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Dear readers,

I would like to present for your attention the first regular issue of the journal “Kazan University Law Review” in 2021.

The issue you are holding now has articles on vital questions of theory and practice of Russian and foreign law.

The issue starts with the article by Doctor of Legal Sciences, Professor, Head Department of Theory and History of Law of the Belarusian State Economic University Dmitrii Demichev “Constitutional and legal basis for privatisation and denationalisation of property in the republic of Belarus”. The article deals with the peculiarities of constitutional and legal regulation of ownership relations in the Republic of Belarus at the present stage, the process of implementation of state policy in respect of denationalization and privatization of state-owned property. The author’s definition of ownership is given. Stages of the privatization process are defined.

The issue is continued by the article by skilled researcher from Italy Candidate of Legal Sciences, University of Pavia Olga Papkova, titled “Discretionary Justice Development. Mindfulness. Quantum theory”. The paper provides answers three questions: Why discretionary justice? Why the development of comparative 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.

I am very pleased to introduce the research of Charles White Graduate, University of South Carolina School of Law; Graduate, Chapman University Fowler School of Law: “Pay day: tax cash hoard defense hidden inside the couch”.

The “Commentaries” section has interesting article: Farhat Khusnutdinov Chairman of the Constitutional court of the Republic of Tatarstan, Candidate of Legal Sciences, titled “Case Law of the European Court of Human Rights applied in Decisions of Constitutional Courts and Statutory Courts of Constituent Entities of the Russian Federation”. the article notes some decisions of the constitutional court of the Republic of Tatarstan, in which the provisions of the Convention and

the practice of the European court of human rights contributed to the protection of human rights.

The “Conference reviews” section contains an article by representatives of Kazan University, Nigina Nafikova, Yulia Nasyrova and Nikolay Rybushkin about the past event. This article is a review of the V International Scientific and Practical Convention of Undergraduate and Graduate Students “Topical Issues of Russian Federalism: Retrospective Approach and Current State”.

*With best regards,
Editor-in-Chief
Damir Valeev*

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ARTICLES

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CONSTITUTIONAL AND LEGAL BASIS FOR PRIVATISATION AND DENATIONALISATION OF PROPERTY IN THE REPUBLIC OF BELARUS

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Abstract: The article deals with the peculiarities of constitutional and legal regulation of ownership relations in the Republic of Belarus at the present stage, the process of implementation of state policy in respect of denationalization and privatization of state-owned property. The author's definition of ownership is given. Stages of the privatization process are defined. At the first stage (1991–1993) the state pursued largely fiscal aims by receiving non-tax revenues. The second stage (1994–2008) was characterised by the country's transition to a market economy, an increase in the share of private property, and an increase in business ownership. The third period (2008 — present) is characterised by the active development of stock market instruments, which are shares of reformed enterprises. Both positive results and problems in the reform of state ownership are highlighted.

Keywords: Constitution, State, President, Government, law, decree, executive order, economic relations, property, ownership, reform, privatisation, denationalisation.

Economic relations are an essential element of the constitutional order of any state. They constitute the economic basis of the state and consist of relations of ownership, production, exchange, distribution and consumption of material and spiritual wealth. At the same time, society and the state, using legislation and social norms, can have a significant influence on the development and formation

of economic relations. Economic relations arise and develop objectively in their basis, because the democratic state does not establish the economic order of society. It only protects its basic foundations, based on rights and freedoms, the freedom to choose forms of ownership and forms of economic management. Economic relations are an important precondition for the sovereignty of the people and the real freedom of the individual.

Ownership is an important element of economic relations. The right of ownership is the possibility to own, use and dispose of specific property. According to Article 13 of the Constitution of the Republic of Belarus “ownership may be state and private. The state shall grant equal rights to all to engage in economic and other activities, except those prohibited by law, and shall guarantee equal protection and equal conditions for the development of all forms of ownership”¹.

An essential peculiarity of the constitutional development of the Republic of Belarus at the end of the 20th century is the idea of the property social function consolidation at the constitutional level. Thus, the Constitution of the Republic of Belarus stipulates that the state shall ensure the direction and coordination of public and private economic activities for social purposes (part five of Article 13).

The second most important element of economic relations is the production of material goods. No society can function properly without an increase in material production. Therefore, the constitutions of most democracies contain provisions stipulating the duty of the state to create favourable conditions to stimulate highly productive labour.

An important part of the constitutional order is also social relations, through which the social policy of the state is implemented. The main directions of social policy are the regulation of relations between labour and capital, interethnic and family-marriage relations, as well as in the field of environmental protection, human life and health, protection of consumer rights, etc. The fundamental principles of social relations are also reflected in the Constitution of the Republic of Belarus, which has substantially enshrined all the social and economic rights and freedoms of man and citizen universally recognised by the international community.

Ownership relations in any society play a paramount, predominant role, since the basis of economic life is the process of production taking place in a certain historical form. Ownership of the means of production, and in the first place, of the means of labour as their most active part, characterises the essence of socio-economic relations prevailing in any socio-economic formation.

In other words, ownership is a special kind of social relationship in that some persons freely and “absolutely” own, use and dispose of a thing or object, and others are not allowed to interfere with this ownership.

¹ National Register of Legal Acts of the Republic of Belarus. 1999. No. 1. 1/0; 2004. No. 188. 1/6032.

Property *in the broad sense* is a system of historically changing objective relations between people in the process of production, exchange, consumption, characterising the appropriation of means of production and consumption objects; it is the appropriation, the gaining of something into one's own power, into one's own possession.

According to the Marxist doctrine, ownership as an economic category expresses relations between people regarding appropriation (alienation) of means of production and material goods created with their help in the process of their production, distribution, exchange and consumption. In this definition, attention is fixed on the fact that the fact of ownership of material goods by a subject should be recognised not only by him/her, but also by other subjects, therefore, the right of ownership emerges as a social relation. K. Marx considered ownership in connection with the attitude towards objects “as one's own”¹. Property, according to K. Marx, is the relation to the conditions of production as its own and it is realized only through production itself². A characteristic feature of the Marxist interpretation of property was the underlining of the primacy of the economic content (economic nature) of property over its legal form, as well as the underlying basis of property as a relationship between people in contrast to the relationship of man to thing. “Ownership means, therefore, initially nothing other than man's relation to his natural conditions of production as belonging to him, as his own, as preconditions given together with his own existence, a relation to them as natural preconditions of himself, forming, so to speak, only his elongated body”³.

Therefore, according to classical Marxism, the term “property” refers to the historically changing way in which society and the individual appropriates the means of life.

The French Civil Code of 1804 (the Napoleonic Code) stated, “Property is the right to use and dispose of things in the most absolute manner, so that the use is not such as is forbidden by laws or regulations”⁴.

According to the restrictive approach, ownership is the main constitutive element of the economic system in which it acts as a separate (original and basic) production relation. From the point of view of the expansive approach,

¹ K. Marx. *Kritika politicheskoy ekonomii [Critique of Political Economy]* (draft, 1857–1858) // K. Marx, F. Engels. *Op. Ed. II. Vol. 46. Part I. M.: Izdatelstvo politicheskoy literatury, 1968. P. 479.*

² *Ibid.* P. 482–483.

³ *Ibid.* P. 480.

⁴ See: Art. 544 of the French Civil Code (Napoleonic Code) of 1804 // *Khrestomatiya po istorii gosudarstva i prava zarubezhnykh stran: d 2-kh t. [The Reader on the History of State and Law of Foreign Countries: in 2 vols.] / Ed.-in-chief N.A. Krasheninnikova. Vol. 2. M: Norma, 2008.*

however, property in itself cannot act as a separate, independent production relation at all, because, as a condition and result of the social process of production, it embraces the whole system of production relations within which its economic content unfolds¹.

In a narrow sense, the concept of “property” is identified with property belonging to a certain person by right of ownership.

The social relations, which determine the position of the participants in the production of material goods towards such objects of production as instruments of labour, means and products of production, etc., are economic relations of ownership.

By means of legislation, the state establishes legal norms that regulate existing forms of ownership, as well as social relations connected with possession, use, disposal of property belonging to the state or certain persons. In this way, economic ownership relations acquire the form of legal relations, and the subjects of ownership are endowed with the right of ownership, because willful ownership relations cannot develop outside the legal framework, without obligation and protection by the state.

Thus, *the right of ownership* is a totality of legal norms that enshrine and protect ownership (appropriation) of material goods to the owner, providing for the scope and content of his rights with respect to the property owned by him (the owner), as well as methods and limits of exercising these rights.

Ownership relations are the most important element of the economic system of civil society, which is based on the forms of ownership established in the state, the forms of organisation and methods of regulation of economic activity inherent in it. However, the content of ownership rights is revealed not only through traditional rights of possession, use and disposal, but also by granting the owner the right to perform, at his own discretion, any actions with respect to the property belonging to him that are not contrary to legislation, public benefit and safety, not damaging the environment, historical and cultural values and not infringing upon rights and legally protected interests of other persons.

In most states, there are two main forms of ownership — public and private. All other forms of ownership are derived from them. These forms of ownership differ both in the mode of use and in the subjects.

As mentioned above, in accordance with Article 13 of the Constitution of the Republic of Belarus there are two types of ownership in our country — state and private. The subjects of the right of state ownership are the Republic of Belarus and administrative-territorial units. The subjects of the right of private ownership are natural persons and non-state legal entities. The Republic of Belarus guarantees

¹ Z. Kh. Dzugaev. *Sobstvennoct' v sisteme proizvodstvennykh otnosheniy* [Property in the System of Production Relations] // *Filosofiya i obshchestvo* [Philosophy and Society]. 2010. No. 4. P. 105–106.

equal protection and equal conditions for the development of all forms of ownership on the basis of constitutional provisions.

State property is a national property (property of the Republic of Belarus) and communal property (property of such administrative-territorial units as regions, cities, districts, etc.). The national property consists of the treasury of the Republic of Belarus¹ and the property assigned to the legal entities of the Republic.

Communal property consists of the treasury of the administrative-territorial unit² and the property assigned to communal legal entities.

State-owned property may be assigned to state-owned legal entities on the right of economic management or operational management.

According to the legislation, there are the state bodies in both republic and communal forms of state ownership: republic's state administration bodies and local government and self-government bodies.

The state administration body in the field of property reform in Belarus has been the BSSR's State Committee for State Property Management (Gosimushchestvo BSSR) since February 1991³, which was reorganized in June 1993 into the State Committee for State Property Management and Privatization⁴ and later the Ministry of State Property Management and Privatization⁵.

Presidential Decree No. 516 of September 24, 2001 assigned the functions of state property management and privatisation to the Ministry of Economy by establishing the State Property Fund in its structure, which was a department with the rights of a legal entity⁶.

At present, according to Presidential Decree No. 289 of May 5, 2006 (with amendments and additions), the State Property Committee (Goskomimushchestvo) carries out state policy of management, disposal, privatisation, evaluation and accounting of property owned by the Republic of Belarus. The Ministry of Economy

¹ In accordance with Article 215 of the Civil Code, the Treasury of the Republic of Belarus consists of the Republic's budget, the gold and currency reserve and the diamond fund, objects of exclusive property of the Republic of Belarus and other state property not assigned to republic's legal entities.

² The treasury of the respective administrative-territorial unit consists of local budget funds and other communal property not assigned to communal legal entities.

³ SPP BSSR. 1991. No. 7–8. Art. 62.

⁴ On the State Privatisation Programme: Resolution of the Supreme Soviet of the Republic of Belarus. On the State Privatisation Programme: Resolution of the Supreme Council of the Republic of Belarus, June 16, 1993 // Bulletin of the Supreme Soviet of the Republic of Belarus. The State Privatization Program: Proclamation of the Supreme Council of the Republic of Belarus. 1993. June 16. No. 26. Art. 329.

⁵ Collection of Presidential Decrees and Resolutions of the Cabinet of Ministers of the Republic of Belarus. 1994. No. 6. Article 142.

⁶ National Register of Legal Acts of the Republic of Belarus. 2001. No. 92. 1/3078.

retains the functions of formulating state policy in the area of state property management and privatisation¹.

Global experience of economic development shows that it is possible to transfer property from private to public (nationalisation) and public to private (privatisation). As a rule, this is done on the basis of constitutional or other legal provisions. Ideas on the social function of property are the most important feature of constitutional development in most democracies in the 20th century. Thus, Article 42 of the Constitution of the Italian Republic of December 22, 1947 (amended and supplemented) establishes that “in cases provided for by law, private property may be alienated in the general interest, subject to the payment of compensation”². The Constitution of Greece, which entered into force on June 11, 1975 (Article 17), also provides that “no one may be deprived of his property except in the public interest”, “subject to prior full compensation corresponding to the value of the property alienated...”³. The institution of property is regulated in more detail than in foreign constitutions in the Constitution of the Russian Federation of 1993⁴.

In designing the Belarusian economic model, the experience of transition economies has been fully taken into account, which shows that both monetary and non-monetary leverage have an equally negative impact on economic development.

Privatisation of state property was seen as the sale of those or other objects to subjects of privatisation in the manner and on the terms established by legislation and means a change of ownership through the sale or gratuitous transfer of state property to other economic subjects: private or legal entities, labour collectives. As a result of privatisation, the state fully or partially loses the right to own, use and dispose of state property. In a broad sense, privatisation refers to the transfer of state assets to the private sector, accompanied by a fundamental redistribution of available productive resources, restructuring of the existing institutional structure of production, and the introduction of new methods of corporate governance. The main content of privatisation is that the transformation of centrally regulated state enterprises into independent market entities fundamentally changes ownership relations both within the enterprise and throughout society. The result is a new system of economic interests requiring new mechanisms of reconciliation and

¹ National Register of Legal Acts of the Republic of Belarus. 2006. No. 74. 1/7567; National Legal Internet Portal of the Republic of Belarus. 05.10.2017. 1/17294.

² Konstitutsiya gosudarstv Evropy: V 3 t. T. 2. [Constitutions of the States of Europe: In 3 vols. V. 2]. M.: Norma, 2001. P. 111.

³ Konstitutsiya gosudarstv Evropy: V 3 t. T. 2. [Constitutions of the States of Europe: In 3 vols. V. 2]. M.: Norma, 2001. P. 652.

⁴ Constitution of the Russian Federation of December 12, 1993 (amended and augmented) // Full Collection of Codes of the Russian Federation. M.: OMEGA-L, 2005. P. 540–552.

a new system of governance. By transforming property relations, privatisation creates the preconditions for fundamental changes in the social structure of society.

The objects of privatisation are state enterprises, institutions, organisations, structural units of associations and structural subdivisions of enterprises; state property leased out; shares (units, shares) owned by the Republic of Belarus and administrative and territorial units in the property of economic entities.

Denationalisation generally refers to the transfer from the state to individuals and legal entities of part or all of the direct economic management of property, replacing vertical links between state administration and enterprises with horizontal ones, i.e. links between the enterprises themselves. Denationalisation involves a change in the role and functions of the state in the economy, in particular the dismantling of administrative management and its replacement by economic regulation, the creation and development of competitive market relations, the formation of a multi-structure economy, and a reduction in the share of the state sector in the economy. In other words, denationalisation is the process of eliminating state monopolism, forming a multi-structural, mixed economy, its decentralisation and freeing the state from direct economic management functions. Thus, denationalisation means, on the one hand, a transition from command-administrative to economic methods of governance and, on the other hand, a change in the form and content of property relations.

The objects of denationalisation are state enterprises, institutions, organisations, structural units of associations and structural subdivisions of enterprises, as well as state property leased out.

In Belarus, the process of reforming state property relations actually started at the end of the socialist period with the adoption of the Law of December 11, 1990 “On Property in the Belarusian SSR” (hereinafter referred to as the Law on Property)¹. By that time, 99% of the property in the USSR republic was owned by the state.

In general, the process of state property reform in Belarus can be divided into three stages.

The first stage (1991–1993) was characterised by the beginning of formation of legislative acts regulating the process of normative regulation of this process. In particular, the Law on Property established the circle of owners, forms of ownership, grounds for origin of ownership rights, content and objects of ownership rights, principles of protection of ownership rights. At the same time, the Law determined that the ownership right in the Republic of Belarus is recognized and protected by the law, while the state provides equal rights necessary for the development of all forms of ownership and guarantees their protection. According to Article 4 of the aforementioned Law, the right of ownership arises through labour participation in economic activities for the use of property, entrepreneurial activity,

¹ Bulletin of the Supreme Soviet of the BSSR. 1990. No. 2. Art. 13

manufacture or acquisition of property as a result of a commercial transaction, restoration of ownership, inheritance or in any other way not contrary to the law.

In essence, the legal basis for property reform, including state ownership, was laid down in Article 6 of the Law of Property Act, according to which the owner owns, uses and disposes of the property belonging to him at his own discretion, and may perform with this property any actions not contradicting the law. He may dispose of his property, as well as transfer its possession, use and disposal to others.

In the adopted decree of December 11, 1990 “On Introduction of the Law of the Belarusian SSR “On Property in the Belarusian SSR”, the Supreme Soviet of the BSSR instructed the government to develop and submit for its consideration draft legislative acts on joint-stock companies and partnerships, as well as to solve the question of formation of the Committee on state property management under the Council of Ministers of the BSSR¹.

With the view of implementing the basic conceptual provisions on denationalization and privatization of the economy, approved by the Supreme Council of the Republic of Belarus, the Council of Ministers of the Republic of Belarus by its Resolution No. 360 of September 23, 1991 “On Denationalization of the Economy and Privatization of State Property in the Republic of Belarus in 1991” has approved the list of associations, enterprises and organizations to be denationalized and privatized as given by the State Property Management Committee under the Council of Ministers and the State Economic Planning Committee. Also, it was inadmissible to transform state-owned enterprises and organisations of Union subordination situated in the territory of Belarus into joint-stock companies and other economic entities, and to transfer state property free-of-charge to labour collectives, other legal entities and private individuals without the consent of the Council of Ministers. The same ordinance stipulated that until the Law of the Republic of Belarus “On Privatisation” was adopted, reorganisation of state enterprises into enterprises based on other forms of ownership was predominantly carried out through leasing with subsequent redemption, and any disputes between a state enterprise, a labour collective and a ministry or agency regarding privatisation would be considered by the State Property Management Committee under the Council of Ministers of the Republic of Belarus and the economic court in accordance with the current legislation².

In December 1991, the Council of Ministers of the Republic of Belarus approved the Programme of Economic Denationalisation and Privatisation of State Property of the Republic of Belarus for 1992, which was aimed at deepening the privatisation process, formation of a mixed economy, development of entrepreneurial activity on this basis in order to increase the efficiency of the national economy, bring

¹ Bulletin of the Supreme Soviet of the BSSR. 1990. No. 2. Art. 14.

² SPP BSSR. 1991. No. 27. Art. 328.

it out of crisis and stabilise it in the conditions of sovereignty of the republic¹. Enterprises (associations) and organizations were granted the right to independently determine the amount of net profit to be allocated for the redemption of state property. In addition, the ordinance stipulated that the transfer without compensation to labour collectives of privatised state-owned property belonging to the republic's property could be made by the decision of the Council of Ministers of the Republic of Belarus, which was adopted on the basis of proposals made by the State Property Management Committee under the Council of Ministers and agreed with the State Economic Planning Committee and the Finance Ministry, while the property belonging to the communal property, in the order determined by local councils of people's deputies. It has also been established that the method of privatisation shall be justified for each property included in the list. The lease with buyout was deemed a priority method for relatively small and technologically unsophisticated enterprises. The creation of collective (people's) enterprises was recommended for facilities with small production potential. It has also been established that such major state corporations as Minsk Tractor Works, Gomselmash, Azot, etc., should be denationalized through the establishment of joint-stock companies. The main form of payment for objects of state property and redemption of shares of privatised enterprises is payment in instalments. The source of financing of denationalisation and privatisation could be bank loans provided according to the procedure specified by Resolution of the Council of Ministers of the Republic of Belarus No. 393 of October 24, 1991 "On Temporary Provisions on the Procedure of Crediting and Payment for the Sale of State Property to Citizens and Legal Entities".

Thus, at the first stage of the state property reform in Belarus, the legal foundations for privatisation and denationalisation were laid, and privatisation projects were financed exclusively with money. Nevertheless, during this period around 500 enterprises were transformed.

The second stage of the state property reform can be defined as the period from 1994 to 2008. The beginning of this stage is associated with the enactment of the laws "Privatisation of State Property and Transformation of State Unitary Enterprises into Joint-Stock Companies" of January 19, 1993 (the version of the Law of July 16, 2010)² and "On Personal Privatisation Cheques of the Republic

¹ On the Programme of Economic Denationalisation and Privatisation of State Property in the Republic of Belarus for 1992: Resolution of the Council of Ministers of the Republic of Belarus, December 23, 1991. No. 486 // SPP BSSR. 1991. No. 36. Art. 447.

² On Privatisation of State Property and Transformation of State Unitary Enterprises into Open Joint-Stock Companies: Law of the Republic of Belarus, January 19, 1993 // Bulletin of the Supreme Soviet of the Republic of Belarus. 1993. No. 7. Art. 41; The National Register of Legal Acts of the Republic of Belarus. 2010. No. 184. 2/1724.

of Belarus”¹ of July 6, 1993. These legislative acts changed the form of financing and allowed the use of securities as payment for state property. The “Property” cheques could be used to pay up to 50% of the value of the property, and the rest was redeemed for cash.

The main principles of privatisation and transformation of state unitary enterprises into open joint-stock companies were: legality; planning and consistency; transparency, openness and wide public information on privatisation and transformation of state unitary enterprises into open joint-stock companies; equality of subjects of privatisation; compensability of privatisation objects to subjects of privatisation; observance and protection of owners’ rights; promotion of effective socially-oriented market economy development.

The most important legal act regulating the relations of denationalisation and privatisation of state property in the Republic of Belarus is the Decree of the President of the Republic of Belarus of March 20, 1998, No. 3 “On Denationalisation and Privatisation of State Property in the Republic of Belarus”². The Decree stipulated that transformation of state-owned and leased enterprises into open joint-stock companies and buyout of leased state property by the leased enterprises shall be carried out on the basis of proposals by labour collectives, agreed with the relevant republic’s government bodies, associations subordinate to the Government of the Republic of Belarus, and regional (Minsk) city governments; with the relevant local executive and administrative bodies for communally owned facilities. It was also stipulated that the Council of Ministers of the Republic of Belarus could initiate the denationalisation and privatisation of owned enterprises by the Republic for the purpose of their financial rehabilitation if there are no proposals from the labour collectives of the enterprises, and the relevant local executive and administrative body in the case of communally owned enterprises. In the event of discord between the labour collectives of enterprises in the republic’s ownership and republic’s bodies of state administration, associations subordinated to the Government of the Republic of Belarus, and regional (Minsk) city governments on the expediency of denationalization and privatization of particular objects, decisions shall be made by the President of the Republic of Belarus for enterprises with the number of employees over four thousand persons; by the President of the Republic of Belarus for enterprises with the number of employees between two and four thousand persons; by the Ministry of State Property Management and Privatisation for enterprises

¹ On Personal Privatisation Cheques of the Republic of Belarus: Law of the Republic of Belarus, July 6, 1993 // Bulletin of the Supreme Soviet of the Republic of Belarus. 1993. No. 25. Art. 305.

² Collection of Decrees, Presidential Decrees and Resolutions of the Government of the Republic of Belarus. 1998. No. 9. Art. 206; National Legal Internet Portal of the Republic of Belarus. 03.09.2019. 1/ 18540.

with the number of employees up to two thousand persons. The Ministry of State Property Management and Privatization has the right to transfer on a competitive basis in accordance with the procedure to be determined by the Council of Ministers of the Republic of Belarus, shares of open joint-stock companies created in the course of denationalization and privatization of state-owned enterprises.

In addition, Presidential Decree No. 3 of March 20, 1998 stipulated that the sale of state-owned objects at tenders and auctions shall be carried out only for monetary means.

During the first five years of the second phase (1994–1999), on average about 540 enterprises were reformed per year.

However, the pace of reform during the second stage gradually began to slow down, as highly profitable enterprises had already been privatised or were not included in the programmes. Between 2000 and 2004, on average only 170 enterprises per year were reformed, and by 2005, the process of reforming state-owned enterprises was effectively abandoned. This was largely due to the fact that the shares purchased for “Property” cheques could not be realised, as the country had declared a moratorium on these securities.

During the third stage of the state property reform (after 2008 up to now), the processes were resumed and it was largely promoted by the Decree of the President of the Republic of Belarus of April 14, 2008, No. 7 “On Introducing Amendments to the Decree of the President of the Republic of Belarus of March 20, 1998, No. 3”¹. The said decree and the resolution of the Council of Ministers of the Republic of Belarus of July 10, 2008, No. 1002 “On the Introduction of Amendments to the Resolution of the Council of Ministers of the Republic of Belarus of November 14, 2000, No. 1740”² make the privatization of state-owned facilities subject to the three-year plans approved by the Government and local councils of deputies. The shares of open joint-stock companies created in the process of denationalization and privatization were to be sold through tenders and auctions. In addition, the state gave up its pre-emptive right to purchase shares (stocks) in authorized funds of commercial organizations created in the process of privatization. Restrictions on the circulation of shares in open joint stock companies created in the process of denationalization and privatization, alienation of which was prohibited before 2008, were to be gradually abolished. The moratorium on shares purchased for “property” cheques for individuals and legal entities was abolished. Shares in open joint-stock companies that had been created in the process of privatization of state

¹ On introduction of amendments and additions into the Decree of the President of the Republic of Belarus of March 20, 1998 No. 3: Decree of the President of the Republic of Belarus, of April 14, 2008, No. 7 // National Register of Legal Acts of the Republic of Belarus. 2008. No. 94. 1/9625.

² National Register of Legal Acts of the Republic of Belarus. 2008. No. 172. 5/27984.

property were also started to be sold. As a result, enterprises could be financed from the stock market. In addition, participants of the privatization process now have the opportunity not only to sell, but also to donate, transfer into trust, as well as to inherit the shares of open joint stock companies. At the same time, the Belarusian Currency and Stock Exchange has become the main trading platform for transactions in shares. Overall, between 2008 and 2014, a total of 1089 state-owned enterprises were reformed, and the reform of state-owned enterprises was largely completed by 2015¹.

Thus, by now, a mechanism for denationalisation and privatisation of state property has been formed in the Republic of Belarus and adapted on the basis of adopted legislative acts. Thus, the President of the Republic of Belarus determines the content of the unified state policy in the field of privatization and transformation of state unitary enterprises into open joint-stock companies. He approves the plans for privatization and plans for the transformation of the republic's unitary enterprises into open joint-stock companies; and takes the decisions on privatization and lowering of the initial sale price for privatized objects, authorizes the Council of Ministers of the Republic of Belarus or the republic's body of state administration for managing state property (Goskomimushchestvo) to take decisions on privatization and on lowering of the initial sale price for privatized objects. The President of the Republic of Belarus may establish other procedures, methods and conditions for privatisation than those established by the law On Privatisation of State Property and Conversion of State Unitary Enterprises into Open Joint-Stock Companies.

Implementation of the unified state policy in the field of privatisation and reformation of state unitary enterprises into open joint-stock companies is ensured by the Council of Ministers of the Republic of Belarus, which at the initial stages approved plans of privatisation of objects owned by the Republic of Belarus, and at present stage approved plans of transformation of republic's unitary enterprises into open joint-stock companies, and determines the procedure of auctions (tenders) for selling objects of privatisation, determines the procedure for holding tenders for transfer of shares of open joint-stock companies owned by the Republic of Belarus or an administrative and territorial unit into trust management, takes decisions on privatization of objects of privatization owned by the Republic of Belarus in accordance with the approved plans for privatization, on reducing the initial sale price of objects of privatization owned by the Republic of Belarus, etc.

¹ S.S. Ryabova. *Etapy reformirovaniya gosudarstvennoy sobstvennosti v Respublike Belarus'* [Stages of state property reform in the Republic of Belarus] / S. S. Ryabova // *Scientific Papers / The Republic's Institute of Higher Education*. Minsk, 2016. Vol. 15: Philosophical and Humanitarian Sciences. P. 330–337.

Local Councils of Deputies of the Republic, as the main link of local self-government, ensure the implementation of a unified state policy in the field of privatisation and transformation of communal unitary enterprises into open joint-stock companies on the territory of the respective administrative-territorial unit in accordance with their competence.

The most important link in organising the privatisation of state property is the privatisation bodies. In accordance with the Law of the Republic of Belarus of January 19, 1993 (as amended by the Law of July 16, 2010) “On Privatization of State Property and Transformation of State Unitary Enterprises into Open Joint-Stock Companies”, privatization bodies are the republic’s bodies of state administration for administration of state property (Goskomimushchestvo), its territorial bodies, local executive and administrative bodies which act on behalf of the Republic of Belarus or administrative and territorial authorities in privatization and transformation of state unitary enterprises into open joint-stock companies Subject to the decision of the President of the Republic of Belarus, certain powers of the privatisation bodies may be exercised by other state bodies or organisations.

Privatisation bodies implement the unified state policy in the field of privatisation; directly carry out the process of organisation of privatisation; establish commissions for privatisation; prepare draft decisions on privatisation; make decisions on the transformation of state unitary enterprises into open joint stock companies; prepare proposals on the method and conditions of sale of objects of privatisation; act as founders of open joint stock companies established in the process of transformation of state unitary enterprises; organise auctions (tenders) for sale of privatisation objects and tenders for transfer of shares of open joint stock companies into trust management with the right to buy out a part of these shares according to the results of trust management, etc.

Planning of the transformation of state unitary enterprises into joint-stock companies was carried out on the basis of respective plans for three years as per Ruling of the Council of Ministers of the Republic of Belarus No. 348 of March 21, 2011 “On Approval of the Plan of Privatization of State-Owned Unitary Enterprises in the Ownership of the Republic of Belarus for 2011–2013 and the Plan of Transformation of Republic’s Unitary Enterprises into Joint-Stock Companies for 2011–2013”¹. As regards the current privatization plans, Presidential Decree No. 8 of September 10, 2012 stipulated that state property shall be privatized without the privatization plans specified in the Law of the Republic of Belarus of January 19,

¹ National Register of Legal Acts of the Republic of Belarus. 2011. No. 36. 5/33513; 2011. No. 121. 5/34662.

1993 on the Privatization of State Property and the Transformation of State Unitary Enterprises into Joint-Stock Companies¹.

In order to privatise an enterprise as a property complex by selling it at an auction (by tender), the privatisation body establishes special commissions for privatisation.

Sellers in respect of objects of privatisation owned by the Republic of Belarus — the republic's body of state administration for management of state property; by the administrative and territorial units — relevant local executive and administrative bodies.

The composition of the enterprise to be privatised as a property complex is determined on the basis of a balance sheet taking into account the inventory of property and liabilities of the state unitary enterprise.

As a rule, the initial selling price of an enterprise as a property complex when sold at an auction (by tender) is determined in the amount of its appraised value, which is determined on the first day of the month and is valid for 12 months from the date on which it is determined. The procedure for determining the initial selling price of shares (stakes in authorized funds) shall be established by the Council of Ministers of the Republic of Belarus in respect of shares (stakes in authorized funds) owned by the Republic of Belarus; and shall be established by relevant local Councils of Deputies in case of the administrative and territorial units.

In this case, the initial selling price of the privatisation objects may be reduced.

The President of the Republic of Belarus or a state body authorised by him shall be take decisions on privatization in respect of privatisation objects owned by the Republic of Belarus; and in accordance with the procedure determined by the relevant local Councils of Deputies in respect of administrative-territorial units.

In accordance with the Law of the Republic of Belarus of January 19, 1993 (as amended by the Law of July 16, 2010) "On Privatization of State Property and Transformation of State Unitary Enterprises into Open Joint Stock Companies" privatization is carried out by selling: shares (stakes in authorized funds) at auctions; shares (stakes in authorized funds) by tender; enterprises as property complexes at auctions; enterprises as property complexes by tender; shares of open joint stock company by results of trust management. At the same time, sale of privatization objects without holding an auction (competitive bidding) shall be carried out in the event of sale of shares of an open joint-stock company according to the results of trust management and in other cases established by the President of the Republic of Belarus.

¹ National Legal Internet Portal of the Republic of Belarus. 12.09.2012. 1/13737.

Privatisation objects are sold at open auctions (tenders) for cash only, and subjects of privatisation are entitled to participate in auctions (tenders) for the sale of privatisation objects.

The sale of shares (stakes in authorised capital) and enterprises as property complexes at auction is carried out when no conditions are required of the buyer.

Sale of shares (shares in authorized funds) is carried out on a competitive bidding, when the buyer is required to meet certain conditions established in the decision on privatization (the volume, timing and direction of investments; preservation or creation of a certain number of jobs within a certain period of time; preservation for a certain period of time the profile of the business entity; preservation and financing for a certain period of time of social facilities owned by the business entity and or under a contract of gratuitous use, etc.).

Sale of enterprises as property complexes is carried out on a competitive bidding, when the buyer is required to meet certain conditions established in the decision on privatization (volume, timing and direction of investments; maintenance or creation of a certain number of jobs within a certain period of time; retraining and or further training of employees; maintenance of the range of goods produced within a certain period of time; maintenance of the activity profile of the state unitary enterprise within a certain period of time).

Sale of shares in an open joint stock company as a result of the trust management may be carried out with shares in unprofitable open joint stock companies.

Decisions on transformation of the state unitary enterprises into the open joint stock companies in accordance with the approved plans of transformation of the state unitary enterprises into the open joint stock companies are made by the republic's body of state administration for managing state property for the republic's unitary enterprises with a number of employees over 1,000 people; by territorial bodies of the republic's state administration body for state property management for republic's unitary enterprises with less than 1,000 employees; by the relevant local executive and administrative bodies for municipal unitary enterprises.

The founders of the open joint stock companies created in the process of transformation of state unitary enterprises are the privatisation bodies. In addition to the state, other founders of open joint-stock companies can be the subjects of privatisation who have made monetary or non-monetary contributions to the authorised funds of the open joint-stock companies.

Thus, in Belarus, the main way of privatisation is the transformation of republic's and communal property enterprises into open joint-stock companies: corporatisation has proved to be a priority in most of all the ways of market reform of state property.

At the same time, the planned indicators of privatization approved by the Government and local authorities were not fully implemented, and the process of privatization and corporatization significantly slowed down. Thus, according to the new

privatization program for 2011–2013 announced in 2011 for 244 state-owned enterprises, in 2011, out of 180 small and medium-sized enterprises planned for sale, only 39 enterprises were actually sold for a total amount of approximately \$ 43 million. According to the assessment of the European Bank for Reconstruction and Development, in 2011 the share of products produced by state-owned or state-controlled enterprises accounted for 70% of Belarus' GDP. This figure was almost twice as high as in Russia and other countries.

Based on this situation, in March 2012 the President of the Republic of Belarus decided that any state-owned enterprise can be privatised provided that the investor offers a higher price for the assets. The President of Belarus decided that any state-owned enterprise can be privatised provided that the investor offers a higher price for the assets and is prepared to meet economic and social requirements (including increasing production capacity and maintaining the composition of the workforce without layoffs during the first few years).

Overall, it can be stated that in 2015 the process of reforming state-owned enterprises in the country was actually completed. The positive outcome is that the process of forming a mixed economy with different forms of ownership and types of enterprises has started and continues in the country. The relationship between enterprises has become new, more dynamic and efficient: directives and instructions from the center have been replaced by independent contacts based on mutual interest and benefit; new relations between enterprises and the state budget have taken shape, as the sources of funding for enterprises have changed significantly: from non-repayable budget subsidies and grants to loans based on repayment, payment and maturity principles.

However, there are also negative aspects of denationalisation and privatisation. The results by themselves have not led to a significant economic upturn. The reforms lasted longer than planned. Denationalization and privatization did not always promote efficiency and often led to social conflicts. In addition, society was not prepared for transparent and controllable privatization, especially in the initial phase. Foreign investment has been negligible. The imperfect legal framework and insufficient control by the Government of the Republic of Belarus have in some cases led to the undesirable phenomenon of spontaneous privatisation. Individual enterprise managers and their cronies or relatives bought up or simply appropriated state assets for next to nothing. Sometimes large enterprises were split into a number of smaller ones run by people close to the management. Such cases have caused and continue to cause natural indignation among the population and have created a sense of distrust in the reforms undertaken.

As established by the Constitution of the Republic of Belarus (Article 13, part six), subsoil, waters and forests are the exclusive property of the state, while agricultural land is owned by the state. In addition, in accordance with Article 13

of the Constitution (part seven), the law may define other objects that are only owned by the state, or establish a special procedure for their transfer to private ownership, as well as enshrine the exclusive right of the state to carry out certain types of activities. Thus, the Law of the Republic of Belarus of July 15, 2010. The Law of the Republic of Belarus of July 15, 2010 “On Objects under Exclusive State Ownership and Activities Exercised by the State” defines a list of objects under exclusive state ownership only¹.

The Constitution of the Republic of Belarus and the Civil Code of December 7, 1998 adopted based on its provisions provide not only for state ownership but also for private ownership. The subjects of the right of private ownership may be natural persons and non-state legal entities, which, under Article 214 of the Civil Code, may own any property, with the exception of certain types of property, which, in accordance with the law, may not be owned by them. At the same time, the number and value of property owned by citizens is not restricted, except where such restrictions are prescribed by law in the interests of national security, public order, and protection of morals, public health or the rights and freedoms of others. For legal entities, such restrictions may also be prescribed by legislative acts².

According to the current legislation, any enterprise may be privatised in the Republic of Belarus. The legal framework for this is in place. However, it is deliberately complicated to prevent a chaotic sale of property, because this key principle remains unchanged in the country.

Recently, the concept of “spot privatisation” has come into use, in which, including with strategically important economic entities, the investor takes on additional obligations. The country has experience of such transactions. An example is the privatisation of Beltransgaz, in which the Belarusian side received the declared USD 5 billion. A substantial discount to the price of fuel, a guarantee of its supplies and transit, and increased incomes for the workforce should be added to. In addition, taxes from the company’s activities go to the budget of the Republic of Belarus, which obviates the need to maintain a strong infrastructure.

At the same time, there is a need for a “re-privatisation” mechanism, which would be triggered when the investor does not fulfil the obligations undertaken. In order to do so, the relevant documents should specify the privatisation objectives. Everything should go back to square one in cases where these goals are not met. There should be a single, comprehensive document that sets out all the conditions for privatisation, which should be known in advance to the potential investor.

¹ National Register of Legal Acts of the Republic of Belarus. 2010. No. 184. 2/1721; National Legal Internet Portal of the Republic of Belarus. 14.01.2016. 2/2347.

² Bulletin of the National Assembly of the Republic of Belarus. 1999. No. 7–9. Art. 101; National Legal Internet Portal of the Republic of Belarus. 27.12.2019. 2/2709.

Thus, the privatisation process in Belarus is quite fully regulated, and criteria have been approved, according to which economic entities are classified as strategically important. For such entities, a number of additional conditions accompanies the procedure of transfer into private hands.

Reforming ownership relations in the Republic of Belarus is aimed at creating a socially oriented market economy and stimulating investment activity. By taking care of the functioning of the market economy, the Republic of Belarus creates equal conditions for all economic entities, defines the rules of their economic behaviour, protects their interests, realises the opportunity for the most efficient aspects of the market mechanism and eliminates its negative consequences.

Legal methods play an extremely important role in the system of state regulation of economic and social policy. Its legal regulation provides a purposeful impact on the behavior and activity of people, and on social relations through them. The main elements of legal methods are legal norms, state regulations and acts of application of law, legal relations, and acts of rights and obligations implementation. Thus, constitutional provisions, fundamental norms of civil, land and other legislation of the Republic of Belarus create prerequisites and state-legal basis.

References

Z. Kh. Dzugaev. *Sobstvennoct' v sisteme proizvodstvennykh otnosheniy* [Property in the System of Production Relations] // *Filosofiya i obshchestvo* [Philosophy and Society]. 2010. No. 4. P. 101–109.

K. Marx. *Kritika politicheskoy ekonomii* [Critique of Political Economy] (draft, 1857–1858) // K. Marx, F. Engels. *Op. Ed. II. Vol. 46 Part I. M.: Izdatelstvo politicheskoy literatury*, 1968. P. 49–508.

S. S. Ryabova. *Etapy reformirovaniya gosudarstvennoy sobstvennosti v Respublike Belarus'* [Stages of state property reform in the Republic of Belarus] / S. S. Ryabova // *Scientific Papers / The Republic's Institute of Higher Education Minsk*, 2016. Vol. 15: *Philosophical and Humanitarian Sciences*. P. 330–337.

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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 comparative 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 disciplines. 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 refund 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 iustum*” (*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 Civil 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 iustum”*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 longstanding 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 rules¹.

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 discretion². 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.

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

² See: *Starykh U.V. Usmotrenie v nalogovom pravoprimerenii (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 1101 of 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

¹ Pravoprimerenie 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 concept which includes: a freedom of a court², a discretionary power³, an authority⁴, a law application activity, the choice of several legal alternatives. Each of these provisions is controversial.

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), *Moscv*, 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), *Moscv*, 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* activity¹. Number of Russian scientists has the same opinion².

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. Vaskovsky³ 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 them⁴.

We specified that *the 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 limits⁵.

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 activity⁶. This phraseology is necessary so the judicial discretion seems il-

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 primeneniю 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, family, 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 legality¹.

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 (hereinafter 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.

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 justice¹.

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 justice².

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.

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

² Rassahatskaya N. Problemy sovershenstvovaniya grazhdanskogo processualnogo zakona (The Problems of Civil Procedure 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 type².

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-

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 injustice¹. 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 research¹.

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

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 them². 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 law³. 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

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 nraivitsya 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 objective 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 discretionary 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 its 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.

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 ADR¹ 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) civil 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 compassionate¹.

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 Progress².

SPAIN. The most significant reform of Spanish civil procedure was the *Ley de Enjuiciamiento 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 adopted³. 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

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 justice¹. 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 writ³ 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

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 justice¹.

Let you know our opinion: 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 interest². 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 code³.

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 Federation⁴. 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 indicative⁵. 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.

¹ *Shakaryan M.* Prinitat 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 ECtHR into 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 phenomenon¹.

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

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 judgments². 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-area³. 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-

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

² Marochkin S. Evropejskij Sud po pravam cheloveka i Kostitucionnyj 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 Evropejskay 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. Konstituzionnyj Sud Rossii v Evropejskom pravovom pole (The Constitutional Court of Russia in European legal field). Zurnal Rossijskogo 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 proceedings¹.

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 Russia². 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 gradually⁴. 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 than 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?

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 dealt 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 2015².

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-ECHR relations without Russia's withdrawal from the Strasbourg system.

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.^{Footnote 17} 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) Harmonisation¹ 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.

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-oriented².

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) Harmonisation³ 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

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 principles of transnational civil procedure¹.

Recent developments have introduced the option of *harmonisation* as a new regulatory approach². 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 judiciatures 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-norm³ 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 Zimmermann⁴ is well known particularly. The author speaks

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 mindfulness¹ 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 judge². 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-

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 intimately¹. 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.Koni³ 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,

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't 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 reality³. D.Gabor stated: “You cannot predict the future,

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-your-mouth-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_ExcercisePlaceboEffect.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 physicist², 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 manifestation³. Already Immanuel Kant argued that it is the mind that shapes reality⁴.

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 Taylor⁵. 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 phenomenon⁶. 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,

(<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..*, Intellegance 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 observer¹. 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 research².

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.

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 see².

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 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 illusion⁴. 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 Pribram⁵, the activity of the brain has been studied in holographic terms, i.e. the hypothesis that our brain

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 part¹.

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 Beta². 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

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, where 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 not 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 Rovelli¹ confirms that quantum theory is the most radical scientific revolution of all time². 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 everyday application.

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) themselves, 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

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 and other 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 physics¹. 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.

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, Putnam¹. 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. Garfield².

Today the specialists are discussing zen, mindfulness, diligence in Law³. And the power of ideas that today emanates from ancient lines is very interesting! 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 scientists. This international integration

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.

References

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, No. 1. P. 2001.

Alastair I.M. Rae, Quantum Physics, Second Edition: Illusion or Reality? Cambridge University Press. 2012.

Baglay V.M. Vstupitel`naya stat`ya k: Barak A. Sudeyskoe usmotrenie (Introduction to: Barak A. Judicial Discretion). Moscva, 1999.

Baksa P. Faith Wave I Think... Therefore It Is., Intelegance Publishing. 2014.

Barak A. Sudeyskoe usmotrenie (Judicial Discretion). Moscva, 1999.

Bingham Tom. The Business of Judging. Selected Essays and Speeches. 2000.

Bohm David. Causality and Chance in Modern Physics. London Taylor and Francis (2005), Miguel Espinoza, Théorie du déterminisme causal, L'Harmattan, Paris. 2006.

Bonner A. Primenenie Normativnykh aktov v grazhdanskom processe. (Application of Legal Acts in Civil Procedure), Moscva. 1980.

Bozzi Ida. “Helgoland” di Carlo Rovelli, l'isola e gli amici geniali: la fisica dei ventenni”. Corriere della Sera. September 2 2020.

Bunge Mario. Causality: the place of the causal principle in modern science. Cambridge: Harvard University Press. 1959.

Danilenko G.M. Implementation of International Law in CIS States: Theory and Practice, European Journal of International Law 10:1, 1999.

De Cruz P. Comparative Law in a Changing World, London: Cavendish Publishing. 1999.

Drozdov I. Sudeyskoe usmotrenie — kraeugolnii kamen` sudejskoj rabotii (Judicial Discretion is the cornerstone of a judge's job), Zakon №1, 2010.

Gabor D. Inventing the Future, Penguin Books. 1964.

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.

Garfield Jay L. The Fundamental Wisdom of the Middle Way, Oxford: Oxford University Press. 1995.

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, Winter — Spring, 1961.

Green Celia. *The Lost Cause: Causation and the Mind-Body Problem*, Oxford: Oxford Forum. 2003.

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

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

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, 2003.

Khare Ghose, Archana. *The retell market*, *The Times of India*. 2011.

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

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, 2017.

Marchenko M.N. *Uridicheskaya priroda i karakter reshenii Evropeyskogo Suda po Pravam Cheloveka (Legal Nature of the Rulings of ECtHR)*, *Gosudarstvo i Pravo*, 2, 2006.

Nikolaev A. M., Davtyan M. K. *Ispolnenie reshenij Evropejskogo Suda po pravam cheloveka i Mezhameri-kanskogo 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: 2018.

Panova I. *Administrativno-yurisdiktsionnyi protsess. (The Administrative Jurisdictional Process)*, Saratov (1998), *Gosudarstvo i pravo*, 10. 1999.

Papkova O.A. *Usmotrenie Suda (Judicial Discretion)*. Moscva, 2005.

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

Pravoprimenenie v Sovetskom Gosudarstve (Law Application in Soviet State). Moscva, 1985.

Rassahatskaya N. *Problemy sovershenstvovaniya grazhdanskogo processual'nogo zakona (The Problems of Civil Procedure Law's Improvement)*, Tver, 2000.

Roeben Volker. *Judicial Protection as the Meta-norm in the EU Judicial Architecture*, *Hague Journal on the Rule of Law*, volume 12, 2020.

Shailini George. The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness, 53 *Du-quesne L. Rev.* 215. 2015.

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

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.

Squires Euan J. *The Mystery of the Quantum World*. Taylor & Francis Group. 1994.

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, 2000.

Starykh U.V. *Usmotrenie v nalogovom pravoprimerenii (Discretion in tax law application)*. Moscva, 2007.

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

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

Vaskovskiy E. *Rukovodstvo k tolkovaniyu i primeneniyu zakonov (prakticheskoe posobie) (Guide to Interpretation and Application of the Laws (Text-book)*, Moscva, 1997.

Vikut M.A, Zaitsev I.M. *Grazhdanskii protsess Rossii (The Civil Procedure of Russia)*. Text-book, Moscow, 1999.

Wimmel Hermann. *Quantum Physics & Observed Reality: A Critical Interpretation of Quantum Mechanics*. World Scientific, 2. 1998.

Zimmermann Reinhard. *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford University Press. 2001.

Zorkin V.D. *Konstituzionnyy Sud Rossii v Evropeyskom pravovom pole (The Constitutional Court of Russia in European legal field)*. *Zurnal Rossiiskogo prava*, 3, 2005.

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PAY DAY: TAX CASH HOARD DEFENSE HIDDEN INSIDE THE COUCH

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Abstract: A defendant's claim of cash on hand is commonly referred to as a cash hoard defense¹. A typical cash hoard defense asserts that the defendant in earlier years received money from such sources as gifts from family members or friends, or an inheritance, which he or she then spent during the prosecution period². George Kleinman's trial hinged on a cash hoard. In *U.S. v. Kleinman*, the trial proceeded as to Count Two which charges that in 1950 Kleinman filed a false and fraudulent joint income tax return on behalf of himself and his wife for the calendar year 1949, wherein it was stated that their net income for that calendar year was \$6,141.69, and that the amount of tax due thereon was \$621.12, whereas the defendant knew that their net income for that calendar year was \$20,225.46, upon which there was owing to the United States an income tax of \$3,955.78³.

Keywords: cash, money, taxes, case law

I. PIGGY BANK: NEVER SPENT A NICKEL COINING THE CASH HOARD DEFENSE

The United States District Court noted:

The defendant's father, Bernard Kleinman, died in 1954. Beginning in 1944, and throughout the years from 1944 through 1949, savings bank accounts were opened in the father's name. Approximately \$55,000 was deposited in these accounts during these years, and from these accounts approximately \$50,000 was subsequently,

¹ The United States Department of Justice, Criminal Tax Manual 12.

² *Id.*

³ 167 F.Supp. 870, 871 (E.D.N.Y. 1958).

and within the years mentioned, transferred to the defendant or to members of his family. This was accomplished in part by the transfer of cash by check from Bernard Kleinman to the defendant and members of his family, and in part by the transfer of assets from Bernard Kleinman to the defendant, which assets had been purchased with funds deposited in these savings bank accounts¹.

The court indicated:

The Special agent who investigated this case testified that he examined taxpayer's returns which had been audited by the defendant; that he spoke to some three hundred of such taxpayers, and investigated taxpayers who prepared returns audited by the defendant. No one was brought forward to testify that the defendant had taken a bribe or had offered to take a bribe. The Government in the late hours of the case candidly advised that it does not ask the Court to assume that the unreported income of the defendant was received through bribes. The net result is that there is a void as to a showing of a possible source of unreported income, and the persuasive value which such as showing might have is replaced only by speculation of no probative value whatever².

The court suggested:

From the middle of 1946 until the latter part of 1947 the defendant was assigned in connection with the performance of his duties to posts in Phoenix, Arizona and Los Angeles, California. During this period approximately forty-eight deposits totaling some \$13,700 were made in the Bernard Kleinman accounts in Brooklyn and in New York City. Assuming, arguendo, that these were deposits of the defendant's funds in the continued pursuit of a conspiracy in his behalf, in the absence of evidence indicating the actual state of facts, it is as reasonable to conclude that this was the systematic disposition by the father of a hoard accrued by the defendant in some prior period, as it is to conclude that the funds were the current unreported earnings of the defendant transmitted to his father in some unknown manner. If such were the case, it may have been the case in the year 1949, with which we are primarily concerned, and in such event it would be clearly erroneous to assimilate deposits in the Bernard Kleinman accounts with current unreported income of the defendant³.

Kleinman should not be read for the proposition that the cash hoard defense can replace federal tax accounting. The entire structure of the income tax depends on an annual accounting system that assigns income, deductions and other tax incidents to specific accounting periods⁴. It is not enough for a taxpayer to know that she has

¹ *Id.* at 873.

² *Id.* at 874.

³ *Id.*

⁴ *Michael B. Lang, Elliot Manning & Mona L. Hymel. Federal Tax Accountnig iv* (2nd ed. 2011).

an item of income, loss, deduction, or credit to report on her federal income tax return¹. The taxpayer must also know when the item should be reported on a return². Tax accounting rules determine when the tax incidents of tax-recognized events must be taken into account for federal income tax purposes³. Tax accounting issues permeate all areas of the federal income tax⁴. One of the most important facets of the annual accounting system is that it requires a method for deciding which tax-recognized events are reported in which year⁵. By a method, we mean a series of rules for determining when to recognize items of income, expense, credit and other tax incidents⁶. The cash method basically focuses on when the taxpayer receives income items or pays expenses, while any accrual method generally focuses instead on when the taxpayer has earned the income items and when all events have occurred fixing the taxpayer's liability to pay for expenses⁷. However, *Kleinman* reinforces the reality that it is as reasonable to conclude funds were a relative's cash hoard as current unreported income.

Put Me On Your Calendar: Shuffling Money Through Taxable Years With The Cash Hoard Defense

Under the federal income tax, tax returns are prepared on an annual basis, each return covering a period of one year or occasionally a fraction of a year (a "short year")⁸. At this point, the important point is that the when question is really: for which year⁹? Use of an annual accounting system for the income tax has a number of consequences and offers planning opportunities that go far beyond merely shifting income from December of one year until January of the following year, or shifting a deduction from one year to another¹⁰.

An annual accounting system requires that taxpayers file returns on an annual basis¹¹. For individuals, generally, annual filing would ordinarily refer to a calendar year basis, but many businesses use some other fiscal year for financial accoun-

¹ *Id.* at 1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 14.

⁶ *Id.*

⁷ *Id.* at 15.

⁸ Lang, Manning, & Hymel, *supra* note 7, at p. 3.

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.* at 10.

ting purposes, often for business reasons¹. Thus, a business which must keep track of physical inventory will often end its fiscal year at a time of year when its actual inventory is low, thus reducing the burden of doing the annual inventory². 20 For example, many retail stores use a January fiscal year, before which they reduce their physical inventory through post-Christmas sales³.

Section 7701(a)(23) defines a “taxable year” as the calendar year or the fiscal year upon the basis of which taxable income is computed for the income tax⁴. The term “fiscal year” is defined as “an accounting period of 12 months ending on the last day of any month other than December”⁵. So there are basically 12 different possible taxable years⁶. In addition, the Code permits use of a 52–53 week year, a type of fiscal year which always ends on the same day of the week and is favored by some cyclical businesses, but the 52–53 week year is essentially a variation on the fiscal year⁷. Section 441(b) generally defines which of these possible years is the taxpayer’s possible year, unless another provision of the Code provides otherwise⁸. If the taxpayer regularly keeps her books on the basis of an annual accounting period that is either a calendar year or a fiscal year, that year is the taxpayer’s taxable year⁹. Otherwise, the taxpayer must use the calendar year as her taxable under section 441(b)(2) and(g), unless the return is made for a period of less than 12 months, in which case that period — referred to as a “short period” — is the taxable year¹⁰.

Most individuals really have no choice about what taxable year they use since section 441(g) requires the calendar year for taxpayers who either keep no books or who otherwise lack an annual accounting period¹¹. Treas. Reg. § 1.441-1(b)(7) explains that “books” must be sufficient to reflect income adequately and clearly”, but merely having a checkbook — the extent of most individuals’ books — is probably not adequate¹². While there are often advantages to an individual using a fiscal

¹ *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

year, to do so an individual would have to keep books with respect to her income on a fiscal year basis for the first year in which she had income, a most unlikely occurrence¹.

In *U.S. v. Uccellini*, Emil Uccellini was convicted of income tax evasion for the years 1950 and 1951². Other than a check book, Uccellini kept no personal books or records of his income³. The United States District Court observed:

Mindful that expenditures in excess of reported income, standing alone, might not of themselves support a conviction of tax evasion without evidence indicating a lack of available funds from which these expenditures might have come, the revenue agents, prior tot [sic] trial, undertook an elaborate investigation in order that the government might prove, insofar as it was possible, that defendant did not have any substantial available cash, and that his 1951 expenditures, after deductions, were paid out of taxable income earned in 1951⁴.

The court found:

The agents interviewed the defendant concerning inheritances, gifts and loans. Court records were searched for inheritances and none were found.

They attempted to negative a claimed cash hoard of \$15,000, allegedly saved by defendant from earnings up to 1944, by investigating his financial history back to 1926.

At the trial, December 31, 1941 was selected as a starting point. At that date defendant was credited with the alleged hoard of \$15,000. During the succeeding years he was credited with depreciation and loans from his partner and certain financial institutions which were revealed by the investigation⁵.

The court determined:

Consequently, it is argued that the jury could conclude that defendant had not only exhausted the alleged hoard, but in addition had expended approximately \$24,000 in excess of the income reported in his tax returns filed for the preindictment years, and thus there was no available cash at the beginning of the indictment years. But the government's evidence tends to prove just the contrary, i.e., that defendant either had considerable cash available at the beginning of 1951, or he acquired it during the first four months of 1951 from an undisclosed source other than his partnership business and real estate rents⁶.

¹ *Id.*

² 159 F. Supp. 491 (W.D. Pa. 1957).

³ *Id.* at 492.

⁴ *Id.* at 493.

⁵ *Id.*

⁶ *Id.*

The court reversed, concluding:

Even if we assume defendant's available cash was taxable income, it cannot be allocated reasonably to taxable income received from defendant's business and rents from January to May 3, 1951. The government's evidence conclusively proved that the partnership was not capable of producing income remotely approaching \$24,000 for defendant's share even annually. Thus the fund was either accumulated from receipts in prior years, or it was acquired in 1951 up to May 3 from an undisclosed source, and was not shown to have been taxable income. In either event, as shown, the conviction on the second count cannot be sustained¹.

Cash Is King: Problem Of Not Calculating Starting Cash On Hand

Since the subject may contend that the unexplained deposits into the bank accounts came from a cash hoard, it crucial to thoroughly establish and document any increase in the subject's cash on hand². The special agent must begin by documenting the cash on hand at the starting point and then document cash on hand at the end of each year under investigation³. The cash on hand increase (or decrease) is then determined for the first year of the investigation by subtracting the cash on hand at the starting point from the cash on hand at the end of the first investigation year⁴.

In *U.S. v. Birozy*, The Honorable Mark Costantino presided over Hyman Birozy's trial⁵. The only problem with the government's offer of proof was its failure to establish a cash on hand figure to start the analysis, as stated in *U.S. v. Slutsky*⁶. An exchange addressed cash hoards:

MS. O'BRIEN: Your Honor, if I may make a brief response to that? THE COURT: Surely.

MS. O'BRIEN: The government has no proof at the present time as to the defendant's available cash on hand; however, in the *Slutsky* case, that is far different from this particular case, because there is only two relatively small cash deposits in the business checking account; an amount of \$2300 from which the defendant has not been given credit.

There was another deposit of \$5,000. We consider that to be the proceeds of the loans and we have already given him credit for that \$5,000 in that 1967 figure. Ac-

¹ *Id.* at 495.

² Internal Revenue Manual 9.5.9.7.4.3.

³ *Id.*

⁴ *Id.*

⁵ 1974 WL 605, 1 (E.D.N.Y. 1974).

⁶ *Id.*

tually, all we're talking about as the possible cash re-deposits in that \$2300 figure in May, '65.

THE COURT: It does stand for the fact you must start with some monies at the beginning of the year. What was the cash on hand when they started for that period?

If he started with zero, then you can assume all the money placed in there was income, but if he started with, let's say \$100,000 left over from the year before, and that's been reported at prior income tax period, then you must deduct that from the following year. That hasn't been done here.

MS. O'BRIEN: What your Honor says is absolutely true, if the deposits were cash re-deposits.

If that were a fact, then the cash deposits could be attributable to prior cash on hand. In this case, your Honor, there's only one small \$2300 cash deposit. Every other deposit in that account, your Honor, is a check.

THE COURT: That doesn't mean — you see, it doesn't only mean the cash itself. It means any other resources that may be available at the beginning of the year. It could be merchandise or anything else. That would all be inclusive as to whether or not that was part of the income-producing monies that were deposited in the bank.

MS. O'BRIEN: Your Honor, it's not reasonable to suppose that if a man has a cash hoard, he would transfer this into some sort of a money order or some sort of other check, and thereafter re-deposit it by check. If a man has a prior cash hoard, he would indeed deposit as cash to the business banking account.

The *Slutsky* case is different because there was substantial question there of having an accumulation of cash, which he defendant claim were to be cash for advanced reservations and, therefore, should not figure into the present income figure¹.

An exchange addressed cash on hand:

THE COURT: You're not answering the question. What did he start off the taxable year?

MS. O'BRIEN: We do not know.

THE COURT: You have to find this out. That's what this paragraph says. This paragraph says, you must start with a figure, that you say is income. You can't say if a man has a going business, you can't say that's income, any more than if I just started my business yesterday. You couldn't say it's income because I put \$200,000 in the bank. I may have paid taxes on that for years. The question is, where did all that money come from, and must be deducted from the taxable income. If it is, then you don't have \$200,000. Then you may have \$20,000. You can see that.

MS. O'BRIEN: Then there is, in effect, what your Honor is saying, not what your Honor is saying, no real distinction a net worth case and bank deposit.

¹ *Id.* at 2.

THE COURT: Just because I make a salary every year, you can't add on the salary for the past 19 years. Assume I never spent a nickel. You can't tax that money¹.

Birozy suggests it was a problem for the government to have no proof as to the defendant's available cash on hand. Cash was king, because it was a problem to not calculate the starting cash on hand amount:

Verdict

The indictment herein having regularly come on trial before the Honorable MARK

A. COSTANTINO, United States District Judge, and a Jury, and the defendant having moved for a Judgment of Acquittal, and the said motion having been granted, and the Jury having been discharged

IT IS ADJUDGED that the defendant HYMAN BIROZY is NOT GUILTY of the charge in said indictment.

Dated: Brooklyn, New York².

II. QUIET ON THE SET: LEARNING THE VALUE OF A DOLLAR THRU THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Open The Safe: Spilling Cash Hoard Beans To IRS

The Internal Revenue Service has a publication addressing minimum income probes and cash hoards. It provides:

Always ask about a cash hoard. In a cash business this is critical. Find out if one existed and where the money came from. In a cash business this is critical. Find out if one existed and where the money came from. If it was skimmed from the business in prior years, it is taxable. If it came from other sources it can be traced and the examiner must follow up³.

A publication provides:

With a cash intensive business, it is important to get complete information about nontaxable income as soon as possible in the examination. Question the taxpayer about any Cash T imbalances during the initial interview. If there is a cash hoard, or other nontaxable income, the examiner will want to consider this information early in the examination. It will be necessary in every indirect method case.

Cash-on-hand should be established for the beginning of each year under audit. Also, the taxpayer's practice of keeping cash on hand should be determined for present and prior periods to establish any accumulation of cash over the years.

¹ *Id.* at 5.

² *Id.* at 8.

³ Cash Intensive Businesses Audit Techniques Guide — Chapter 4, Internal Revenue Service.

Cash-on-hand is defined as including all cash not in a financial institution, such as: at home, in pocket, in a safe deposit box or a safe.

A taxpayer's explanation about a cash hoard may change during an examination. The examiner should document the information as it is received. The documentation should include when and where the information was received, who was present, what was said, and when the documentation was prepared.

The credibility of a cash hoard explanation should be examined. The examiner should ask to see the cash hoard and where it is kept to determine if the space is adequate. The examiner should examine the taxpayer's bill paying and borrowing habits; an individual which a cash hoard will not incur insufficient fund charges for checks written or require loans¹.

A Criminal Tax Manual provides:

If the defendant claims during the investigation to have had a cash hoard, the IRS agent will ask very detailed questions to attempt to learn the amount of this cash hoard, its source, when it was received, and where it was kept, who else was aware of its existence, the denomination of the bills, and whether it was always kept in the same place. The defendant should be asked to identify which particular assets were purchased with the funds from this cash hoard so the government can contact the seller-witness to verify that currency was in fact exchanged during the sale².

Can't Tell You That: Disclosing Cash Hoard Danger

The Fifth Amendment privilege against self-incrimination states that “[n]o person...shall be compelled in any criminal case to be a witness against himself...”³ An individual might seek to raise this privilege in response to interrogation by a police officer or in response to a request for evidence⁴. In what circumstances can an individual validly invoke the privilege⁵? This was the question addressed by the Supreme Court in *Hoffman v. United States*⁶

As *Hoffman* makes clear, an individual can invoke the privilege against self-incrimination in two circumstances⁷. The first circumstance is when the individual is asked a question and an answer in itself would support a conviction under

¹ Cash Intensive Businesses Audit Techniques Guide — Chapter 6 14, Internal Revenue Service.

² Criminal Tax Manual 14, The Department of Justice.

³ Colin Miller, Criminal Adjudication 239.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 246.

a federal [or state] criminal statute...¹. For instance, if a defendant is charged with robbery and the prosecutor calls the defendant's alleged co-conspirator and asks him, "Did you rob the bank with the defendant", the witness could invoke the Fifth Amendment privilege because an affirmative answer would itself support a robbery conviction².

Second, an individual can invoke the Fifth Amendment privilege if an answer would furnish a link in the chain of evidence needed to prosecute the claimant for a federal [or state] crime³. Assume that a defendant is charged with murder and that the prosecutor calls his alleged co-conspirator as a witness⁴. If the prosecutor asks the witness, "Where is the victim's body", the witness could invoke the Fifth Amendment privilege because an answer pointing the State to the body could be the first link on the chain of evidence needed to prosecute the witness for murder⁵. Can an individual, however, who claims that he is innocent of any criminal wrongdoing,

invoke the privilege⁶? This was the question addressed by the Supreme Court in *Ohio v. Reiner*⁷. As *Reiner* makes clear, even an individual who protests his innocence can invoke the Fifth Amendment privilege against self-incrimination⁸. Assume that a defendant is charged with murder and the prosecution calls his alleged co-conspirator⁹. On the witness stand, the alleged co-conspirator repeatedly answers questions by stating that he had no role in the murder of the victim¹⁰. Then, when the prosecutor asks him if he knows the location of the victim's body, the witness pleads the Fifth¹¹. At a sidebar conference, the judge might ask the witness why he is pleading the Fifth, and the witness could legitimately respond that he played no role in the killing but that an answer identifying the location of the body could lead the prosecutor to think that he was involved in the murder and thus bring charges against him¹².

¹ *Id.*

² *Id.*

³ *Id.* at 247.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 250.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

While *Ohio v. Reiner* stands for the proposition that even an individual protesting his innocence pleads the Fifth, it also states that an individual cannot plead the Fifth if the danger that answering a question could lead to his prosecution is of “imaginary and unsubstantial character...”¹. Instead, the individual must have “reasonable cause to apprehend danger from a direct answer...”².

Assume that a husband is accused of tax fraud based upon misstatements in a joint tax return, and the prosecutor calls his wife as a witness at the husband’s trial and asks her questions about statements that her husband made about taxes during tax season³. Even though these questions are directed toward the husband’s wrongdoing, the wife could likely plead the Fifth on the ground that the prosecutor could easily assume that the statements might have given her constructive knowledge of the tax fraud, making her guilty of some tax-related crime⁴.

The court in *Uccellini* noted there is danger in a taxpayer disclosing a cash hoard. The court acknowledged:

Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government’s case by showing loose business methods or losing the jury through his apparent evasiveness... The courts must minimize this danger. (Emphasis supplied.)

Seemingly appropriate is this admonishment to this case if the taxpayer here were compelled to state when or from where he accumulated the \$24,000 which he had available from March to May 3, 1951, to say nothing of his expenditures in excess of declared income during the preindictment years⁵.

Birozy indicates the government expects the taxpayer to disclose the cash hoard:

MS. O’BRIEN: Your Honor, it’s not reasonable to suppose that if a man has a cash hoard, he would transfer this into some sort of a money order or some sort of other check, and thereafter re-deposit it by check. If a man has a prior cash hoard, he would indeed deposit as cash to the business banking account⁶.

Birozy provides:

Secondly, I would state that, again, these are all cash deposits, and it is highly unlikely that any individual who did have a cash hoard would somehow translate the cash into checks and, therefore, deposit it in the checking account. It’s much more likely an individual would take cash, deposit it directly to his checking account as cash, and, therefore, since this is not the situation in this case, since we only have

¹ *Id.* at 251.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 159 F.Supp. at 495.

⁶ *Birozy*, 1974 WL 605, 2.

one small \$2300 cash deposit, the rest of the deposits were either verified customers' receipts or had the inherent appearance of customers' receipts¹.

Keeping Quiet: Ethics In Tax Practice, Fifth Amendment, And Questions

State ethics rules and opinions, rules of court, and state judicial opinions are as significant in the regulation of tax practice as provisions of the Code (e.g., return preparer penalties in Section 6694) and Regulations². In addition, ethics rules governing accountants who provide tax services are relevant to those who concurrently maintain professional licenses as lawyers and accountants, and also serve as nonbinding guidance to non-accountant lawyers who practice in the tax area³. ABA Formal Op. 85-352, however, regards the filing of a tax return as a possible first step in an adversary proceeding⁴. Therefore, the lawyer has an ethical duty not to mislead the IRS by misstatement, silence, or through her client, but has no ethical duty to disclose the weaknesses of her client's case⁵. She may advise the statement of positions most favorable to the client, even if she believes that the positions probably will not prevail, so long as she has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification, or reversal of existing law⁶. On the other hand, where an audit or litigation is underway, the IRS is on notice that the lawyer is an adversary and her primary duty is to the client⁷. Thus, the lawyer's obligations to the IRS in this context are those of one litigator to another⁸. She may make any nonfrivolous argument that could win for the client and need not act in the government's interest⁹.

Bar associations at all levels issue advisory opinions on discrete ethical questions¹⁰. While these are never binding, they are both helpful and instructive¹¹. In the area of tax practice, two ABA opinions, ABA Formal Op. 65-314 and ABA Formal Op. 85-352, are and have been particularly influential¹². ABA Formal Opinion 314 provides:

¹ *Id.* at 3.

² Linda Galler & Michael B. Lang, *Regulation Of Tax Practice* iv (2nd ed. 2016).

³ *Id.*

⁴ *Id.* at 5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.*

Similarly, a lawyer who is asked to advise his client in the course of the preparation of the client's tax returns may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions. Thus where the lawyer believes there is a reasonable basis for a position that a particular transaction does not result in taxable income, or that certain expenditures are properly deductible as expenses, the lawyer has no duty to advise that riders be attached to the client's tax return explaining the circumstances surrounding the transaction or the expenditures¹.

It indicates "But as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer"².

Opinion 65-314 has been superseded as to the "reasonable basis" reporting standard but otherwise accurately describes the guiding principles³. ABA Formal Op. 85-352 superseded ABA Formal Op. 65-314 with respect to the "reasonable basis" standard for advising on tax return positions⁴. Under ABA Formal Op. 85-352:

A lawyer may advise reporting a position on a tax return so long as the lawyer believes in good faith that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law and there is some realistic possibility of success if the matter is litigated⁵.

ABA Formal Op. 85-352 provides "In many cases a lawyer must realistically anticipate that the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS"⁶. No efforts have ever been undertaken to revise ABA Formal Op. 85-352⁷. As an advocate ethics, rules permit a lawyer to advise her client not to volunteer information to the IRS, and the lawyer herself is not obligated to disclose weaknesses in her client's position⁸.

The Fifth Amendment privilege precludes compelling a witness to give testimony that is incriminating⁹. Thus, in a summons proceeding and in an ensuing

¹ Ethical Relationship Between the Internal Revenue Service and Lawyers Practicing Before It, ABA Opinion 314 (1965).

² *Id.*

³ *Id.* at 9.

⁴ *Id.* at 9 n. 2.

⁵ *Id.*

⁶ Tax Return Advice; Reconsideration of Formal Opinion 314, ABA Formal Opinion 85-352 (1985).

⁷ Galler & Lang, *supra* note 73, at p. 137 n. 12.

⁸ *Id.* at 13.

⁹ *John A. Townsend*, Federal Tax Procedure 847 (2020 Practitioner Ed.).

summons enforcement proceeding, a taxpayer having substantial fear of incrimination from answering the questions posed can assert the Fifth Amendment¹. In *U.S. v. Matthews*, in response to the summonses, the defendants appeared at the local IRS office separately and refused to answer questions regarding their assets and sources of income, asserting their Fifth Amendment privilege against self-incrimination². The court refused to enforce the summonses³. The United States District court determined that invocation of the Fifth Amendment privilege against self-incrimination was appropriate in case finding that:

The defendants had and still have a real apprehension of danger that by answering the IRS's questions and providing documents could lead to evidence necessary to prosecute them for criminal violations. The IRS had conducted a criminal investigation of the defendants for nine years, the last being 2001. Although no charges have been filed, the IRS is unwilling to represent that none will be filed. Transcript ("Tr.") at 23–24, 27 (Jan. 6, 2004). Furthermore, it refuses to grant immunity from criminal prosecution, even though its own counsel has requested it⁴.

Matthews provides illustrations of questions to consider not answering "In response to the summonses, the defendants appeared at the local IRS office separately and refused to answer questions regarding their assets and sources of income, asserting their Fifth Amendment privilege against self-incrimination"⁵.

Down To Last Penny: Fifth Amendment And Documents

Under current jurisprudence, while the person compelled to produce documents may not assert a Fifth Amendment privilege as to the contents of the documents, the person may have and assert a Fifth Amendment privilege as to any testimonial characteristics inherent in the compulsory act of producing the documents⁶. In *City of Cincinnati v. Bawtenheimer*, the basis of the charge against Ralph Bawtenheimer was his refusal to comply with a subpoena duces tecum from the tax commissioner requiring him to produce certain documents for inspection⁷. The stated ground for his refusal was the Fifth Amendment's protection against self-incrimination⁸. The Court of Appeals of Ohio affirmed dismissal of the charge,

¹ *Id.*

² 327 F. Supp.2d 527, 528 (E.D.Pa. 2004).

³ *Id.*

⁴ *Id.* at 530.

⁵ *Id.* at 528.

⁶ Townsend, *supra* note 92, at 849.

⁷ 1990 WL 138914, 1 (Ohio Ct. App. 1990).

⁸ *Id.*

concluding that “As we find *Cates* persuasive on this issue, we adopt its reasoning in the instant case and conclude that the documents subpoenaed herein “fell into the categories of documents for which the act of production may be privileged” by the Fifth Amendment¹.

Secret Stash: Penny Saved Is Penny Earned With Cash Hoard Defense

As noted, an individual can plead the Fifth in response to interrogation or in response to interrogation or in response to a request for evidence². The Supreme Court has stated that the Fifth Amendment only covers “testimonial” evidence that results from compelled communicative acts, i.e., acts which disclose the content of one’s mind³. But while the prior voluntary creation of evidence is not testimonial, the Supreme Court has recognized the act of producing such evidence might in some cases be testimonial and trigger the Fifth Amendment privilege⁴. This is known as the act of production doctrine⁵. Under this doctrine, the act of producing such evidence in response to a subpoena can be “testimonial” if the act of production involves compelled admissions that the documents exist, are authentic, and are in the witness’ possession or control⁶.

Assume that Dan is charged with murdering his wife, and the prosecution gets the court to issue a subpoena that compels Dan to produce all diaries or journals that he has created in which he discusses the murder of his wife⁷. If there are in fact such diaries, Dan did not create them under government compulsion⁸. But, if Dan were to produce such diaries, he would be admitting that the diaries exist, that he wrote them, i.e., that they are authentic, and that they are in his possession or control⁹. Therefore, the act of production would be testimonial, and Dan can move to quash the subpoena¹⁰.

Birozy indicates a defendant who is found not guilty in tax case is quiet about the cash hoard initially:

¹ *Id.* at 2.

² Miller, *supra* note 49, at p. 255.

³ *Id.*

⁴ *Id.* at 256.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

THE COURT: Paragraph 14, “As in a net worth case, *Holland v. United States*, *supra*, 348 U.S. at 132-35, an essential element of the government’s burden of proof in a bank deposits case is to establish an accurate cash on hand figure for the beginning of the taxable year. If the taxpayer’s deposits or other expenditures during the relevant year ‘came from a safety deposit box in a bank or from a hoard at home, obviously they are not ‘income’ when taken from their storage place and deposited in a checking account nor when spent.’ *United States v. Frank* [57-1 USTC P 9675], 245 F. 2d, 287 (3 Cir), cert. denied, 335 U.S. 819 (1957). Thus,

the government must prove with reasonable certainty the amount of undeposited cash at the beginning of the year so that an appointment amount may be subtracted from the total of deposits made during the taxable year.”

This what they’re talking about.

MS. O’BRIEN: Yes, your Honor. I would request, then, that for that particular fact, under those cases, when they were dealing with a substantial amount of cash deposited to the business checking accounts, that the requirement under the Second Circuit be applied to a bank deposits case where you do have these cash deposits.

In this case, your Honor, basically, it is irrelevant to the case what his cash on hand was, with the exception of that small \$2300 figure. We can delete from the calculations; that’s a small amount compared.

I think the rationale that they’re applying had particular application to the Nevele situation when there was a substantial amount of cash items deposited to that account and in that particular kind of bank deposit case, where there’s cash deposited, then the cash on hand figure must be established. Otherwise, you would have — if that were true for all cases, we would have a net worth case in every single situation which is not again the method of proof the government is using here.

I would state, your Honor, that if – first of all, the defendant has not made any allegations in the opening statement there was any defense that there was a prior cash hoard or money in safe deposit boxes, or anything in that nature¹.

Birozy notes the government claimed the cash on hand amount could not be calculated: THE COURT: Is there any way at all the agents can, in this case, come up with cash on hand?

I’ll give you an opportunity to review them. Take a recess for half an hour. See what you can do with them.

MS. O’BRIEN: He claims if it’s provided by the defendant. That’s the only way at this point that we can get a statement as to the net worth, income, or the cash on hand figure at the beginning².

¹ 1974 WL 605, 3.

² *Id.* at 6.

III. KEEP THE CHANGE: FOLLOWING MONEY INSIDE MATTRESS TO THE CASH HOARD DEFENSE

Some Things Money Can't Buy: Cash Hoard Defense Is Worth A Try

Tax controversy enthusiasts will recall that one of the traditional defenses to the net worth method of proof often used in both civil and criminal cases is the cash hoard defense¹. The net worth method may be stated simply, although the concept may be difficult in application because it takes a lot of work: The method is a simple comparison of the net worth at the beginning of the period and at the end of the period, with the assumption that increases in net worth from the beginning to the end coupled with expenditures in the period are taxable income unless otherwise explained (such as by gifts, unrealized appreciation in value, etc.). The cash hoard defenses argues that the agent incorrectly used the method because the agent understated beginning net worth by leaving out a “cash hoard” or other assets acquired before the beginning that contributed to the ending net worth or expenditures in the period². Since cash is the usual claimed “hoard”, this is referred to as the cash hoard defense³. A Federal Tax Crimes blog provides:

Apparently, ISIS has some form of income tax and will, perhaps arbitrarily, determine the amount of income and the tax that should be paid. If the ISIS tax police find assets in your home (say cash or some valuable asset such as gold items), they would claim that is part of the income subject to tax. The hapless “taxpayer”

— if that is the right word to use — might, with valuable assets like gold at least, claim that those assets were from long ago, such as wedding gifts and therefore should not be considered for that particular genre of income tax. I am not sure how often that would work in the ISIS controlled regions (wonder if ISIS keeps database entries on that), but I guess it is worth a try⁴.

William Bethea’s trial hinged on a cash hoard. Bethea filed no income tax return for the years 1971 and 1972 and paid no income tax in either year⁵. He testified at trial that increases in his net worth established by the government were derived from an inheritance of between \$53,000 and \$54,000 which was left him by his brother, Vernon Bethea, who was knifed to death in July 1970 in New York City⁶. According to the defendant, his brother often left him sealed envelopes containing

¹ *Jack Townsend*. The Cash Hoard Defense and ISIS Taxes, Federal Tax Crimes (2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *U.S. v. Bethea*, 537 F.2d 1187, 1188 (4th Cir. 1976).

⁶ *Id.* at 1189

money to be put in his safe deposit box and told him the contents of those envelopes were his if Vernon were to die¹.

The United States Court of Appeals, Fourth Circuit noted “The typical “cash hoard” defense which the government discharges rests upon the totally uncorroborated testimony of a defendant that years ago he buried money in his backyard”². The court indicated:

He says his brother made a lot of money in the narcotic traffic in New York. Vernon’s criminal record confirms that he was in the business. Lawyer Moss’ testimony confirms that Vernon at times carried very large sums on his person. And finally the bank’s record show the rental of a safety deposit box by a defendant living at a poverty level. The government, in short offers no evidence to refute the probability of a cash hoard, and instead, relies solely upon a natural disinclination to believe that large sums of money are ever cached away.

It is not necessary that we believe Bethea’s story to reverse his conviction. He is not required, even under the net-worth theory, to prove his innocence; the government must establish his guilt beyond a reasonable doubt³.

The court concluded “Because of failure to offer evidence sufficient to establish Bethea’s guilt beyond a reasonable doubt, the conviction will be REVERSED”⁴.

Money In Hand: Net-Worth Expenditures

The net worth method is used often when there is a reason to believe that such records as the taxpayer maintains do not accurately reflect his or her taxable income (and components thereof)⁵. Basically, the net worth method develops taxable by identifying the taxpayer’s increase in net worth and nondeductible expenses during the period that can, by inference, indicate that the increase in net worth and nondeductible expenses are from taxable income⁶. In brief, the methodology is:

Taxpayer’s net worth at the beginning of the period (one or more years) Less: Taxpayer’s net worth at the end of the period.

Plus: Taxpayer’s nondeductible expenditures during the period

Less: Income (or asset receipts) from nontaxable sources (such as gifts) Yields: Taxpayer’s income during the period⁷.

¹ *Id.*

² *Id.* at 1190.

³ *Id.*

⁴ *Id.* at 1192.

⁵ Townsend, *supra* note 92, at p. 435.

⁶ *Id.* at 435–36.

⁷ *Id.* at 436.

There are variations on this formula¹. According to the court in *Bethea*:

On the net-worth theory, the government must first establish the total net value of the defendant's assets at the beginning of the tax year in question. That figure is subtracted from the net value of his assets at the close of the tax year, and to it is added all his non-deductible expenditures during the year. The final figure is the defendant's "taxable income" if the government's proof either (1) negates all non-taxable sources of income or (2) demonstrates a likely taxable source which generated the income².

Money On The Table: Bank Deposits And Expenditures Methods

This method uses bank deposits on the opening premise that all unexplained bank deposits are taxable income³. Depending upon the facts involved, the method then proceeds to reconstruct income⁴. An example of a formula that might be used is:

All of the deposits to the taxpayer's bank account(s) during the period Less:
Deposits shown to be nontaxable income (such as gifts)

Plus: All known expenditures which were not from the bank account(s)

Less: All expenditures which are deductible

Yields: Taxpayers' taxable income during the period.

A related method is the expenditures method⁵. If the IRS had done a sloppy job in performing the indirect method analysis or used a methodology that does not fit under the taxpayer's circumstances, a court may throw it out altogether or give the taxpayer all benefit of the doubt despite the supposed burden of proof being on the taxpayer⁶.

Cash on hand is one of the most common and troublesome areas in any indirect method computation⁷. Because a cash hoard defense is so difficult to refuse, subjects frequently claim their cash hoard was of a sufficient amount to account for any understatement of income⁸. In *Bryan v. U.S.*, Bryan did not take the stand, but his wife did, and testified that when she married the Defendant in 1926 he was a bootlegger possessed of approximately \$180,000, the residue of which was kept in a safe in a closet in their home until November 4, 1940, when she rented a lock

¹ *Id.*

² 537 F.2d. at 1188-89.

³ Townsend, *supra* note 92, at p. 436.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 437.

⁷ Internal Revenue Manual 9.5.9.7.4.9.

⁸ *Id.*

box at the Florida National Bank in Jacksonville wherein she put between \$150,000 and \$160,000 in cash¹. An exchange addressed cash money:

‘By the Court:

‘Q. If you overlooked any assets that this defendant had, in your calculations, then your calculations would be in error, or subject to revision? A. Yes, sir.’ (R. 289.)

‘Q. And you don’t mean to say that he had no money whatsoever other than what is shown on that bank account, shown on January 1, 1941? A. I didn’t say that.

‘Q. Doesn’t your audit assume that? A. That is all the money we could account for.’ (R. 296.)

‘Q. And you took into consideration only recorded purchases that you could find?

A. That was all I could.

‘Q. That was all you could? A. Yes.

‘Q. During the course of examining Mr. Bryan, did you inquire into the cash sales that he made prior to that time? A. No.

‘Q. Did the Department, or someone in your presence in one of the Government Departments, make inquiry into that? A. I would not know. (R. 300.)

‘Q. Yet up until that time you had never found a bank account, up until 1940, that Mr. Bryan had? A. No.

‘Q. And yet you assume that the only monies he had were in the bank on the first day of January, 1941? A. That is all we took into account.

‘Q. You don’t know whether he had a lot of other money, or not? A. No, sir.’ (R. 302–303.)².

The United States Court of Appeals reversed finding that:

The jury no doubt disbelieved, and had the right to disbelieve, Mrs. Bryan’s testimony, but in view of the auditor’s admissions that he was not able to say that his computation included all of the assets of the Defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the defendant as to the lack of additional assets at the beginning of the tax period, the evidence, in the light of the bill of particulars, was insufficient to make out a prima facie case against the defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income³.

¹ 175 F.2d 223, 226 (5th Cir. 1949).

² *Id.*

³ *Id.* at 227.

The Internal Revenue Manual addresses the option to hoard money and bank deposits method of proving income:

The theory behind the bank deposits method of proof is simple: There are only three things a subject can do with money once it is received, i.e., he/she can spend it, deposit it, or hoard it. Accounting for these three areas considers all funds available to the subject. If non-income sources are eliminated, the remaining currency expenditures, deposits, and increases in cash on hand will equal corrected gross income¹.

It indicates:

An increase in the subject's cash on hand is treated as a currency expenditure. Since the subject may contend that the unexplained deposits into the bank accounts came from a cash hoard, it is crucial to thoroughly establish and document any increase in the subject's cash on hand.

The special agent must begin by documenting the cash on hand at the starting point and then document cash on hand at the end of each year under investigation. The cash on hand increase (or decrease) is then determined for the first year of the investigation by subtracting the cash on hand at the starting point from the cash on hand at the end of the first investigative year².

Savings Jar: Living Frugally To Cash In On Cash Hoard Defense

Evidence developed during the course of a thorough financial investigation may be used to prove actions inconsistent with a cash hoard³. The Criminal Tax Manual provides:

- For example, an individual with a cash hoard would not
- withdraw money at ATMs in \$20-\$40-\$60 increments;
 - obtain high interest rate loans;
 - borrow relatively small amounts of money from friends/relatives to buy assets or pay bills;
 - pay high fees to cash checks;
 - be charged NSF fees for bounced checks in his or her bank account;
 - pay over time for appliances, furniture, carpeting, etc.; or
 - engage in other spending, or manifest a lack of spending, inconsistent with a person who had access to significant sums of currency⁴.

¹ IRM 9.5.9.7.1.

² IRM 9.5.9.7.4.3.

³ The United States Department of Justice, Criminal Tax Manual 17.

⁴ *Id.*

Living frugally has a relationship with the cash hoard defense. *Kleiman* indicates about the defendant who had a father with a large hoard of money that “He lived frugally with his unmarried daughter who had her own income”¹. While it is often difficult to disprove the existence of a cash hoard, the government can often prove acts that are inconsistent with a person’s having had a substantial amount of currency available to spend². Such proof might include evidence that the defendant took out a high interest rate loan to purchase a vehicle or home furnishings or that the defendant made frequent ATM withdrawals in small increments³.

One’s Man’s Trash Is Another’s Man Treasure: The Power Of The Dollar That Builds A Cash Hoard

There are various ways to build a cash hoard. In *U.S. v. Melillo*, Nicholas Melillo was charged with willfully attempting to evade the payment of income taxes⁴. Melillo a laborer, began a garbage and rubbish collection service⁵. His first four Brooklyn customers, referred to by him as ‘stops’, were ‘donated’ by a relative, one Gallo⁶. His married sister kept the books⁷. Central to the success of the business was defendant’s mother, a matriarch of the old school⁸. In addressing the issue, the United States District Court noted:

Trucks and new stops were purchased from money advanced by the mother. She used some dozen substantial bank accounts in her name, individually and as co-owner. These assets were said by her to have come from cash received from her father and other relatives.

The mother also hired an ‘accountant’ to help with the books. He was without formal training in this country and his main vocation was as a customer’s man in a brokerage office. Experts for both the government and the defense agreed that the accounting techniques used were not satisfactory. For example, tens of thousands of dollars in income each year from major customers, including Fort Totten Army Base in Brooklyn, were deposited directly in the mother’s many bank accounts, bypassing the business records completely. This income was not reflected in the tax returns prepared by the accountant. Cash, claimed to have amounted to more

¹ 167 F.Supp. at 875.

² Criminal Tax Manual, *supra* note 1, at p. 13.

³ *Id.*

⁴ 275 F.Supp. 314 (E.D. N.Y. 1967).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

than twenty thousand dollars each year, was used to ‘purchase stops’. The recipients of these disbursements were not shown on the books and defendant refused on and off the witness stand to tell them who any of them were.

Whether the mother followed the accountant’s directions — as she testified — or he hers — as appears possible from her forceful personality — is impossible to determine. He died a natural death after the government began its tax investigation. Some of the papers relating to the business perished with him¹.

The court acknowledged:

The problem of jury control at the trial level is particularly important in a case like the present one where prejudice lurks. The trial judge, observing the jury, sensed a distinct danger that it, would rely upon rumor current in the local process to conclude that defendant was linked with organized crime and weigh this conclusion against him in determining guilt².

The court indicated:

The defendant was closely associated — as owner of his own business and as a trade association official — with the garbage collecting industry, believed to be influenced by criminals; he received assistance from a cousin named Gallo — a named associated in the public’s mind with organized crime; and there were large payments for ‘purchasing stops’ to unnamed persons — who might have been used to channel cash into the underworld³.

The court concluded “The motion for judgment of acquittal is granted”⁴.

Badge Of Honor: Cash Hoard Money Machine

In making the determination, as with criminal cases, courts will often look to certain common patterns indicating fraud—referred to as badges of fraud, such as unreported income, failure to keep adequate books, dealing in cash, etc⁵.

However, in *Kleinman* a defendant employed by the IRS who was dealing in cash used the cash hoard defense to explain receipts during his IRS employment:

In the instant case the defendant was employed as an agent of the Internal Revenue Service from 1935 until 1951. It should be stated preliminarily that this is a case involving no specific items of allegedly unreported income. It appears that the defendant filed returns for and paid income taxes upon his salary as an

¹ *Id.* at 315.

² *Id.* at 319.

³ *Id.*

⁴ *Id.* at 320.

⁵ Townsend, *supra* note 92, at p. 321.

agent and upon capital gains, interest and dividends earned by him during these years¹.

In *Kleinman*, the defendant employed as an agent of the Internal Revenue Service from 1935 until 1951 had a father who built a cash hoard:

The defendant testified that during the 1940's his father earned about \$50 per week, and that prior to that period he earned more. The defendant's mother worked for fifteen years prior to her death in 1929, and earned about \$35 per week which she gave to her husband. The defendant and his two sisters starting working at a young age and turned money over to their father².

In *Uccellini*, the court indicated that:

Preliminarily, it is to be observed that defendant might have acquired and set aside more money that is represented by his expenditures during the preindictment years and in 1950. Of course, this statement is mere speculation, but a look at the government's evidence demonstrates that defendant had a substantial amount of available cash in March and April, 1951³.

In *Birozy*, the court suggested the cash hoard might have just as easily come from pay day money in the taxpayer's piggy bank:

THE COURT: It does stand for the fact you must start with some monies at the beginning of the year. What was the cash on hand when they started for that period?

If he started with zero, then you can assume all the money placed in there was income, but if he started with, let's say \$100,000 left over from the year before, and that's been reported at prior income tax period, then you must deduct that from the following year. That hasn't been done here⁴.

IV. WALKING RIGHT INTO A TRAP: TAX AGENT ENTRAPMENT

Prior to utilizing a CI/CW, the controlling special agent, in the presence of the back up agent or other law enforcement office will review the applicable information on Form 9834 with the CI/CW which covers "The CI/CW will not tamper, intimidate, or entrap any witnesses, nor will they fabricate, alter, or destroy evidence"⁵. In *U.S. v. Campbell*, Alphonso Campbell is charged with engaging in the business of accepting wagers on horse races without registering or paying the tax⁶. The only evidence of such a continuity of activity as could amount to being 'engaged'

¹ 167 F.Supp. at 873.

² *Id.* at 875.

³ 159 F.Supp. at 494.

⁴ 1974 WL 605, at 2.

⁵ Internal Revenue Manual 9.4.2.5.4.11.

⁶ 235 F.Supp. 190 (E.D.N.Y. 1964).

either ‘in the business of accepting wagers’ or ‘in receiving wagers’ was evidence of the receipt of a series of wagers from Agents of the Internal Revenue Service at their solicitation effected through a man defendant had known for forty years; there was no evidence that defendant had theretofore been suspected, reasonably or otherwise, of being engaged in receiving wagers and there was only one episode, somewhat ambiguous, of the receipt of a wager from any other person and that was coincident with the last of the series of wagers placed by the Internal Revenue Agents¹. In determining there must be an acquittal on both counts the United States District Court finds that:

The great difference is that the Agents’ activities must serve to throw light on independently existing criminality and must not themselves be the constitutive elements of all the offense that is made to appear. The test of criminality is not the embittered and disdainful standard of Mark Twain’s *The Man that Corrupted Hadleyburg*, the ability to withstand calculated temptation by the Government, but the more useful standard of actual engagement in the criminality at the solicitation of others than the Government; where that exists, the evidence of Agents’ activities is useful, but useful only as it proves criminality beyond that which consists solely in the immediate reciprocals of the Agents’ acts.

It follows that in this case there must be an acquittal on both counts².

In *Zwak v. U.S.*, an undercover operation, conducted by agents of the Alcohol, Tobacco & Firearms Division of the Treasury Department, resulted in criminal charges against Jerald Swak for crimes of making and transferring firearms without pay the tax and possession of firearms which did not have serial numbers³. At his criminal trial, Zwak raised the defense of entrapment⁴. The jury returned a verdict of acquittal⁵. Zwak sought a claim for tax refund incorporating into the complaint the allegations of entrapment previously made in his claim to the IRS⁶. According to the United States Court of Appeals “In conclusion, the district court’s grant of summary judgment in favor of the United States of America is REVERSED and the case is REMANDED”⁷.

When requesting the use of Federal prisoners the Federal Prisoner Application and Appendices must include “Acknowledgement that the Federal prosecutor has

¹ *Id.*

² *Id.* at 191.

³ 848 F.2d 1179, 1180 (11th Cir. 1988).

⁴ *Id.*

⁵ *Id.* at 1181.

⁶ *Id.* at 1181.

⁷ *Id.* at 1185.

considered entrapment issues and foresees no problems”¹. The Internal Revenue Manual provides:

While controlling a CI/CW, special agents will not:

Make any promises of immunity or give the impression that the special agent has the authority to do.

Authorize the CI/CW to participate in an act that would be unlawful if conducted by a law enforcement officer.

Let a CI/CW determine the procedure to be used in the investigation or otherwise control the investigation.

Condone any violation of law in order for a CI/CW to obtain information. If a defendant can show that that the CI/CW was acting under some arrangement with Federal agents, he/she will have a viable defense. Whenever there appears to be a possibility of entrapment or some other unlawful act by a CI/CW, he/she should be guided in a manner that will prevent the occurrence of such acts².

According to the Internal Revenue Manual “Undercover agents will avoid acts of entrapment and must observe the Constitutional rights of persons they come in contact with during assignments”³.

V. POT OF GOLD: TAX EVASION MESSAGE OF INNOCENCE AT END OF RAINBOW

The Solicitor General of the United States (“SG”) has two key roles in tax litigation⁴. The SG’s lawyers are the *crème de la crème* and usually beyond political influence⁵. Federal Tax Procedure information provides:

In any event, as I said, there did appear to be a conflict among the circuits and, at the time, a conflict was almost guaranteed certiorari material. I therefore recommended that the United States seek certiorari in the case. The SG (Dean Griswold whom I mentioned in two paragraphs up) himself nixed the recommendation, noting in handwriting on my recommendation that (and this is a paraphrase but pretty close to the actual quote) “We can’t take a mitigation case to the Supreme Court, for they will never understand it”⁶.

Dean Griswold’s quote should not be read for the proposition that the Supreme Court of the United States is over qualified to resolve any case. The District Judge

¹ Internal Revenue Manual 9.4.2.5.13.1.

² Internal Revenue Manual 9.4.2.5.8.

³ Internal Revenue Manual 9.4.8.8.

⁴ Townsend, *supra* note 92, at p. 99.

⁵ *Id.* at 100.

⁶ *Id.*

in *Birozy* understood it is simple that the cash hoard defense is king. *Birozy* provides:

THE COURT: That's not the argument. It's the argument, it's the question of what was deposited of any resources whatsoever, including the cash on hand. That's the argument. That must be deducted. That must be deducted.

In other words, you can't say the man has a going business for prior years and he's paid taxes on the amount of money that have been in that account and he starts off with an account for 1965 with \$150,000, he's already paid taxes on. You can't tax him to say he made \$150,000. You have to start off with cash on hand. That, to me, is simple. That's business¹.

The court indicates:

THE COURT: Madame Forelady, ladies and gentlemen of the jury:

I advised you on Friday that a serious problem, a question of law, had been propounded to the court and that the Court was going to give it complete research as to the question of proof that would be permitted in this trial, the admissibility of that proof.

There is one case that the Court had to follow with a line of the essentials of the elements in the trial of this type must be proven by the government and lacking any one of those essentials, then the case must fail

It has nothing to do with yourselves or myself. It's a Court of Appeals case.

We can make determination, decisions on the cases, of cases recited prior to the ones we're trying.

I had given the opportunity to the government and Ms. O'Brien to see whether or not she could obtain the necessary proof to go forward with the case and meet the required essential which has been set forth in the *United States versus Slutsky*, which is the case I was following, and I've been advised the evidence they have is the only evidence they can produce before the jury.

On the basis of that, the Court accepted the motion to acquit the defendant for failure of proof. On that basis, the indictment is dismissed and I dismiss you with the thanks of the Court, and I do hope you don't think I've taken the facts away from you, but I must go according to the law.

Sometimes, I know that people get a little disturbed by the fact the judge takes the law in his own hands and does what he thinks is right, and they want to know how come they haven't a right to make a determination. Just remember one thing: as I told you when I selected you, that I will continue to be the judge of the law, contrary to what anybody else may say. I will do what I think is right in my own good conscience, as I interpret the law.

¹ 1974 WL 605, 4.

I've been on the bench for 19 years. I'm not a newcomer to the judiciary in any sense of the word. I've been doing that all my entire tenure on the bench as a judge.

I've made my own decisions. This one, I feel I'm absolutely right in. Thank you. Have a good day. It's a nice day outside¹.

The IRS understands the cash defense is king. The Internal Revenue Manual indicates:

1. When a subject offers leads or information during a net worth investigation that, if true, would establish his/her innocence, such leads must be pursued. This also applies if the subject offers leads or information after the completion of an investigation but within sufficient time before trial.
2. During the trial, if the government fails to show an investigation into the validity of the leads provided by the subject, the trial judge may consider the defendant's information as true and the government's investigation insufficient to go to the jury.
3. Most leads refer to cash hoards, gifts, inheritances, and loans. These leads should be checked as routine steps taken during the investigation².

However, if a case has certain problems taxpayers following the money may be the most invested in the cash hoard defense paying off.

In making the determination, as with criminal cases, courts will often look to certain common patterns indicating fraud-referred to as badges of fraud, such as unreported income, failure to keep adequate books, dealing in cash, etc.³

However, in *Kleinman* a defendant employed by the IRS who was dealing in cash used the cash hoard defense to explain receipts during his IRS employment:

In the instant case the defendant was employed as an agent of the Internal Revenue Service from 1935 until 1951. It appears that the defendant filed returns for and paid income taxes upon his salary as an agent and upon capital gains, interest and dividends earned by him during these years⁴.

Additionally, *Uccellini* reinforces the reality why taxpayers should write down as little as possible.

The defendant was engaged in the restaurant business in Pittsburgh. Since about 1942 he operated restaurants as an equal partner with Gilbert Kinderman who individually conducted a restaurant supply business. On March 31, 1951, defendant bought Kinderman's interest and thereafter operated the restaurant known as 'Emil's' as an individual enterprise.

¹ *Id.* at 7–8.

² Internal Revenue Manual 9.5.9.5.8.

³ Townsend, *supra* note 92, at p. 321.

⁴ 167 F.Supp. at 873.

In 1944 the partnership purchased the building in which ‘Emil’s’ was located, and in 1943 and 1946 defendant, or defendant and his wife, bought four properties in or near Pittsburgh. One of the latter was sold prior to 1950, but the defendant continued to own the others through 1951.

Defendant derived income from the restaurant and rentals from some of the real estate.

Other than a check book, he kept no personal books or records of his income¹.

The court acknowledged “The efforts to show that the partnership understated its actual income failed when the partnership bookkeeper did not testify as expected, but said she entered the daily receipts in the partnership books as shown by the cash register tapes which she destroyed”². In *Birozy*, the court notes “The fact that the years following 1965 at here turned up increasing proportions of identifiable deposits indicates that the problem here was not the investigatory methods of the prosecution, but rather the fact that the businesses which paid defendant simply did not keep their old records”³.

One issue is will never they understand cases are just a § 441 situation where the taxpayer keeps no books. Most individuals really have no choice about what taxable year they use since section 441(g) requires the calendar year for taxpayers who either keep no books or who otherwise lack an annual accounting period⁴. It is not expected taxpayers will keep adequate books:

Treas. Reg. § 1.441-1(b)(7) explains that “books” must be sufficient to reflect income adequately and clearly”, but merely having a checkbook — the extent of most individuals’ books — is probably not adequate. While there are often advantages to an individual using a fiscal year, to do so an individual would have to keep books with respect to her income on a fiscal year basis for the first year in which she had income, a most unlikely occurrence⁵.

In *Melillo* experts for both the government and the defense agreed that accounting techniques used were not satisfactory:

The mother also hired an ‘accountant’ to help with the books. He was without formal training in this country and his main vocation was as a customer’s man in a brokerage office. Experts for both the government and the defense agreed that the accounting techniques used were not satisfactory. For example, tens of thousands of dollars in income each year from major customers, including Fort Totten Army

¹ 159 F.Supp. at 491–92.

² *Id.* at 494.

³ 1974 WL 605, 1.

⁴ Lang, Manning, & Hymel, *supra* note 7, at p. 10.

⁵ *Id.*

Base in Brooklyn, were deposited directly in the mother's many bank accounts, bypassing the business records completely. This income was not reflected in the tax returns prepared by the accountant. Cash, claimed to have amounted to more than twenty thousand dollars each year, was used to 'purchase stops.' The recipients of these disbursements were not shown on the books and defendant refused on and off the witness stand to tell them who any of them were.

Whether the mother followed the accountant's directions — as she testified — or he hers — as appears possible from her forceful personality — is impossible to determine. He died a natural death after the government began its tax investigation. Some of the papers relating to the business perished with him¹.

The court finds:

Both mother and son testified that he had not dealt at all with the accountant and had not seen or had any notion of the books or of the tax returns. The mother testified that only she and her daughter talked to the accountant. This testimony was partially confirmed by that of the government investigators who had to obtain details from the accountant rather than from the defendant.

Whatever uncertainty may have existed as to whether there could be a reasonable doubt about defendant's knowledge was dispelled by the government. It rigorously cross-examined the business's recently retained Certified Public Accountant — a man of conceded reputation and skill, whose direct testimony tracked that of government experts. He had been called by the defense to show the inadequacy of the books previously kept by the business in an effort to demonstrate that the deceased accountant's advice had been bad. Pressed by the Assistant United States Attorney, he testified that the prior accountant had declared that all of his dealings were with the mother and sister².

The record reads as follows:

Q You didn't ask Mr. Melillo (the defendant) during the entire indictment years, which he is being tried for right now, '57, '58, '59, if he discussed these books and records with Mr. Lo Castro (the dead accountant)? Is that your testimony?

A The only thing Mr. Lo Castro told me was that he had all his dealings with Mrs. Melillo and Mrs. Vivian Magliano (defendant's sister).

Q I am asking you now in the preparation of the defense of this case. Did you ask Mr. Melillo, the defendant, whether he ever discussed during the indictment years the books and records of Melillo Carting with Mr. Lo Castro?

A. No, sir³. The court observed:

¹ 275 F.Supp. at 315.

² *Id.* at 315–16.

³ *Id.* at 316.

The declaration of the former, now deceased, accountant was, of course, hearsay. But it had considerable probative force. There was no obvious reason for the former accountant — the hearsay declarant — to lie about the matter in dealing with his successor. The witness, a Certified Public Accountant had no substantial reason to falsify¹.

Matthews indicates:

The summonses sought testimonial and documentary evidence. The defendants did not, as the IRS suggests, refuse to produce documents. They informed the IRS that they did not have any documents responsive to the requests. In re: Richard L. Matthews, Hearing, at 14–15 (May 29, 2003). Consequently, it was not necessary to consider the application of the act-of-production doctrine².

Campbell considers whether the IRS is walking taxpayers right into a trap:

The great difference is that the Agents' activities must serve to throw light on independently existing criminality and must not themselves be the constitutive elements of all the offense that is made to appear. The test of criminality is not the embittered and disdainful standard of Mark Twain's *The Man that Corrupted Hadleyburg*, the ability to withstand calculated temptation by the Government, but the more useful standard of actual engagement in the criminality at the solicitation of others than the Government, where that exists, the evidence of Agents' activities is useful, but useful only as it proves criminality beyond that which consists solely in the immediate reciprocals of the Agents' acts.

It follows that in this case there must be an acquittal on both counts³.

Zwak indicates the Treasury Department is involved with undercover operations:

An undercover operation, conducted in 1979 by agents of the Alcohol, Tobacco, & Firearms Division of the Treasury Department, resulted in criminal charges against the taxpayer, Jerald D. Swak for crimes of making and transferring firearms without paying the tax and possession of firearms which did not have serial numbers⁴.

Kleinman indicates the cash hoard of a taxpayer's relative is a defense:

Assuming, arguendo, that these were deposits of the defendant's funds in the continued pursuit of a conspiracy in his behalf, in the absence of evidence indicating the actual state of facts, it is as reasonable to conclude that this was the systematic disposition by the father of a hoard accrued by the defendant in some prior

¹ *Id.*

² 327 F.Supp.2d at 528–29.

³ 235 F.Supp. 190.

⁴ 848 F.2d 1179, 1180.

period, as it is to conclude that the funds were the current unreported earnings of the defendant transmitted to his father in some unknown manner”¹.

Bethea suggests a taxpayers have a lot to gain from a personal cash hoard defense:

The typical “cash hoard” defense which the government disparages rests upon the totally uncorroborated testimony of a defendant that years ago he buried money in his backyard. *Bethea*’s story is atypical. He says his brother made a lot of money in the narcotic traffic in New York. Vernon’s criminal record confirms that he was in the business. Lawyer Moss’ testimony confirms that Vernon at times carried very large sums on his person. And finally the bank’s records show the rental of a safety deposit box by a defendant living at a poverty level. The government, in short offers no evidence to refute the probability of a cash hoard, and instead, relies solely upon a natural disinclination to believe that large sums of money are ever cached away².

Use of an annual accounting system for the income tax has a number of consequences and offers planning opportunities that go far beyond merely shifting income from December of one year until January of the following year, or shifting a deduction from one year to another³. The lawyer’s personal integrity is particularly significant in tax planning, where the lawyer assists her client in making or creating facts, rather than in characterizing events that have already occurred⁴. A taxpayer needs to create five things given planning opportunities. First, a relative with a cash hoard. Second, a personal cash hoard. Third, willingness to exercise the Fifth Amendment privilege against self incrimination. Fourth, a lawyer. Fifth, the least method of accounting regularly used allowable. There is a pot of gold at the end of the tax case message of innocence rainbow. It is pay day, because of the tax cash hoard defense hidden inside the couch.

References

- Colin Miller. *Criminal Adjudication*. 2013.
- Jack Townsend. *The Cash Hoard Defense and ISIS Taxes, Federal Tax Crimes*. 2015.
- John A. Townsend. *Federal Tax Procedure*. 2020.
- Linda Galler & Michael B. Lang. *Regulation of Tax Practice*. 2nd ed. 2016.
- Michael B. Lang, Elliot Manning, & Mona L. Hymel, *Federal Tax Accountnig*. 2nd ed. 2011.

¹ 187 F.Supp. at 874.

² 537 F.2d at 1190.

³ Lang, Manning, & Hymel, *supra* note 7, at p. 7.

⁴ Galler & Lang, *supra* note 73, at p. 3.

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COMMENTARIES

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CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS APPLIED IN DECISIONS OF CONSTITUTIONAL COURTS AND STATUTORY COURTS OF CONSTITUENT ENTITIES OF THE RUSSIAN FEDERATION

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Abstract: The Convention for the protection of human rights and fundamental freedoms and the decisions of the European Court of human rights are an integral part of the Russian legal system and are taken into account by the legislator when regulating public relations and by law enforcement agencies when applying the relevant legal norms. The Russian Federation consists of entities where it is possible to establish their own constitutional (statutory) courts. In the Republic of Tatarstan and 14 other regions, such courts have been established. The article provides statistics on their application of the European court of human rights rulings, as well as the provisions of the European Convention, as well as the most frequently applied rulings and provisions. In addition, the article notes some decisions of the constitutional court of the Republic of Tatarstan, in which the provisions of the Convention and the practice of the European court of human rights contributed to the protection of human rights.

Keywords: case law, European Court of Human Rights, Constitutional court, Republic of Tatarstan

The consequences of the Second World War resulted in the need for a single organization of European nations. The Council of Europe, founded in 1949, was such an organization. According to the Statute of the Council of Europe, the purpose of the Council of Europe is to achieve greater unity among its Members in order

to defend and implement the ideals and principles, which are their common heritage and to contribute to their economic and social progress¹. A significant part of the Council of Europe's activities is devoted to the protection of human rights and freedoms. The European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on November 4, 1950 is one of the most important documents in this field and entered into force on September 3, 1953. The European Convention proclaimed the fundamental principles related to human rights and freedoms. However, their admission could not be sufficient, if there was no mechanism to protect them. Lord Leighton, who took part in preparation of the Convention, put it into the following words: "Our Convention will only have real value, if we put it into effect and, in order to do so quickly and effectively, it must be provided with clear legal sanctions"². As a result, the Convention did not remain merely a declaratory instrument, as it provided a special mechanism for the enjoyment of the rights under it. This special mechanism was the European Court of Human Rights, established to ensure compliance with the obligations undertaken by member states. It is realized by investigation and resolution of complaints lodged by any individual, any non-governmental organization, or any group of individuals who claim that they are victims of violation by a member state of their rights acknowledged in the Convention or the Protocols thereto as well as issues of alleged violation by a member state of the provisions of the Convention and the Protocols thereto upon the request of the other member state.

"The value of the Convention, — writes, for example, K. Vasak, a famous French scientist, — is determined by its mechanism, not by the rights it protects. For the first time ever, — he emphasizes, — there is an international mechanism that operates outside the state and "expresses the common values of all mankind". According to other scientists, it is "unique, vital and developing"³.

The Russian Federation joined the Council of Europe on February 28, 1996 and was its 39th member and the Russian Federation ratified former signed Convention and Protocols thereto, with a number of reservations under its Federal Law No. 54-FZ dated March 30, 1998.

According to the Constitution of the Russian Federation, everyone has the right, in accordance with international treaties to which the Russian Federation is a party, to apply to inter-state bodies for the protection of human rights and freedoms, if all available domestic remedies have been exhausted (Article 46, Part 3).

¹ Statute of the Council of Europe (*ETS No. 1*) [Russian, English] (Adopted in London 05.05.1949) // Russian Federation Code. 24.03.1997. No. 12

² *Tumanov V. A.* European Court of Human Rights. Essay on organization and activity. Moscow: NORMA Publishing House, 2001. P. 8–9.

³ *Bessarabov V. G.* European Court of Human Rights. Moscow: Yurlitinform Publishing House, 2004. P. 17.

The orders of Article 15 (Part 4) of the Constitution of the Russian Federation are in conjunction with this provision of the Constitution of the Russian Federation, which Article provides that international treaties of the Russian Federation are an integral part of its legal system, and Article 79, which provides that the Russian Federation may participate in inter-state associations and transfer the part of its powers to them in accordance with international treaties, provided that it does not provoke restrictions on human and civil rights and freedoms and does not conflict with the foundations of the constitutional order of the Russian Federation¹.

By ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation accepted the jurisdiction of the European Court of Human Rights as binding with regard to the interpretation and application of the Convention and the Protocols thereto in case of alleged violation by the Russian Federation of the provisions of these compacts. Thus, both the Convention for the Protection of Human Rights and Fundamental Freedoms and the judgments of the European Court of Human Rights, to the extent that they interpret the content of the rights and freedoms set forth in the Convention including the right of access to the courts and fair justice proceeding from universally recognized principles and norms of international law — are an integral part of the Russian legal system and, therefore, must be taken into account by federal legislators when regulating social relations and law enforcement agencies in case of applying the relevant rules of law².

P. A. Laptev, who was the Commissioner of the Russian Federation for the European Court of Human Rights from 1999 to 2007, also stated that “case law of the European Court is becoming an integral part of the legal system of the Russian Federation, and it is hardly possible to deny it at present”³.

It should be noted that the courts take into account the legal positions of the judgments of the European Court of Human Rights, which have been adopted not

¹ Constitution of the Russian Federation (adopted by popular vote on 12.12.1993) (subject to the amendments made under the Laws of the Russian Federation On Amendments to the Constitution of the Russian Federation No. 6-FKZ dated 30.12.2008, No. 7-FKZ dated 30.12.2008, No. 2-FKZ dated 05.02.2014, No. 11-FKZ dated 21.07.2014) // Official Internet portal of legal information <http://www.pravo.gov.ru>, 01.08.2014, Russian Federation Code, 04.08.2014, No. 31, Art. 4398.

² Ruling of the Constitutional Court of the Russian Federation dated February 05, 2007, No. 2-P. On the Case of Verification of Constitutionality of Provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Civil Procedural Code of the Russian Federation in connection with the request of the Cabinet of Ministers of the Republic of Tatarstan, Complaints of Nizhnekamskneftekhim and Khakasenergo Open Joint-Stock Companies, and also Complaints of Some Citizens // Gazette of the Constitutional Court of the Russian Federation, 2007, No. 1, Russian Federation Code, 12.02.2007, No. 7, Art. 932, Rossiyskaya Gazeta, 14.02.2007, No. 31.

³ *Zimnenko B. L.* International Law and Legal System of the Russian Federation. Moscow: RAP; Statute, 2006. P. 308.

only with regard to the Russian Federation, but also with regard to other member states to the Convention, if the facts of the case, which it considers are similar to those which are the subject matter of analysis and conclusions of the European Court of Human Rights.

Indeed, the provisions of both the Convention and the judgments of the European Court of Human Rights are often used in the judgments of the Constitutional Court of the Russian Federation and constitutional (statutory) courts of the constituent entities of the Russian Federation. If we analyze the judgments of the Constitutional Court of the Russian Federation, then almost all the judgments adopted by the Court have references to the universally recognized principles and norms of international law, including those enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms; however, the application of the case law of the European Court of Human Rights is also not uncommon.

As for the constitutional (statutory) courts of the constituent entities of the Russian Federation, the situation is slightly different. From the date, on which the Russian Federation ratified the Convention and up to 2019, only 9 of 15 courts applied the case law of the European Court of Human Rights in their decisions, and 9 courts also applied the provisions of the Convention¹.

Speaking specifically of the provisions of the Convention, the constitutional courts of the Republic of Dagestan, Mari El, Kabardino-Balkaria applied it in 1 decision, the Constitutional Court of the Republic of Adygea applied in 2 decisions, the Constitutional Court of the Republic of Sakha (Yakutia) applied in 3 decisions, the constitutional courts of the Republic of Karelia, Komi, North Ossetia-Alania applied in 6 decisions, the Constitutional Court of the Republic of Tatarstan applied in 13 decisions. At the same time, the constitutional courts of the Republic of Bashkortostan, Ingushetia, the Chechen Republic, the statutory courts of Kaliningrad Oblast, St. Petersburg and the Sverdlovsk Oblast did not apply the Convention in their decisions².

The decisions of the European Court of Human Rights were applied by the Constitutional Courts of the Republic of Mari El, Sakha (Yakutia), the Constitutional Court of the Sverdlovsk Oblast applied them in 1 decision, the Constitutional Courts of the Republic of Bashkortostan, Komi applied in 2 decisions, the Constitutional Courts of the Republic of Ingushetia, North Ossetia-Alania applied in 3 decisions, the Constitutional Court of the Republic of Karelia applied in 4 decisions, the Constitutional Court of the Republic of Tatarstan applied in 20 decisions. The

¹ From official sites of constitutional (statutory) courts of the constituent entities of the Russian Federation ConsultantPlus computer-assisted legal research system.

² Ibid.

constitutional courts of the Republic of Adygea, Dagestan, the Chechen Republic, the Republic of Kabardino-Balkaria and the Constitutional Court of the Republic of Kaliningrad and St. Petersburg did not apply the case law of the European Court of Human Rights in their decisions¹.

The Constitutional Court of the Republic of Tatarstan applied the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the law case of the European Court of Human Rights in 24 of 84 final judgments. For the first time, the Constitutional Court of the Republic of Tatarstan applied the provisions of the Convention in its Decision No. 20-P dated May 11, 2006². While formulating its legal position the Court referred in that decision to Article 3 of Protocol No. 1 to the Convention, which provided the right to free election.

It should be noted that the constitutional and statutory courts of the constituent entities of the Russian Federation most often referred in their decisions to Article 3 of Protocol No. 1 to the Convention, according to which member states undertake to hold free elections at reasonable intervals by secret ballot under conditions which would ensure the free expression of the will of the people in electing the legislative bodies³. Article 1 of Protocol No. 1k to the Convention for the Protection of Property, according to which every individual or legal entity has the right to respect for his, her or its property, is also frequently applied; no one shall be deprived of his or her property except in the public interest and under the conditions prescribed by law and the general principles of international law⁴.

¹ From official sites of constitutional (statutory) courts of the constituent entities of the Russian Federation ConsultantPlus computer-assisted legal research system.

² Ruling of the Constitutional Court of the Republic of Tatarstan No. 20-P dated May 11, 2006. On the Case of Verification of the Constitutionality of Certain Provisions contained in the Annex to the Ruling of the Head of the Administration of Kazan No. 2086 dated August 23, 2005. On Opening in the Territory of Kazan of Polling Stations for the Election of Deputies to the Representative Body of the Municipal Entity of Kazan, in connection with the complaint of citizen M. G. Pikashova // Republic of Tatarstan, 16.05.2006, No. 97, Vatanym Tatarstan, 13.05.2006, No. 92–93.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (Concluded in Rome on 04.11.1950) (as amended on 13.05.2004) (together with Protocol [No. 1] (signed in Paris on 20.03.1952), Protocol No. 4 on Enforcement of some Rights and Freedoms other than those already included in the Convention and the first Protocol thereto (signed in Paris on 20.03.1952), Protocol No. 4 on the Protection of Human Rights and Fundamental Freedoms (signed in Paris on 20.03.1952). Strasbourg 16.09.1963), Protocol No. 7 (signed in Strasbourg 22.11.1984) // Russian Federation Code, 08.01.2001, No. 2, Art. 163, International Treaty Bulletin, 2001, No. 3.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (Concluded in Rome on 04.11.1950) (as amended on 13.05.2004) (together with Protocol [No. 1] (signed in Paris on 20.03.1952), Protocol No. 4 on Enforcement of some Rights and Freedoms other than those already included in the Convention and the first Protocol thereto (signed in Strasbourg on 16.09.1963), Protocol No. 7 (signed in Strasbourg on 22.11.1984) // Russian Federation Code, 08.01.2001, No. 2, Art. 163, International Treaty Bulletin, 2001, No. 3.

As for the case law of the European Court of Human Rights, the judgment of the European Court of Human Rights dated May 24, 2007 in the case *Ignatov vs. the Russian Federation*, the judgment dated May 24, 2007 in the case *Vladimir Solovyev vs. the Russian Federation*, and the judgment dated March 31, 2009 in the case *Weller v. Hungary* were the most frequently applied in decisions of constitutional and statutory courts of the constituent entities of the Russian Federation. The judgments of the European Court of Human Rights dated May 24, 2007 in the case *Ignatov vs. the Russian Federation* and dated May 24, 2007 in the case *Vladimir Solovyev vs. the Russian Federation* were frequently applied as regards the point of view contained in them, according to which it was required that the law made it possible to foresee the consequences of its application, thus complying with the legality standard established by the Convention, which standard requires that all laws have precise wording enabling a person to foresee to the extent reasonable in the circumstances the consequences, which any action may have¹. The constitutional and statutory courts of the constituent entities of the Russian Federation more frequently applied the judgment of the European Court of Human Rights dated March 31, 2009 in the case *Weller vs. Hungary*, namely the provision prohibiting differentiation, which places families with children in a position of inequality in terms of access to benefits for support of the children and the family as a whole².

I consider it necessary to note some decisions of the Constitutional Court of the Republic of Tatarstan, in which the provisions of the Convention have contributed to the protection of human rights. Thus, by ruling No. 61-PK dated March 19, 2015 the Constitutional Court of the Republic of Tatarstan declared the contested provisions not complying with the Constitution of the Republic of Tatarstan, stating that provision under the contested regulatory legal act of a compensation for damages caused by vehicles transporting heavy goods by public roads of Almet'yevsk is a restriction on the constitutional right of private property of the owners and users of the specified vehicles in the form of collection by local governments of statutory

¹ Judgment of the European Court of Human Rights dated 24.05.2007 in the case of *Ignatov vs. the Russian Federation*. (complaint No. 27193/02) The unlawfulness and excessive duration of pre-trial detention was appealed with regard to case. The case involved violation of paragraphs 3 and 4, Article 5, paragraph 1 (c), of the Convention for the Protection of Human Rights and Fundamental Freedoms // Bulletin of the European Court of Human Rights, 2007, No. 10.

Judgment of the European Court of Human Rights dated 24.05.2007 in the case of *Vladimir Solovyev vs. the Russian Federation*. (complaint No. 2708/02) // Bulletin of the European Court of Human Rights. Russian Edition, 2007, No. 12.

² Judgment of the European Court of Human Rights dated 31.03.2009 in the case of *Weller vs. Hungary*. (complaint No. 44399/05). The refusal to pay the benefit on the basis of the father's status and nationality was appealed with regard to case. The case involved violation of the requirements of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms // Bulletin of the European Court of Human Rights, 2009, No. 8.

charges not stipulated by federal law. This conclusion was also based on the provisions of Article 1 of Protocol No. 1 to the Convention applied by the Constitutional Court of the Republic of Tatarstan in this case¹.

The Constitutional Court of the Republic of Tatarstan concluded in another ruling, that the regulation provided for in the standard under appeal, which establishes the registration of all members of a family with many children at the same place of residence as a binding condition for obtaining the above social safety net, is, in fact, a technical and legal hurdle for the exercise of their right to housing improvement. The granting of certificates to families with many children whose members are registered at the same place of residence, where it is impossible for families falling into the same category but not having co-registration to obtain similar social guarantees, results in unjustified differentiation, which, in turn, results in decrease in the level of their social protection. Such legal regulation, in violation of the constitutional principle of equality, results not only in the unjustified differentiation of the scope of the social rights of the families with many children, which need housing improvement, but also strains the sense of the right in question, which is inconsistent with the constitutionally significant goals of possible restrictions on human and civil rights and freedoms. This opinion of the Court also complies with the provisions of judgment dated March 31, 2009 in the case *Weller vs. Hungary* of the European Court of Human Rights, which the Constitutional Court of the Republic of Tatarstan referred to in its decision².

Thus, the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights, having become an integral part of our legal system one day, have played

¹ Decision No. 61-P of the Constitutional Court of the Republic of Tatarstan dated March 19, 2015 in the case No. 63 dated May 30, 2012 on Verification of the Constitutionality of the Rules of Site Improvement of the city of Almetyevsk, Almetyevsk Municipal District of the Republic of Tatarstan, Provisions on Compensation for Material Damage of Public Roads caused by Heavy Duty Vehicles approved by Order No. 691 of the Executive Committee of Almetyevsk Municipal District dated February 26, 2009, Items 1 and 2 of the Provision No. 265 on Municipal Road Traffic approved by Decision of the Almetyevsk Municipal District Council dated August 05, 2008 in connection with the complaint of Mr. I. V. Avdeyev// *Vatanyam Tatarstan*, 04.04.2015, No. 48, the Republic of Tatarstan, 07.04.2015, No. 48.

² Decision No. 83-P of the Constitutional Court of the Republic of Tatarstan dated May 30, 2019 in the case of Verification of the Constitutionality of Subparagraph (a), Paragraph 4, the Rules for Issue and Implementation of Certificates to Provide Housing to Families with Many Children, which need Housing Improvement approved by Resolution No. 326 of the Cabinet of Ministers of the Republic of Tatarstan dated May 16, 2008 On Amendment of Resolution No. 732 of the Cabinet of Ministers of the Republic of Tatarstan dated December 18, 2007 on Measures to Provide Housing to Families with Many Children, which need Housing Improvement, in connection with the complaint of Mr. A.V. Orlov // Official Portal of Legal Information of the Republic of Tatarstan <http://pravo.tatarstan.ru>, 09.07.2019, the Republic of Tatarstan, 12.07.2019, No. 99, *Vatanyam Tatarstan*, 13.07.2019, No. 100.

a significant role in the protection of civil rights and freedoms by the constitutional and statutory courts of the constituent entities of the Russian Federation. Even today, they are an important guideline both in case of administration of justice and in case of legal regulation and law enforcement. There is no doubt that the application of international rules by courts in case of awarding judgment brings an explicit responsibility for judges, but if properly applied and interpreted, the provisions of the Convention and the case law of the European Court of Human Rights provide an additional guarantee of protection of civil rights and freedoms.

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CONFERENCE REVIEWS

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OVERVIEW OF V INTERNATIONAL SCIENTIFIC AND PRACTICAL CONVENTION OF UNDERGRADUATE AND POSTGRADUATE STUDENTS ON “ACTUAL ISSUES OF RUSSIAN FEDERALISM: RETROSPECTIVE APPROACH AND CURRENT STATE”

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Abstract: This article is a review of the V International Scientific and Practical Convention of Undergraduate and Graduate Students “Topical Issues of Russian Federalism: Retrospective Approach and Current State”.

The history of the event as well as individual contributions are disclosed. It also mentions the representatives of various educational institutions who attended the event and worthily presented their law schools on the platform of one of the oldest universities in Russia — Kazan University. In particular, the overview reflects the information about the winners in each section — the branch of law that took place within the framework of the conference.

The article also notes that the event was timed to coincide with the 100th anniversary of the Tatar Autonomous Soviet Socialist Republic, whose legal successor can now be called the Republic of Tatarstan. This fact and this anniversary date determined the choice of the theme of the event and consideration of the issues of federalism.

Keywords: conference, review, KFU, Kazan University, law, law faculty, student scientific society, international event, jurisprudence

On 27th of November KFU Faculty of Law hosted the Fifth International Scientific and Practical Convention of Undergraduate and Postgraduate Students: “Actual issues of Russian Federalism: Retrospective Approach and Current State”. The numbers do not know how to fail: the Anniversary Convention of Students and Postgraduates dedicated to the 100th anniversary of TASSR was held in the leap year of 2020.

This year’s Convention was held in one day, on November 27, 2020, and it was a full-distance event. At 10 a.m. Moscow time, Dr. Liliya Talgatovna Bakulina, Dean of the Faculty of Law of Kazan (Volga Region) Federal University, cut the red ribbon and launched the event. At the plenary session, welcome speeches were also made by co-chairmen of the Organizing Committee of the Convention: Dr. D.Kh. Valeev, Deputy Dean of the Faculty of Law of KFU for Research, Professor, O.A. Cheparina, Deputy Dean of the Faculty of Law of KFU for Educational Activities, Candidate of Juridical Sciences, Associate Professor, Dr. R.Sh. Davletgildeev, Deputy Dean of the Faculty of Law of KFU for International Activities, Assistant Professor, and Yu.M. Lukin, Head of research work of students of the Faculty of Law of KFU, lawyer of the Bar Chamber of the Republic of Tatarstan. Other members of the Organizing committee also spoke at the plenary session: Z.F. Safin, Head of the chair of ecological, labour law and civil procedure, Doctor of law, Professor, E.B. Sultanov, Head of the chair of constitutional and administrative law, Candidate of Juridical Sciences, Assistant Professor, M.V. Talan, Head of the Department of Criminal Law, Doctor of Law, and A.V. Mikhailov, Head of the Department of Business and Energy Law, Candidate of Juridical Sciences, Assistant Professor, as well as N.G. Muratova, Doctor of Law, Professor of the Department of Criminal Procedure and Criminalistics.

The opening ceremony was followed by an auditorium lecture by Dmitrii Borisovich Abushenko, Doctor of Law, and Professor of the Civil Procedure Department of the Ural State Law University. The scholar presented an analysis of current problems of civil procedure. The speech interested not only people of science but also practitioners.

At 1 p.m. on the same day, 13 sections — video conferences with the help of the Zoom platform started their work: “Actual issues of Russian federalism: Current

issues of Russian federalism: retrospective approach and current status” (English-language), “International law”, “Constitutional law”, “Tax and financial law”, “Business law”, “Civil law”, “Labour law”, “Theory and methodology of teaching law”, “Criminal law”, “Criminal procedure”, “Environmental and land law”. The distance format could not reduce the heat of scientific discussion, the work of the sections lasted four hours and was productive both for the participants of the Convention and for the jury of the competition. No one issue was left indifferent to the problem of the current state of Russian federalism that is now being tested not only by time, but also by external influences.

The programme of the Convention envisaged interdisciplinary and multidisciplinary work. For example, an Olympiad on Criminal Procedure and an essay competition on “Constitutional and Legal Methods of Countering Sources of Danger to Russian Society, Economy and the Russian State” were held in parallel to the second session of the videoconferences.

The jury of the V International Scientific and Practical Convention was faced with the difficult task of choosing the best of the best. However, the results of the sections confirm the motto “Nothing is impossible”.

In the Criminal Procedure section, first place was shared between Daria Lobashova, representing Kazan (Volga Region) Federal University, and Elena Belozerova, representing Southern Federal University; second place went to Anna Noskova, a student of Samara National Research University named after Academician S.P. Korolev, and Aigul Akhmadullina, a student of Kazan (Volga Region) Federal University; third place was shared between Aslan Chuchuladze and Anzhelika Abulova, representing Perm State National Research University and Kazan (Volga Region) Federal University, respectively.

In the Labour Law section, the jury awarded the first place to Aleksandr Afanasiev, a student of the Belarusian State University; the second place went to Aelina Gabdrakhmanova, representing Kazan (Volga Region) Federal University; the third place went to Grigorii Bobrovskii, a student of the National Research Tomsk State University. Also in the Best Report category, the section moderators chose Vladimir Koval, representing Ural State Law University.

In the Civil Law section, first place went to Zhanna Baumova, representing St. Petersburg State University; second place went to Alina Faizova, a student of Kazan (Volga Region) Federal University; third place went to Artem Svetlorusov, representing ITMO University.

Alisa Gumerova and Aisylu Ziganshina from Kazan (Volga Region) Federal University took the second place in the Entrepreneurship Law section; second place was awarded to Elena Borisova, a student of Kazan (Volga Region) Federal University; Arina Galejeva and Nadezhda Germanovich, students of Kazan (Volga Region) Federal University and South Ural State University respectively, shared third place.

In the Civil Procedure section, the jury awarded first place to Aigul Gumerova, representing the Russian State University of Justice; second place to Aleksandr Gavriusov, a student of Perm State National Research University; and third place to Roman Shabanov, a student of the Kutafin Moscow State Law University.

Students from Kazan (Volga Region) Federal University, Maksim Isaev, Alena Rusalkina and Liliia Lesnova, won prizes in the Theory and Methodology of Teaching Law section.

A student of St. Petersburg State University, Vladislav Romenko, won in the Tax and Financial Law section; Iuliia Ovchinnikova, representing Samara State University of Economics, took second place; and Albina Miroshnichenko, a student of Saratov State Law Academy, took third place.

In the Constitutional Law section the first place went to Vasilii Zadera, representative of Saratov State Law Academy; the second place was awarded to Elena Sechina, a student of Kutafin Moscow State Law University; the third place went to Dariia Zubkova, representative of Moscow Technological University (MIREA).

In the Environmental and Land Law section, Anton Beloplotov took the first place, representing Ural State Law University; the second place went to Liubov Kolpakova, a student of Peoples' Friendship University of Russia; the third place went to Karima Letfullina, a student of Kazan (Volga Region) Federal University. Albina Sotavova, a student of the North-Caucasus Institute (Branch) of the All-Russian State University of Justice, won in the nomination "For Interdisciplinary Approach in Legal Research".

"ACTUAL ISSUES OF RUSSIAN FEDERALISM: RETROSPECTIVE APPROACH AND CURRENT STATUS" (English language): the first two places went to Artem Ignatov and Arina Ignatova from Kazan (Volga Region) Federal University respectively; the third place went to Rashid Kaimarasov representing North-Caucasus Institute (Branch) of the All-Russian State University of Justice.

The International Law section was won by Aleksandr Fedorov, a student of the Financial University under the Government of the Russian Federation; second place went to Liadashcheva and Valeriia Martaller, students of Kazan (Volga Region) Federal University; third place went to Elizaveta Cherepanova, a student of the National Research University Higher School of Economics.

In the Theory of State and Law section, the first place went to Danil Strenin and Anastasiia Moroz representing the Financial University under the Government of the Russian Federation; the second and third places went to Gleb Gusev and Iuliia Basarkina, students of Kazan (Volga Region) Federal University. Timur Sagutdinov representing Kazan (Volga Region) Federal University was awarded with the Audience Choice Award. Grigorii Petukhov, student of Kazan (Volga Region) Federal University, and Olga Goluzina, a student of Perm Institute of the Federal Penitentiary Service, were awarded in the Best Performance category.

Vladislav Glukhov, a student of Immanuel Kant Baltic Federal University, won the Criminal Law section; second place went to Kirill Nagornov, representing Kazan (Volga Region) Federal University; third place went to Maksim Gorenko, a student of Kuban State University. Artem Komissarov, a student of Kazan (Volga Region) Federal University, won in the category “Research relevance”; Elvira Imamova, representing Kazan (Volga Region) Federal University, won in the category “Originality of research”; Arbi Duligov and Magomed Magomedov, representatives of the North-Caucasus Institute (Branch) of the All-Russian State University of Justice were awarded in the category “Active participation”.

The results of such events are the mutual enrichment of all participants with practical, educational and scientific experience. The materials of the V International Scientific-Practical Convention of Students and Postgraduate Students are available to all, they are published as a two-volume collection, which is intended for researchers, postgraduate and law students, practitioners and all those interested in contemporary problems of law.

Summing up the results of the V International Scientific and Practical Convention of Undergraduate and Postgraduate Students “Actual Issues of Russian Federalism: Retrospective Approach and Current State”, we would like to thank the participants of our traditional event. We wish everyone to remain as precise as numbers; as complex as science; as progressive as education; and as enduring as the lawyers of 2020.

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