning of the

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[1] CAP's report Structural Reforms to the Federal Judiciary. Restoring Independence and Fairness to the Courts. May, 2019.

[2] https://www.americanprogress.org/press/release/2019/05/08/469558/release-structural-reforms-can-restore-independence-fairness-federal-judiciary-cap-report-says/

[3] It was published in the Official Gazette of the Spanish State (B.O.E.) No. 245 on 11th October 2011.

"the judicial year". Thus they expressed their protest against the planned radical reform of the judicial system in Italy.

In the last 20 years Italian civil procedure has been reformed several times, with the aim of reducing civil court delays and streamlining the process. The reforms have completely changed the Civil Procedure Code 1940. However, Italian reforms have failed to achieve their primary objective: a substantial reduction in the excessive length of civil proceedings, which in itself constitutes a denial of justice. According to the Doing Business 2010 Report, in Italy the average time required to enforce a contract is 1.210 days, while it is 399 days in the United Kingdom, 300 days in United States, 331 days in France, 394 days in Germany and 515 days in Spain. The question is: why haven't the reforms worked?

In 2014 the Italian Parliament converted into law Law Decree no. 132 of September 12, 2014 (the "Decree") on measures aimed at reducing the backlog in civil proceedings. The Decree is part of above mentioned comprehensive reform of the Italian civil and criminal procedure systems.The key points of the Decree are as follows:

Lawyers' Arbitration — The Decree provides for the possibility of transferring pending proceedings from the ordinary courts to a special arbitration proceeding. The arbitrators need to be lawyers enrolled with the Italian Bar Association and, in order to access this special procedure, a joint request from the parties is required. This procedure is precluded for disputes regarding inalienable rights, employment and social security matters. The arbitral award has the same effect as a court decision.

Assisted negotiation. This is an Alternative Dispute Resolution procedure, led by lawyers, and available for disputes of all natures, with the exception of those related to inalienable rights and employment matters. In cases of disputes concerning the payment of sums of up to €50.000, or regarding compensation for damages claims caused by traffic accidents, this procedure is a necessary first step prior to ordinary proceedings before a court. If the parties reach an agreement it will have the efficacy of a court's decision.

— Summary trial proceedings' incentives. Before the Decree it was possible to switch from a summary trial procedure (a simplified proceeding recently introduced in civil matters) to ordinary proceedings, but it was not possible to do the opposite. With the intention of speeding up trials and relieving the courts' duties, the Decree provides that in cases decided by a single judge, when the dispute is not complex and has a clear evidentiary framework, the judge is authorized to switch from ordinary to summary proceedings, etc.

The measures introduced by the Decree are interesting and innovative for Italian civil procedures. As known, the effectiveness of laws can be reduced to naught by their improper application. Only the time will tell whether such measures, along

with the rapid, on-going digitalization of proceedings, will help to make civil proceedings more efficient.

RUSSIA. In today's Russia, judicial reform is a key issue for justice[1]. It is critically important to find proper links between the terms "judicial reform", "judicial discretion exercise" and "justice".

The administration of judicial authority has evolved a great deal in post-Soviet Russia.

In the XXth c Russia, aspects and directions of development of judicial reform were formulated in the "Judicial Reform Concept", enacted by the RSFSR Supreme Soviet on October 24, 1991.

The legislation of RF was renewed. The Constitution of 1993 was the main achievement. It was the basis for Russian legal and judicial reforms. One of the goals of Russia's 1993 Constitution was to make courts and judges independent. Before that, Soviet courts were regarded merely an instrument of executive power. Since then, a number of steps have been taken to make the system of judicial administration more effective in general. Procedural legislation of Russian Federation was renewed, also. Code of Arbitrazh Procedure of RF (further — CAP)[2] entered into force on 1 September 2002. Code of Civil Procedure of RF entered into force on 1 February 2003. During their drafting the experience of civil procedure regulation of many foreign countries, both having a codified system of rights and not having such (Germany, France, USA, England), was taken into account.

Improvement of court activities in civil procedure was implemented. Also, it aimed the reducing civil court delay and streamlining the process. One of the main feature of XXc Russian legislation was increasing role of discretionary justice.

Inclusion in the CCP 2002 the chapters on a court writ[3] and judgments *in absentia*, appellate judgments review procedure and determinations of justices of peace; amendment of the whole group of the CCP rules related to jurisdiction, evidence, cassation and supervision procedures, etc. — this is a far from complete list of legislative novels aimed at enhancement of improvement of quality of justice in civil cases. However, as certain experts in the procedural law justly remarked, the amendments introduced in the CCP 2002 did not completely solve the problems of improvement of the civil procedural legislation; besides, certain amendments

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[1] The history of the judicial reform in the RF (1991–1995) see here: https://www.belfercenter.org/publication/current-situation-judicial-reform-russia

[2] Arbitrazh (commercial) courts should be distinguished from arbitral tribunals, they exist in Russia,also. Arbitrazh courts are charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens. The Arbitrazh Procedural Code regulates arbitrazh procedure and the Civil Procedure Code regulates civil procedure.

[3] *Vikut M.*A, *Zaitsev I.M.,* Grazhdanskii protsess Rossii (The Civil Procedure of Russia). Text-book, Moscow, 25–0026 (1999) (the author of the chapter is Zaitsev I.M.).

and addenda were even erroneous since they have failed to achieve their primary objectives: improvement quality of justice[1].

Let you know our opinon: the CCP 2002 was called to solve the problems of effectiveness of discretionary justice in civil cases. It is assumed that the Code was based on a principally new conception which, preserving justified ideas of lawfulness, should, at the same time, proceed from the fact that the code 2002 must expressly regulate the correlation between private and public interest[2]. The private interest should prevail in matters concerning the exercise of discretionary justice in consideration of jurisdictional matters.

By 2020, numerous changes have been made to the civil and arbitrazh procedural codes. In modern Russia the civil proceeding reform deals with the unification, with integration of Higher courts (Supreme Court of the Russian Federation and the Supreme Commercial ("Arbitrazh") Court of the Russian Federation) on the basis of the common code[3].

Apparently, in connection with the abolition of the Supreme Arbitrazh Court of the Russian Federation, the State Duma Committee on Civil, Criminal, Arbitration and Procedural Legislation created a working group to develop the Concept of the only Code of Civil Procedure of the Russian Federation[4]. In 2014, the named State Duma Committee approved the Concept. The further development of the idea of combining these procedural laws, apparently, has stopped (at least, there is no publicly available information about the other).

The responses to the Concept given by V.M. Sherstyuk and D.Ya. Maleshin were indicative[5]. They boiled down to the misunderstanding of the need for a hasty replacement of two procedural codes with one. At the same time, the authors noted the need to unify procedural rules.

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[1] *Shakaryan M.* Prinimat li novyi GPK ili podpravlyat staryi? (Is it Necessary to Adopt a New CCP or to Amend the Existent One?) Rossiiskaya Yustitsiya, 2, 18 (1999).

[2] See: *Panova I.* Administrativno-yurisdiktsionnyi protsess. (The Administrative Jurisdictional Process), Saratov (1998), Gosudarstvo i pravo,10, 5–26 (1999), *Starilov Yu.N.* O sushchnosti i novoy sisteme administrativnogo prava: nekotoryye itogi diskussii. (The Essence of the New System of the Administrative Law: Certain Results of the Discussion). Gosudarstvo i pravo, 5, 12–21 (2000).

[3] See: Valeev D, and *Baranov S.* The reform of the civil procedural legislation: world trends, Life Science Journal, 11(12s) (2014).

[4] Introductory remarks to the Concept: "The Supreme Court of the Russian Federation is the only supreme judicial body for civil, criminal, administrative and other cases, as well as for economic disputes, which became a decisive moment in making a decision on the need to unify legal proceedings in civil cases".

[5] Practical magazine for managers and lawyers "Legislation", 2 (2015), https://legal.report/author/smert-edinogo-gpk

In 2018 Russia has adopted a federal law 28.11.2018 № 451 that substantially reforms procedural legislation. The law introduces professional representation and amends the rules of simplified and summary proceedings, as well as some aspects of the consideration of cases at the appellate and cassation levels, and the execution of judicial acts.

This law is yet another piece in the set of new laws aimed at improving Russian procedural legislation.

One of the main events of 2019 was the start of the work of new appeal and cassation courts and the "procedural revolution" that took place along with this. Simultaneously these events became a significant stage in a large-scale judicial reform in Russia. This stage consisted of three elements:

— Consolidation of the Supreme Court RF and the Supreme Arbitrazh Court RF (2014).

— Creation of new appeal and cassation courts of general jurisdiction (2019).

— Reform of procedural legislation (2019). Amendments to the procedural legislation entered into force on October 1, 2019. On the same day, fourteen new appeal and cassation courts of general jurisdiction and two new military courts began to operate.

The Supreme Court of the Russian Federation noted that the main task of that reform's stage was to create the model of the judicial system "which will meet the modern demands of civil society, enjoy the trust of this society and ensure the highest level of legal protection"[1].

In total, for the past of 20 years, the progress has been made in improving quality of justice on civil and commercial cases in Russia. However, the situation is far from being perfect. Reforming an old system run by old people is a tricky task. Judicial practice in Russia has a lot of problems. Arguably, the failure to achieve full and authentic independence for individual judges represents the greatest deficit in Russian justice today, a deficit that must be addressed before the courts in the Russian Federation (RF) will be trusted by most of the public.

The question is: why haven`t the reforms worked?

b) The European Convention on Human Rights and Discretionary Justice in Russia

Under Article 1 of the European Convention on Human Rights (hereinafter — Convention), Russia has undertaken an obligation "to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention." It appears to be that in Russia this obligation is generally understood as the Rus-

[1] https://pravo.ru/story/217169/?desc_autoload=

sian Government's recognition of the authority of the European Court of Human Rights (hereinafter — ECtHR).

First, let's see the legal basis for the Convention's application.

The CCP and the CAP have been created on the basis of the Russian Constitution 1993 and have taken the practice of ECtHRinto account.

The first sentence of Article 15(4) of the Russian Constitution clearly identifies the Russian Federation as a monistic country. It states that "the international treaties signed by the Russian Federation shall be a component part of its legal system". The documents need to include firstly the Universal Declaration of Human Rights and the Convention. It is no longer necessary to transform these treaties into the domestic legal system.

Theoretically there is no difference between the Convention and, for example, the Russian Civil Procedure Code in terms of their implementation in national courts.

In this regard, the provisions of Article 6 of the Convention and their interpretation by ECtHR are essential for discretionary justice, mainly. Article 6 of the Convention states, *inter alia*, that in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Constitution of RF and international law give a court the special role in the mechanism of protection of fundamental rights and freedoms. Discretionary justice should be directed to this role. *Et sic*, this is the mechanism of implementation of the Convention as defined by the legislation. This mechanism deals with discretionary justice.

Let us explore the judicial practice of the Convention's application.

The modern result is that the impact of the Convention on discretionary justice in Russia, in terms of its implementation by domestic courts, is not satisfactory.

In this article, we don't analyze Russia-ECtHR relations through the prism of debates pertaining to the 2015 crisis and possible "Ruxit" and to the backlash against international courts phenomenon[1].

We seek to contribute to existing understanding of this backlash by examining Russia-ECtHR relations in light of justice reform in Russia and Europe.

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[1] See in detail: Mälksoo L, Introduction. Russia, Strasbourg, and the Paradox of a Human Rights Backlash. In *Mälksoo L., Benedek W.* (eds.) Russia and the European Court of Human Rights: The Strasbourg Effect. Cambridge: Cambridge University Press, 24 (2017). L. Mälksoo tried to explain "the paradox of human rights backlash in Russia" through the so-called "Strasbourg effect" (i.e., an expectation that by joining the CoE, Russia would eventually accept European human rights standards). Mälksoo remarks that "the Strasbourg effect" can be twofold: it can be a source of inspiration that triggers important legislative and other reforms, but it can also "amount to rejection and resistance; it can create opposition to ideas that are seen as civilization-wise alien".

According to Anatoly Kovler, Russia's former ECtHR judge, "Russia showed Europe its 1993 Constitution, which enshrined a rather impressive list of rights and freedoms for its citizenry"[1] The Constitutional Court RF has regularly issued recommendations to law-makers on how to bring domestic laws into conformity with the Convention, as well as direct instructions to the domestic courts on the question of review of cases on the basis of the ECtHR judgments[2]. Application of the Convention by Russian courts of first instance has been complicated by a number of problems. A difficult issue has been not the actual (non)compliance with individual decisions, but the adoption of general measures (for instance, new laws or legislative amendments) that would change the situation in a particular issue-area[3]. We can identify the lack of uniformity in the definition of the Convention`s space in the system of Russian law, as well as the role of the legal provisions of ECHR for the Russian implementation practice. There are a great variety of the views of Russian lawyers on these issues. So, there is an opinion according to which "the case law of the European Union approves the practical unconditional priority of the Convention over national Constitutions, since the goals of the Convention can only be achieved when they will have the highest legal power over any rule of national law, including the Constitution"[4]. At the same time, there is the following assessment of the Convention as a source of Russian law: "By virtue of Part 4 of Article 15 of the Constitution RF Convention is incorporated into the Russian legal system as an international treaty and it is a priority to the federal law"[5]. Using specific examples, A.R.Sultanov shows the possibility of using the legal positions of ECtHR, their application to improve judicial protection of human rights in Rus-

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[1] *Kovler A.* European Convention on Human Rights in Russia. L'Europe en Formation 4 (374): 116–135, 117 (2014) https://www.cairn.inforevue-l-europe-en-formation-2014-4-page-116.htm.

[2] *Marochkin S.* Evropejskij Sud po pravam cheloveka i Kostitucionnj Sud Rossii dvadcat' let spostya: v budushchee nazad? (Part I) (European Court of Human Rights and Russian Constitutional Court Twenty Years After: Back to the Future?), Rosskijsij uridicheskij zhurnal 5 (122): 21–32 (2018).

[3] *Nikolaev A.M., Davtyan M.K.* Ispolnenie reshenij Evropejskogo Suda po pravam cheloveka i Mezhamerikanskogo Suda po pravam cheloveka: sravnitel'nyj analiz (Compliance with the ECtHR and Inter-American Court of Human Rights decisions: a comparative study), Zhurnal zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedeniya, 4: 40–46 (2018), https://doi.org/10.12737/art.2018.4.5.

[4] *Zanina M. A.* Kollizii norm mezhdunarodnogo prava i Evropeyskay Konvenzia o zashite prav cheloveka I osnovnykh svobod (Conflict of international legal norms and the European Convention), http:\demos-centre.ru

[5] *Zor`kin V.D.* Konstituzionnyii Sud Rossii v Evropeyskom pravovom pole (The Constitutional Court of Russia in European legal field). Zurnal Rossiiskogo prava, 3, 35 (2005). Its Ruling N 4-P stated that the Parliament has the obligation to introduce a mechanism of execution of final judgments of the European Court of Human Rights which would allow to secure adequate redress for violations of rights determined by the European Court of Human Rights.

sia. The author carefully analyzes the legal nature of the Rulings of the European Court of Human Rights and their legal consequences in civil proceedings[1].

The determination of the place of ECtHR`s rulings in the system of Russian law is the problem, also. So, M.Marchenko concludes that the binding force of Court`s rulings deals with just complaints against Russia[2]. According to V.A. Kanashevskogo, O.I. Tiunova, P. A. Laptev: "Just the rulings of the European Court, which were handed down against Russia, but not the whole acts of the European Court, are binding for the Russian Federation"[3].

Twenty years ago G.Danilenko wrote that the case law of the ECtHR may be put into Russian domestic jurisprudence gradually[4]. The Russian Federation recognized compulsory jurisdiction of the ECHR in regard to the interpretation and application of the Convention.

Thus, appropriate decisions of ECtHR should influence on the discretionary justice in Russia. The Constitutional Court RF went further then any statutes or the Constitution itself. In one of the judgments, the Constitutional Court provided an interpretation which "established an obligation to give direct domestic effect to decisions of international bodies, including the European Court of Human Rights". We shall stress how important this statement of the Constitutional Court was.

Let us indicate that for many years, the Soviet Union was a dualistic country. The Soviet Union ratified more human rights treaties than any other country at the time. But the treaties were never incorporated into the domestic legislation; they have never been implemented domestically by judges. International law simply did not exist for a Soviet judge. Even today we cannot expect a local judge to look at international human rights guaranties simply because their value system was formed during Soviet time.

We will give two examples. The Chief Justice of the Sverdlovsk Oblast Court has been in charge of his court for 23 years, since Soviet times. Another example is the Chief Justice of the Russian Supreme Court who has been holding his position for 21 years, since Soviet times. How can we expect a different approach towards domestic application of international law from a judge who was in charge of a court since Soviet times?

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[1] *Sultanov A.R.* Judgments of the European Court of Human Rights in Civil Procedure of the Russian Federation, Statut, (2020).

[2] *Marchenko M.N.*Uridicheskaya priroda I harakter reshenii Evropeyskogo Suda po Pravam Cheloveka (Legal Nature of the Rulings of EctHR), Gosudarstvo I Pravo, 2,12 (2006)

[3] *Kanashevskii V.A.* Precedentnaya Praktika Evropeyskogo Suda po Pravam Cheloveka kak Regulyator Grazhdanskix Otnoshenii v Rossiiskoy Federatii (Precedents of ECtHR as the regulator of civil relationship in RF), Zhurnal Rossiiskogo Prava, 4, 123 (2003).

[4] *Danilenko G.M.* Implementation of International Law in CIS States: Theory and Practice, European Journal of International Law 10:1, 68 (1999).

Without any prejudice towards experienced justices, from our point of view, changes come to a legal system not only with new constitutions and legislation, but mostly with new approaches in looking at international law, new approaches in teaching international law, therefore with the arrival of newly educated judges with new legal consciousness. Unfortunately, the latter changes have not taken place in Russia as of yet.

And now we will see the way the Convention is being implemented by judges whose value systems were formed during the Soviet time, or by judges who are supervised by such long-living chief justices.

Let us offer you the citation from an interview at a press-conference with the Chief Justice of one of the Russian High Courts, the Sverdlovsk Oblast Court, Ivan Ovcharuk (done in 2004). On the question whether the High Court initiated any training on the European Convention on Human Rights, the Chief Justice stated:

"No, we do not hold any special trainings on the Convention. What sort of training does one need in order to honour the provisions of Article 6? All you need is to follow the national legislation"[1].

This answer is indicative of the way Russian judges delt with the issue of implementation of the Convention — judges were convinced that they do not need to possess knowledge on the Convention or with respect to international law in general. Ironically the online conference of the Chief Justice was called "Judge Shall Know Everything." This is a typical reason why so many cases from the Russian Federation go to Strasbourg.

This is the typical reason for the crisis 2015[2].

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[1] Online interview with the Chief Justice of Sverdlovsk Oblast Court, Ivan Ovcharuk, "Sud'ia Dolzhen Znat' Vse" (A Judge Must Know Everything), News Agency Uralpolit.Ru. 30 August 2004. http://www.uralpolit.ru/regions/svr/30-08 2004/page_29757.html

[2] Konstantin Markin, a radio intelligence operator in the Russian military forces, brought his complaint to the attention of the ECtHR in 2006 where he alleged that due to his gender, he was not allowed to take 3 years of parental leave to take care of his new-born baby. The provision of the Russian Federal Law, "The Federal Law on the Status of Military Personnel (no. 76-FZ of 27 May 1998)", in Article 11 (13) limited the possibility of parental leave to women in the military (men could receive up to three-months leave in cases when the child's mother was dead, seriously ill or absent, in accordance with Art.32 (7) of the Presidential Decree from 16.09.1999 №1237). In 2008, Markin challenged the constitutionality of this provision in the Russian Constitutional Court. In 2010, the ECtHR Chamber decision was announced and found a violation of Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the Convention, and the Grand Chamber on March 22, 2012 confirmed the violation of the above-mentioned two articles. Markin then petitioned a local court in St-Petersburg asking for a review of his case, and the court addressed the Constitutional Court with regard to the question of the contradiction between two decisions. Namely, the previous rejection by the CC of Markin's case and the ECtHR judgment. On 6 December 2013 Russian's Constitutional Court (CC) delivered its judgment in the Markin case, and while avoiding an issue of superiority of ECtHR and CC decisions, it stated that the Constitutional Court would decide the question of the possible constitutional means of implementing an ECtHR judgment in cases where a judgment challenges certain provisions which are consistent with

The main purpose of this chapter was to find the way of exit from the 2015 crisis in Russia-ECtHR relations without Russia's withdrawal from the Strasbourg system.

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the Constitution (Constitutional Court news release. 6 December 2013. http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3137).

The second judgment by the ECtHR that led to much controversy, was the July 2014 judgment Neftyanaya Kompaniya Yuko v. Russia that prescribed the payment of 1.9 billion euro to Yukos shareholders as a compensation for the dismantling and nationalization of the company (violation of Article 1 of Protocol No. 1, the right to property) that took place between 2003 and 2007. The ECtHR decision coincided with the awards of three investment tribunals established under the auspices of the Permanent Court of Arbitration. The ECtHR found violations of Article 6, as well as Article 1 (Protocol 1) of the Convention. These decisions dealt with virtually identical subject matter, and this, in the words of Eric De Brabandere, was uncommon. "Not only is the concurrent jurisdiction between a human rights court and an investment tribunal not self-evident, but two international courts deciding what is in essence the same case is remarkable in view of the potential inconsistent outcomes of the decisions" (De Brabandere E (2015) Case Comment: Yukos Universal Limited (Isle of Man) v the Russian Federation. Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals. ICSID Review 2015, 30 (2): 345–355. P. 346). The Yukos case was delivered in the context of worsening relations between Western European countries and Russia due to the Crimea annexation (when Russia's voting rights were suspended in PACE (Harding L Russia delegation suspended from Council of Europe over Crimea. The Guardian. 10 April 2014. https://www.theguardian.com/world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine) and some other measures against Russia were taken by the organization (its right to be represented in the Bureau of the Assembly, the Presidential Committee and the Standing Committee) (Citing Ukraine, PACE renews sanctions against Russian delegation. 28 January 2015. http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5410&lang=2).

The third case, Anchugov and Gladkov v. Russia (Applications nos. 11157/04 and 15162/05) involved a violation of Article 3 (Protocol 1) the right to free elections. Two convicted prisoners, Anchugov and Gladkov, claimed that they were unable to participate in the parliamentary and presidential elections that had been held between 2000 and 2008 because the Russian Constitution in Article 32 §3 banned convicted prisoners from exercising their right to vote. Both applicants unsuccessfully brought this matter before domestic courts, as well as Russia's Supreme Court. In 2004 and 2005 they sent their complaint to the ECtHR. Referring to Hirst v. the United Kingdom, the applicants believed that these voting restrictions constituted a violation of the ECHR. In para 103 of the judgment, the ECtHR noted that, "The right to vote is not a privilege; in the twenty-first century, the presumption in a democratic State must be in favor of inclusion and universal suffrage has become the basic principle. In light of modern-day penal policy and of current human rights standards, valid and convincing reasons should be put forward for the continued justification of maintaining such a general restriction on the right of prisoners to vote as that provided for in Article 32 §3 of the Russian Constitution." // https://link.springer.com/article/10.1007/s12142-019-00577-7?shared-article-renderer#Fn16

Russia's Constitutional Court, upon a request from State Duma deputies, on 14 July 2015, delivered a judgment on the constitutionality of several provisions contained in the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto", "On International Treaties of the Russian Federation", and several others. This judgment envisaged the possibility of constitutional review of enforceability in cases where an ECtHR judgment seemed to contradict the Constitution.Footnote17 These three cases led to the December 2015 amendment to the Federal Law "On International Treaties of the Russian Federation", that empowered the Russian CC to rule on the (im)possibility of execution of ECtHR judgments (and judgments of other international courts) if they conflict with the Russian Constitution. Thus, in accordance with this law, the Constitutional Court declared Anchugov and Gladkov v. Russia and Yukos judgments non-executable (partially executable, in the first case).

Now the question is whether this crisis exists because the judiciary lack knowledge on the Convention? Or is it because of the quality of discretionary justice? Rather than taking a stand on the question, we have tried to present a variety of opinions emanating from Russia's legal community.

We shall be optimistic. It took the United Kingdom about 50 years to incorporate the Convention.

Further let us use the experience of ***the harmonization in the field of civil procedure*** already accumulated by the countries.

2) Initiatives of Transnational Civil Procedure

For the purposes of our article it is possible to divide all harmonisation mechanisms of civil procedural legislation into 2 primary groups:

a) Harmonisation[1] mechanism in Russia.

b) Harmonisation mechanisms in the EU.

Our task is the examination of their influence on discretionary justice.

a) Harmonisation Mechanism in Russia

The largest shortcoming of the ongoing legal reform in contemporary Russia is its lagging behind the emerging tendency in the legislation of civilized countries towards approximation and harmonization of rules and standards.

The Russian Federation is not a member of the European Union; however, this does not by far belittle the significance of the developing relations between the European Union and Russia for both the two of them and for the entire region and the world as a whole.

Admittedly this relationship is in a rather precarious state. But it is essential that policymakers and analysts understand what the problems are that have impeded Russia's integration with Europe if we and they are to overcome these obstacles. Such analysis is highly important to any effective understanding of both Russia's and the EU's future trajectory for improvement quality of civil justice.

Obviously, the indicated conditions dictate the vital need of developing mutual relations between Russia and the Union on a broad range of issues, *inter alia*, in the field of improvement of justice.

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[1] "Unlike unification which contemplates the substitution of two or more legal systems with one single system, harmonisation of law arises exclusively in comparative law literature, and especially in conjunction with interjurisdictional, private transactions. Harmonisation seeks to 'effect an approximation or coordination of different legal provision or systems by eliminating major differences and creating minimum requirements or standards' (de Cruz, P. Comparative Law in a Changing World, 1999, London: Cavendish Publishing).

The contemporary legal basis for the above-mentioned relations is established by the Partnership and Cooperation Agreement underpinning the partnership between the Russian Federation on one hand, and the European

Communities and their Member States, on the other hand, signed on June, 24, 1994 on the island of Corfu, Greece (hereinafter — PCA)[1].

The PCA is a framework agreement, because many of its positions require further development and specific definitions within the framework of special bilateral agreements on individual issues. The important feature of PCA is that it is future-oriented[2].

Consistent implementation of the Agreement's provisions leads to the deeper integration between the Parties. Partnership and Cooperation Agreement outlines in its provisions an entire set of means aimed at the enhancement of such an integration. One of the most important and effective means is the harmonization (i.e. approximation) between the legislations of Russia and the European Union.

This idea is reflected today in the concept of creation of four common spaces between Russia and the Union, one of which is Safety and Justice. Such space should include real mechanisms of harmonization of the procedural law. Among others, the provisions should concern the quality of justice.

So, this tool will be important for our research because the harmonization of legislation is capable of creating a strong common legal basis for improving of quality of discretionary justice on civil and commercial cases in Russia and in the EU.

b) Harmonisation[3] Mechanism in the EU

Unfortunately, the experience accumulated in the framework of the second group of mechanisms is so far practically inapplicable to Russia. Member States directly take part in the establishment of the EU acts to be harmonised with.

We are currently overseeing what appears to be a paradigm shift in the way that cross-border litigation is conducted within the European Union. This matter was initially conceptualised from the perspective of ***international judicial cooperation***, based on the notion of mutual trust and mutual recognition.

Special role plays the Court of Justice of the European Union as a "promoter" of a European Procedural Law (principle of effectiveness and principle of equivalence). To the moment the harmonisation is already used: "horizontally", through

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A28010102_2

[2] Furthermore, four European Union-Russia Common Spaces are agreed as a framework for establishing better relations. The latest EU-Russia strategic partnership was signed in 2011, but it was later challenged by the European Parliament in 2015 following the annexation of Crimea and the war in Donbass.

[3] We don`t use the term 'Europeanization' or 'EU-ization'. EU-ization is only a small part of a much broader and longer term process that can lay claim to the term Europeanization.

the regulations on international judicial cooperation, for example the European Account Preservation Order; and "vertically", through the promotion of harmonised standards promoted by the directives on intellectual property rights and competition damages (access to information and evidence), or in the directive on trade secrets and in the field of data protection (protection of confidential information). With a view to the future, there is such harmonisation initiative as ALI-UNIDROIT priciples of transnational civil procedure[1].

Recent developments have introduced the option of ***harmonisation*** as a new regulatory approach[2]. The Future of the Law of Civil Procedure we see as the Coordination in the framework Russian-European Law and Harmonisation within EU. For Russia, the judicial cooperation in civil matters would be easier since activities aimed at harmonisation are limited to the Area of Freedom, Security and Justice of the PCA.

The rule of law in the European Union and Russia rests on a precarious decentralised judicial architecture with the two pillars of the judicatures of the EU and of the Member States and the one pillar of the judicature of RF. Judicial protection (judicial discretion) emerges as the meta-norm[3] for the governance of this scheme. It re-orientates the entire EU judicial architecture and Russian judicial machine towards protecting individual rights grounded in EU law, in Russian Law, in Human Rights Law. The success of European and Russian harmonisation scheme depends on rights being taken seriously through their guaranteed judicial protection.

Further, the process of legislative harmonisation in Europe on the basis of the EU law is bringing the modern understanding of the European law. The European Union law becomes a truly European law.

In this respect the legal system of the European Union is quite comparable to the Roman law and its well-known Justinian Code (*Corpus Juris*) adopted in many European countries and having affected among others the legal system of Russia.

In our view, the modern worldwide meaning of Justinian Code could help to define the door to improve quality of discretionary justice.

In recent times, lawyers of Italy, Germany, Holland, Poland have worked on the idea of wider application of the principles of Roman law in modern practice. The writing of Reinhard Zimmermann[4] is well known particularly. The author speaks

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[1] https://www.unidroit.org/civil-procedure

[2] Inchausti Fernando Gascon, Hess Burkhard (eds), The Future of the European Law on Civil Procedure, 61 (2020).

[3] We use the term from: Roeben Volker, Judicial Protection as the Meta-norm in the EU Judicial Architecture. Hague Journal on the Rule of Law, volume 12, 29–62 (2020).

[4] Zimmermann Reinhard, Roman Law, Contemporary Law, European Law: The Civilian Tradition Today, Oxford University Press (2001).

on the desirability and possibility of recovery of Roman law in united Europe as the nucleus of European law.

Russia should join the process. The importance of developing of modern Roman law is also linked with the fact that it is beyond politics and beyond engaged political and legal theories. General legal culture, language of the Roman legal terms, the revival of the Russian scientific school of Roman law would bring together legal systems of the European Union and the Russian Federation.

A common language between lawyers of common law and civil law countries is critically important for the quality of justice. This is not purely an academic task. The quality of justice movement may be characterized as an effort of the world legal community to clarify and virtually enforce worldwide through national judiciary the concept of discretionary justice.

What can be done that is not now done to minimize injustice from judicial discretion

"Why through mindfulness[1] **and quantum theory?"** *The maxim of the Five W's (and one H)-epigraph* is that for a subject to be considered complete it must answer a checklist of six questions, each of which reflects a part of world. It is a formula for getting the "global" story on the subject.

We do not live in a just world. This may be the least controversial claim one could make in political and legal theories. But it is much less clear what discretionary justice on a world scale might mean. Concepts and theories of discretionary justice are in the early stages of formation, and it is not clear what the main questions are, let alone the main possible issues. Many scholars explore the role of the EU as a promoter of its own standards and values abroad. We argue that it is a true and a mistake, both. The world outside EU should influence EU and, of course, *vice versa,* the EU should influence other world. The same way, the legal world should influence another part of the world and *vice versa*. For example, we have seen above that now there are a lot of problems in the area of judiciary in many countries. The procedural legislations were renewed, the civil justice improvement is going on. But there is not only this one way of civil justice improvement. There is another important way. There is another part of the world that influence civil justice.

As the quality of the tree is recognized from the fruits, so the true nature of a civil justice reform is recognized by what it does, not by what it proclaims. And the civil justice reform qualifies starting from its "heart". In mindfulness language,

[1] We started with Jon Kabat-Zinn's "classic" description of mindfulness // https://www.theguardian.com/lifeandstyle/2017/oct/22/mindfulness-jon-kabat-zinn-depression-trump-grenfell#:~:text=Kabat%2DZinn%20has%20defined%20mindfulness,pain%2C%20both%20physical%20and%20emotional.

the "heart" is the center, the nucleus, which moves and gives "color" and depth to thoughts, words and actions. The heart of any civil justice reform is a lawmaker (a legislator)[1], a judge[2]. Both use discretion. Justice depends on their discretion. Not what enters a lawmaker, a judge does injustice, but what comes out of the lawmaker, the judge does injustice. Using the universal wisdom Jesus says: "What goes into someone's mouth does not defile them, but what comes out of their mouth, that is what defiles them"[3]. This is the maxim for everyone, the axiom of any life's puzzle, including civil justice. In fact, all damages and injustices come from the heart.

The nucleus of a lawmaker's (a judge's) personality should be like a rock: discretion that knows injustice comes from the heart. Human being heart is therefore comparable to a large container. If a lawmaker (a judge) is able to fill it with truth, with good, with just, his discretion, his actions, his choices will be ethic and will not do injustice. It depends on listening, on the welcome a lawmaker (a judge) reserves for ***"Discretio est discernere per legem quid sit justum".***

It must be remembered that the basis of everything is ***the casuality (physics)***[4], ***the law of the Universe of Cause and Effect***[5]: one creates the cause and an effect follows. Someone puts the seed in the ground and it will sprout. If there is the cause, the tree is the consequence. Somebody causes harm, he gets a demand to compen-

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[1] Legislator is a synonym of lawmaker. Lawmaker is a synonym of legislator. As nouns the difference between lawmaker and legislator is that lawmaker is one who makes or enacts laws while legislator is someone who creates or enacts laws, especially a member of a legislative body.

[2] The role of judges as lawmakers has over the years been the subject of much discussion. That this is so, it is so as a result of conscious decision-making by the judges. Judge could be a lawmaker, doing conscious decision-making. See in detail: Bingham Tom, The Business of Judging. Selected Essays and Speeches (2000).

[3] Matthew, 11–15.

[4] Green Celia, The Lost Cause: Causation and the Mind–Body Problem, Oxford: Oxford Forum (2003). Includes three chapters on causality at the microlevel in physics. Bunge Mario, Causality: the place of the causal principle in modern science. Cambridge: Harvard University Press (1959), Bohm David, Causality and Chance in Modern Physics. London Taylor and Francis (2005), Miguel Espinoza,Théorie du déterminisme causal, L'Harmattan, Paris (2006).

[5] For thousands of years, ***the law of cause and effect*** guided scientific inquiry. In fact, the history of ***the concept of causality*** can be traced through Hebrew, Babylonian, Greek and European cultures. Certain Greek philosophers, however, introduced the atomistic concept of chance-events to oppose the common-sense application of causality. The resulting conflict between ***cause versus chance*** has not only shaped the history of science but has imposed lasting effects on Western culture as a whole. This conflict intensified during the Twentieth Century as the Heisenberg Uncertainty Principle (HUP) became the leading tool of the proponents of chance. More recent findings have now demonstrated that the HUP fails.
Common Sense Science counters chance-based philosophy by returning to causality and other principles of Classical Science. This paper shows how discretion models based on the laws and precedents can fully implement the law of cause and effect in manner of quantum theory.

sate this harm. One prepares the case and an effect comes from it. It is the most intimate bond that exists in all life processes, including civil justice reform and decision-making.

With the words of universal wisdom, Jesus put his fingers into the man's ears: the touch of the fingers speaks without words. Jesus enters into a bodily relationship and touches the weak parts, like a doctor, he touches the suffering ones. Then, spitting on his own fingers, he touched the man's tongue. It goes done only when someone kisses other intimately[1]. How it could be different to you if while a judge explains your rights, he also holds your hands, hugs you and kisses you! It could be different, but it is unreal. But it's true that a judge should take care of your case, as it was true in the Soviet civil procedure, with its ***Principle of Objective Truth***[2].

Every injured person needs to feel "taken by the hand", welcomed, he must feel that the judge is there for his case, attentive to his case and then the judge has to exercise discretion, to do justice, because mechanical following the law is not enough! A.Koni[3] said that "the officials of the judicial competition must not forget that in a certain sense the court is a school for the people, which teaches not only to respect the law, but also to serve the truth and respect human dignity"[4].

We must know how to appreciate it, ***the principle of objective truth*** of the Soviet civil procedure, which accompanied someone in need to justice.

Sometimes everyone needs to feel the importance of having the just judge next to his case, because the right presence doubles his strength, increases his esteem,

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[1] Mark, 7:33.

[2] We are agree with Embulaeva Natalia and Ilnickaya Lyubov that it is necessary to interpret the principle of objective truth as universal one, which must permeate not only the sphere of law enforcement, but also the formation of laws. A proposal is formulated on the need to separate and normatively fix the principle of objective truth in the procedural branches of law as an independent principle (The principle of objective truth in law, Web Conferences (January 2018); See also: Ginsburgs George, Objective Truth and the Judicial Process in Post-Stalinist Soviet Jurisprudence, Oxford University Press, The American Journal of Comparative Law, Vol. 10, No. 1/2, 53–75 (Winter — Spring, 1961)

[3] Anatoly Fedorovich Koni (1844–1927) was a Russian jurist, judge, politician and writer. He was the most politically influential jurist of the late Russian Empire. He participated in a number of high-profile criminal cases, including ***The Borki train disaster*** occurred on October 29, 1888 (Miller Frederic P, Vandome Agnes F, McBrewster John (eds) Borki train disaster: Kharkov Governorate, Kharkiv Oblast, Royal train, Tsar, Crimea, Saint Petersburg, Alexander III of Russia, 2010), ***the shipwreck of Vladimir*** (the captain of the Russian steamship Vladimir and the captain of the Italian steamship Columbia were put on trial in this case. They were accused of committing incorrect maneuvers, admitting violations of the rules on the safety of traffic at sea, which caused a collision of steamers, the death of the steamer Vladimir, 70 of its passengers, 2 sailors and 4 people from the service personnel. The collision of steamboats occurred on the night of June 27, 1894, https://law.wikireading.ru/18245), was the author of such works as "Fathers and Sons of Judicial Reform", "Judicial Speeches" and "On the Path of Life". Among his contemporaries, Koni became famous as an outstanding orator.

[4] See: *Koni A.*F, Izbrannye trudi e rechi (Selected works and speeches), Yurayt (2019).

soothes the pain. A.Koni confirmed that in a trial "grace <...> was a higher blessing than mechanical adherence to the letter of the law"[1].

We refer to the second law, we need to know: ***the cause follows the affect***.

Be just and you will not do injustice!

Be just and friendly face of justice will appear.

Be just and everything else follows.

It seems strange, doesn'i it? With the universal wisdom Jesus Christ says the same thing in different words: "But seek first the kingdom of God and his righteousness, and all these things will be added to you"[2]. The Kingdom of God is the effect. He says: first seek the end, the cause will follow. This is how it should be. It is not only true that if you put a seed in the ground you will get a tree; it is also true that if there is a tree, there will be millions of seeds. It is not only true that if a judge ***choose that which is just by the law, he does discretionary justice***. It is also true that if there is ***discretionary justice***, there are millions of ***judges' choices of that which is just by the law***. If the cause is followed by the effect, the effect is again followed by the cause. It's a chain! Then it becomes a circle.

Modern physics says that it is easier to create the effect than to create the cause, because thought affects reality[3]. D.Gabor stated: "You cannot predict the future,

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[1] *Koni A.*F, Izbrannye trudi e rechi (Selected works and speeches), Yurayt (2019).

[2] Matthew 6:33 ESV.

[3] Here are 7 incredible discoveries that prove the power of the mind:
STUDY #1: Visualization creates results: Australian Psychologist Alan Richardson set out to prove the power of visualization through an experiment. (https://www.expertenough.com/visualization-works/)
STUDY #2: Smiling improves mood: One of these studies took place in the late 1980's (https://theeconomyofmeaning.com/2016/08/20/famous-psychology-study-killed-by-replication-does-a-pencil-in yourmouth-make-you-feel-happy/)
STUDY #3: Thought management lowers stress: Don Joseph Goeway, the author of ***Mystic Cool: A proven approach to transcend stress, achieve optimal brain function, and maximize your creative intelligence*** has plenty of experience in this area.
STUDY #4: The brain can produce serotonin on its own: https://www.healthline.com/health/how-to-increase serotonin
STUDY #5: People can "think" their way to releasing weight: this experiment involved a Harvard psychologist and a group of mostly overweight hotel maids. Langer, the psychologist, predicted that the maid's viewpoints on their physical activity made it difficult for them to lose weight.
(https://dash.harvard.edu/bitstream/handle/1/3196007/Langer_ExcersisePlaceboEffect.pdf?sequence=1)
STUDY #6: Positivity and meditation prolongs life: in 1989, Dr. David Spiegel of Stanford University took on a study consisting of 86 women in the late stages of breast cancer (https://www.apa.org/monitor/jun02/mindbody>)
STUDY #7: The placebo effect: pharmaceutical studies frequently employ placebos to affect the human mind and other areas as well. In fact, researchers are discovering that placebos are at times more effective than actual medication.

but you can create it"[1]. It depends on everyone, completely, while the cause may not depend on everyone, completely.

According to quantum physics, we are all part of a reality that we create as we observe it. For this we can modify it. Paolo Scarpari, quantum physicist[2], explains how. His thought system opens up considerable space for human possibilities to make a change through a change of paradigm. Peter Baksa manifests that the level of our thought/brain wave is what makes our reality what it is and what it will continue to be. He reviews the quantum mechanics that supports the manifestation and the tenets of six major world religions, focusing on their teachings of prayer and meditation, and shows how these ancient truths mesh with manifestation[3]. Already Immanuel Kant argued that it is the mind that shapes reality[4].

Why do we continue to view real ***civil justice*** as something foreign to us? Still, we could play a role in producing it. Quantum physics goes in this direction.

It started in 1909 with the experiments on the behaviour of photons carried out in a physics laboratory by Geoffrey Ingram Taylor[5]. Projected against a barrier with two holes, the particles, instead of passing through the two holes one at a time, crossed them simultaneously, which did not meet the expectations of traditional physics: they behaved as if they knew what only the scientist who conducted the experiment. The conclusion was that the observer had influenced the particle through the simple fact of being present in the experiment.

In physics, ***the observer effect*** is the theory that the mere observation of a phenomenon inevitably changes that phenomenon[6]. This is often the result of instruments that, by necessity, alter the state of what they measure in some manner. A common example is checking the pressure in an automobile tire; this is difficult to do without letting out some of the air, thus changing the pressure. Similarly,

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(https://www.health.harvard.edu/mental-health/the-power-of-the-placebo-effect)
Indeed, the power of the mind is an incredible thing.

[1] See: Gabor D, Inventing the Future, Penguin Books (1964).

[2] Paolo Scarpari is the founder of Coscienza Quantica — Institute of Evolutionary Research, researcher and scholar of the processes of determination and development of reality.

[3] Baksa P, Faith Wave I Think… Therefore It Is.., Intelegance Publishing (2014).

[4] Immanuel Kant's Critique of Pure Reason illustrates the inevitable limitations of our ability to discover "reality". Kant asserts that what we perceive to be "real" is not absolutely "real". The brain receives stimuli from the "real" world; it organizes, processes, and shapes the stimuli in a certain fashion before feeding it back to the person. As a result the person only perceives the already processed and shaped information. To Kant, the brain is constantly changing "reality". His assertion is further explained as he introduces two vital terms, "phenomena" and "noumena".

[5] In 1909 Geoffrey Ingram Taylor (1886–1975) set up the "Young" double-slit experiment.

[6] http://faculty.uncfsu.edu/edent/Observation.pdf

it is not possible to see any object without light hitting the object, and causing it to reflect that light. While the effects of observation are often negligible, the object still experiences a change. This effect can be found in many domains of physics, but can usually be reduced to insignificance by using different instruments or observation techniques.

An especially unusual version of the observer effect occurs in ***quantum mechanics***, as best demonstrated by the double-slit experiment. Physicists have found that even passive observation of quantum phenomena (by changing the test apparatus and passively 'ruling out' all but one possibility), can actually change the measured result.

This experiment, repeated in 1998 at the *Weizmann Institute in Israel* with more sophisticated and sensitive equipment, confirmed the result and demonstrated that the more particles were observed, the more they were influenced by the observer[1]. Despite the "observer" in this experiment being an electronic detector — possibly due to the assumption that the word "observer" implies a person — its results have led to the popular belief that a conscious mind can directly affect reality. The need for the "observer" to be conscious is not supported by scientific research[2].

In 1935, an Austrian physicist Erwin Schrödinger published his *"Schrödinger's Cat"* thought experiment to explain ***superposition*** (a quantum mechanics principle stating that something exists in all possible states until it is directly observed or measured, at which point it exists only in one of its possible states)."Quantum physics thus reveals a basic oneness of the universe", Erwin Schrödinger said. He believed that only one mind exists, and we are different manifestations of that same mind. *He didn't imply religion or superstition. This view is actually possible under the laws of physics.*

Schrödinger's philosophy is also apparent in his quote: "The world is given to me only once, not one existing and one perceived. Subject and object are only one. The barrier between them cannot be said to have broken down as a result of recent experience in the physical sciences, for this barrier does not exist". In summary, the experiment means that *reality is the result between observer and observed*. In other words, Civil Justice as a real reform's outcome is the result between lawmaker (judge) and civil justice reform.

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[1] Weizmann Institute of Science, Quantum Theory Demonstrated: Observation Affects Reality, Science Daily (27 February 1998), *Squires Euan J.* The Mystery of the Quantum World. Taylor & Francis Group (1994).

[2] "Of course the introduction of the observer must not be misunderstood to imply that some kind of subjective features are to be brought into the description of nature. The observer has, rather, only the function of registering decisions, i.e., processes in space and time, and it does not matter whether the observer is an apparatus or a human being; but the registration, i.e., the transition from the "possible" to the "actual", is absolutely necessary here and cannot be omitted from the interpretation of quantum theory". — Heisenberg Werner , Physics and Philosophy, 137 (2007).

According to the interpretation developed in 1927 by Niels Bohr and Werner Heisenberg, both Nobel Laureates in Physics respectively in 1922 and 1932, known as ***the Copenhagen Interpretation***[1], the universe exists as an infinite number of superimposed possibilities all present simultaneously as possible. The act of a person who observes those potentials determines the activation of what he is focused on: in other words, what he thinks or expects to see[2].

What prevents a complete acceptance of theories that have already been widely valued by the scientific community. They are destabilizing theories. Although this thought has its roots in ancient oriental cultures, which considered reality as ***maya*** (in Sanskrit "illusion"), only a hundred years have passed since those first discoveries. Perhaps, it will take a few generations for the change to enter the collective mind.

Ashwin Sanghi said "in quantum physics, there is a concept of entangled particles — these particles behave in the same manner even when they are apart. If this is not maya, what is? Scientists are still trying to find out what our universe is made of. These are the same questions our scriptures had raised much earlier"[3].

Today, even quantum physics claims that reality is an illusion[4]. The implications of what has been said are considerable: we are part of a reality that we create as we observe it.

Starting from the work of the neurosurgeon Karl Pribran[5], the activity of the brain has been studied in holographic terms, i.e. the hypothesis that our brain

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[1] It is one of the oldest of numerous proposed interpretations of quantum mechanics, and remains one of the most commonly taught. See: Siddiqui, Shabnam; Singh, Chandralekha, How diverse are physics instructors' attitudes and approaches to teaching undergraduate level quantum mechanics? European Journal of Physics, 38 (3) (2017), Wimmel Hermann, Quantum Physics & Observed Reality: A Critical Interpretation of Quantum Mechanics. World Scientific, 2 (1998).

[2] Dr. Michio Kaku has some interesting, sometimes similar, observations. Here is the link to his website: http://mkaku.org/home/?cat=59

[3] Ashwin Sanghi (born 25 January 1969) is an author of the new era of retelling Indian history or mythology in a contemporary context. (See: Khare Ghose, Archana, The retell market, The Times of India (25 December 2011). Forbes India has included him in their Celebrity 100 list. (See: Mishra, Ashish, Forbes India Celebrity 100. Forbes, 8 February 2013)

[4] See, for ex: *Alastair I.M.* Rae, Quantum Physics, Second Edition: Illusion or Reality? Cambridge University Press (2012).

[5] ***The holonomic brain theory*** is based on some insights that ***Dennis Gabor*** had. He was the inventor of the hologram, and he obtained the Nobel Prize for his many contributions. He was a mathematician, and what he was trying to do was develop a better way of making electron micrographs, improve the resolution of the micrographs. Holography begins to take its first steps in 1947 in a laboratory of an electrical engineering company where Gabor was working on improving the electron microscope. And so for electron microscopy he suggested that instead of making a photograph — essentially, with electron microscopes we make photographs using electrons instead of photons. He thought maybe instead of making ordinary photographs, that what he would do is get the interference

processes reality as if it was a ***hologram***: how laser light activates a static memory that takes shape, so we, who are a set of cells that emit energy, by observing and thinking activate the hologram of reality, that is, the memories present not only in our personal morphogenetic field, but also those registered in the wider electromagnetic field of which we are part[1].

Why then does real Civil Justice Reform not always correspond to how a lawmaker (decision-maker) would like it to be? Because the brain, through its various electric fields called "mental states", processes data and creates what a lawmaker (a judge) perceives as reality at different speeds: Beta to mainly process the so-called external-objective plane and rational thinking, Alpha to mainly process more inner planes, including the emotional and the lower mental, Theta to process mainly the subconscious, the part of the collective unconscious to which, consciously or not, he has joined, determining what he perceives as our sense of existing, Delta to process mainly the collective unconscious, Gamma to mainly process multidimensional reality. At the moment, Theta — Delta is supposed to process reality 500,000 / 1,000,000 times faster than Beta[2]. This means that a lawmaker's (a judge's) conscious is too slow to notice it and, therefore, being unaware of it, the science calls it unconscious, in the sense that it is unknown to it. As far as a lawmaker (a judge) knows, the conscious represents only 10/15 percent of the processing, so it is not aware of what it is actually processing.

The lawmaker (the judge) creates reality as a reflection of the deep feeling he has of himself. This means that the Civil Justice he observes outside him is a reflection of what he unconsciously processes at the level of the subconscious and the collective unconscious. It does not correspond to what he desires at the conscious level as it has a minimal impact.

If someone says that we can have justice only if a certain lawmaker/ judge follows the reform (the case), then justice depends on that lawmaker / judge. If someone says that we are not able to have justice until the certain laws appear, then

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patterns. Now what is an interference pattern? When light strikes, or when electrons strike any object, they scatter. But the scatter is a funny kind of scatter. It's a very well regulated scatter. For instance, if you defocus the lens on a camera so that you don't get the image falling on the image plane and you have a blur, that blur essentially is a hologram, because all you have to do is refocus it.

[1] This specific ***theory of quantum consciousness*** was developed by neuroscientist Karl Pribram initially in collaboration with physicist David Bohm. ***Holonomic brain theory*** is a branch of neuroscience investigating the idea that human consciousness is formed by quantum effects in or between brain cells. This is opposed by traditional neuroscience, which investigates the brain's behavior by looking at patterns of neurons and the surrounding chemistry.

[2] ***Ned Herrmann*** has developed ***models of brain activity*** and integrated them into teaching and management training. Before founding the Ned Herrmann Group in 1980, he headed management education at General Electric, wher he developed many of his ideas. Here is his explanation: https://www.scientificamerican.com/article/what-is-the-function-of-t-1997-12-22/

justice depends on the legislator, on the judicial practice, on the discretion, on the legal and political situation and many other concrete things. It might not even happen, and then we will no see the world of justice. The cause is beyond us. The effect is within us. The cause is in the surrounding factors, in the situation — it is external. The effect is in us!

If one can create the effect, the cause will follow. If someone chooses justice, delicious bread, it means he chooses the effect — and then he can see what happens. His life will change immediately and he will see miracles of justice happening around him ... because he has created the effect and the causes will have to follow.

It looks like magic. But it's not magic. We must simply remember that life is a causal relationship. A judge, a lawmaker should remember that civil justice is a causal legal relationship. ***In "Helgoland" Carlo Rovelli***[1] confirms that quantum theory is the most radical scientific revolution of all time[2]. It turns out to be more and more full of disconcerting and disturbing ideas (phantasmatic waves of probability, distant objects that seem magically connected to each other, etc.), but at the same time capable of countless experimental confirmations, which have led to all sorts of everyday applications, of everycase appication.

It can be said that today our understanding of ***civil justice*** rests on this theory, which is still profoundly mysterious. The controversial ***quantum theory does not not only grow in civil justice***, making its crucial passages evident, even for those who ignore it. But it is inserted into a new vision, where a justice made up of the laws and juridical practice is replaced by a justice made up of legal relationships, of connected judge and people, who respond to each other in an inexhaustible game of mirrors. A vision that leads us to explore, in an amazing perspective, fundamental questions still unresolved, from the setting up of law to that of judges (lawmakers) theirselves, intending they are part of law.

The law of the cause affect and the law of the affect cause are the laws of science. This is what Prof. Carlo Rovelli teaches lawmakers and judges: to know the secrets

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[1] See: Bozzi Ida, "Helgoland" di Carlo Rovelli, l'isola e gli amici geniali: la fisica dei ventenni". Corriere della Sera (in Italian) (September 2, 2020).

[2] Carlo Rovelli is an internationally renowned theoretical physicist who during his career has worked mainly in the field of quantum gravity and was one of the founders of the theory of loop quantum gravity. Carlo Rovelli also deals with the history and philosophy of science. In ***Helgoland*** Rovelli delves into revolutionary theory, first allowing us to understand its theoretical and practical value, and then exploring the issues that make quantum theory one of the most mysterious physical theories science has to do with. These mysteries have been at the center of the research of physicists, philosophers another great thinkers for years: Rovelli focuses on the relational interpretation and on the links between this interpretation and oriental history, art, literature and philosophy. The author leads to discover how this view of quantum theory can lead us to reconsider the way in which we think about reality.

of quantum physics[1]. Don't wait for new laws, new precedents; you have already waited long enough. Choose justice and you will have justice. What's the problem? Can't you choose? Why are you unable to operate under these laws? Because your mind, the whole your mind has been educated by certain thinking. But if someone has got the damage and is seeking the reimbursement (the compensation) in court, that justice will be artificial, it will not be a genuine justice. But vital energy has its ways of operating. If every judge (lawmaker) acts wholly, it becomes real justice. If every judge (lawmaker) creates the effect, if he is total in it, he observes the results. Energy can make you king without a kingdom; you just have to act like king. When all the energy goes into action, it becomes reality! Energy makes everything real. If you stay and wait for the kingdom to come to you, it will never happen. If a lawmaker (a judge) stays and waits for the justice to come to him, it will never happen.You can be an emperor; you just have to create the effect. Every judge is a decision-maker; he just has to create the effect. There is an old saying: laugh and the world will laugh with you; cry, and you will cry alone. If every judge can create the effect and be ecstatic, even the justice will be with every judge, the trees and clouds will dance with him; then the whole existence will become justice, a celebration of it. But it depends on every judge, on whether every judge is able to create the effect. And science tells us it's possible.

Things are just relationships. Civil Justice is just civil-procedural relationships. The thought of the Indian philosopher ***Nagarjuna***[2], who lived about 18 centuries ago, seems to provide conceptual tools to guide us with respect ***to the discoveries of quantum physics and also towards discretion-civil justice.***

Nagarjuna's thought is centered on the idea that ***nothing has existence in itself***. Everything exists only in dependence on something else, in relation to something else. The term used by Nagarjuna to describe this lack of self-essence is ***"emptiness" (sunyata)***: things are "empty" in the sense that they have no autonomous reality, they exist thanks to, as a function of, with respect to, from the perspective of something. On the other hand Nagarjuna distinguishes two levels, as do so many philosophy and science: conventional reality, apparent, with its illusory or perspective aspects, and ultimate reality. But it takes this distinction in a surprising direction: the ultimate reality, the essence is absence, emptiness.

Every scientist seeks an essence on which the thing can depend: the starting point can be God, spirit, Platonic forms, the subject, the elementary level of consciousness, energy, experience, precedents, laws, politics, culture or whatever. Nagarjuna suggests that there isn't ultimate substance.

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[1] https://www.illibraio.it/news/dautore/carlo-rovelli-helgoland-1388361/

[2] Nāgārjuna (c. 150 — c. 250 CE) is widely considered one of the most important Buddhist philosophers.

There are more or less similar insights in Western philosophy ranging from Heraclitus to the contemporary metaphysics of relationships, touching upon Nietzsche, Whitehead, Heidegger, Nancy, Putnam[1]. But Nagarjuna's perspective is a radically relational one. Conventional everyday existence is not denied, it is affirmed in all its complexity, with its levels and facets. It can be studied, explored, analyzed, but it does not make sense to look for its ultimate substratum. So is the emptiness the only reality? No, Nagarjuna writes, every perspective exists only in dependence on another, it is never ultimate reality. There are different interpretations of the text, which has been commented on for centuries. Prof. Carlo Rovelli used the Nagarjuna filtered by J. L. Garfield[2].

Today the specialists are discussing zen, mindfulness, diligence in Law[3]. And the power of ideas that today emanates from ancient lines is very ineresting! How they, intersecting with our culture and our knowledge, can open us spaces for new thoughts! Because this is culture: an interminable dialogue that enriches us by continuing to feed on experiences, knowledge and above all exchanges of the various sciences, of various disciplines. In the light of the present Civil Justice reforms they should radically change our view of how rules, either existing or new ones, in the area of civil procedure are legitimised.

Our aim is not to reiterate the entire debate about the legitimacy of new initiatives of Civil Justice Reforms, but to focus directly on rules that influences judges' discretion. In this area, we argue that there are different ways of Reforming Civil Justice. We believe that the major transformational shifts in the world have been brought about mainly by the sciences' integration and by wisdom that doesn't know the time. We refer to integration of knowledge on a worldwide scale. The same argument applies to certain legal problems. Such is the case with *Judicial Discretion. The phenomenon of Judicial Discretion*, when is studied through a interdisciplinary lens, leads us to a number of wide-ranging considerations. Thus, court activity can be a source of almost endless wonder for scientisits. This international integration

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[1] See: There's Something in the Air: Life Stories from Italy and India (Angeloni Lorenzo, Verrone Maria Elettra eds).

[2] *Garfield Jay L.* The Fundamental Wisdom of the Middle Way, Oxford: Oxford University Press (1995). Jay L. Garfield describes that Nāgārjuna approached causality from the four noble truths and dependent origination. Nāgārjuna distinguished two dependent origination views in a causal process, that which causes effects and that which causes conditions. This is predicated in the two truth doctrine, as conventional truth and ultimate truth held together, in which both are empty in existence. The distinction between effects and conditions is controversial. In Nāgārjuna's approach, cause means an event or state that has power to bring an effect. (*Garfield Jay L.* Dependent Arising and the Emptiness of Emptiness: Why Did Nāgārjuna Start with Causation?, Philosophy East and West. 44 (2): 219–50 (April 1994)).

[3] See, inter alia: *Shailini George.* The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness, 53 Duquesne L. Rev. 215 (2015).

of knowledge is referred to as globalization. Otherwise stated, the need of the hour is to balance national interest with international survival.

"In a single drop of ditchwater, some people can see whole crowded cities and, thus, observe large segments of life". It is one of the epigraphs of this article. It is the argument of a short tale written by H.Ch.Andersen. It shows that everything is in the eye of the beholder: the object studied, even if thought as relatively unimportant by itself, can prompt a surprising variety of far-reaching observations.

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