Research Portfolio

The aim of the research qualifications portfolio is to provide an overall picture of the applicant's research profileand qualifications. The development of the research activity over time is exemplified through a description ofprevious research, current activity and future plans. Important components such as international collaborations, research objectives and research projects are to be described.

Olga Nickole Kuyan (Papkova), PhD, PhD

Summary of research profile

Most of my publications focus *on* ***Quantum Theory, Law, Judicial Discretion*** and its different procedural, psychological, political, social components. *The law of liability* (non-material damages, compensation) is also one of my main interests. I have also explored another civil procedure theme, such as *Civil Procedure in the EU Member States*.

The current research topic deals with the **Human Rights: Innovation, Protection and Limits for Sustainability, Diversity and Involvement.**
As the world in which we operate changes, we aim to keep one step in front. The project is for the transformation of human rights protection model. This research into modern crisis time studies the Enlightenment (1789 – 1914), another crisis time, that led to a cultural revolution with a legacy of values that still live today. We take control of evolution and use it for purposes that bring the greatest benefit. We're harnessing the power of evolution, revealing through the diversity of life, evolutionary jurisprudence, the crisis, too. Applying Design, Critical and Complex thinking, being a pioneer, this project treats to describe and explain how human rights can be protected in future, and what to do for it. For us the future is now. We combine lawyering and legal research, following the United Nations Guiding Principles on Business and Human Rights (UNGP) and its next decade project (UNGPs 10+). The research is for sustanaibility, diversity and involvement. The project, pointing out the inter-systemic character of Living Law, Creativity in Law, Justice Metamorphoses in contexts of legal polycentricity and interlegality, looks at Legal Mindfulness and Legal Mediterrarenean Lifestyle as contributions to a framework of social values for sustainability transitions and legal ecosystem creation. Our drive is the Energy Engaged Law, the Sophia energy including - law accompanied by science (quantum physics etc). The research aims to protect human rights and enhance justice globally, with a special focus on Italy, Russia, Islam, Japan. We put forward the idea that Russian Sophiology and Italian Creativity can help to legal services to accept globally the modern crisis challenge to human rights. This business-research is international, multidisciplinary and innovative.

Research Proposal

Project

in Human Rights: Innovation, Protection and Limits

for Sustainability, Diversity and Involvement

Project Title:

Mehr Licht!

Fathers and Children of Human Rights and Justice.

See Sicily and Die.

Research & Best Delivery Hub: Pontem 0921

Principal Investigator: Prof. Olga Nickole Kuyan, Dr, PhD.

Host Human Rights Professor: Prof. Aldo Schiavello.

Duration: 3-4 years

Conditions: 8 000 w.hrs, with the budget 240 000 – 300 000 euro

Abstract

As the world in which we operate changes, we aim to keep one step in front. The project is for the transformation of human rights protection model. This research into modern crisis time studies the Enlightenment (1789 – 1914), another crisis time, that led to a cultural revolution with a legacy of values that still live today. We take control of evolution and use it for purposes that bring the greatest benefit. We're harnessing the power of evolution, revealing through the diversity of life, evolutionary jurisprudence, the crisis, too. Applying Design, Critical and Complex thinking, being a pioneer, this project treats to describe and explain how human rights can be protected in future, and what to do for it. For us the future is now. We combine lawyering and legal research, following the United Nations Guiding Principles on Business and Human Rights (UNGP) and its next decade project (UNGPs 10+)**.** The research is for sustanaibility, diversity and involvement. The project, pointing out the inter-systemic character of Living Law, Creativity in Law, Justice Metamorphoses in contexts of legal polycentricity and interlegality, looks at Legal Mindfulness and Legal Mediterrarenean Lifestyle as contributions to a framework of social values for sustainability transitions and legal ecosystem creation. Our drive is the Energy Engaged Law, the Sophia energy including - law accompanied by science (quantum physics etc). The research aims to protect human rights and enhance justice globally, with a special focus on Italy, Russia, Islam, Japan. We put forward the idea that Russian Sophiology and Italian Creativity can help to legal services to accept globally the modern crisis challenge to human rights. This business-research is international, multidisciplinary and innovative.

“If you are dark, I will enlighten you”.

(an apt quote by the hero

of the Russian film "White Dew", 1983)

Dedicated to my father.

The research topic. The main question.

This project intends to analyse the Formatting and the Reshaping the ***Relations*** between ***Human Rights***, ***Justice*** and ***Reality***. It is to stand up for human rights, to help break down the barriers to justice and to resist threats to professional independence. It follows ***the United Nations Guiding Principles on Business and Human Rights (UNGP)*** and its next decade project ***(UNGPs 10+).***

Meeting these challenges requires an inclusive approach and a broad diversity of perspectives. That is why we have chosen ***diversity*** and ***involvement*** as the themes of the Project term. The research is to confront the challenges of a globalised and interconnected world, and to be committed to understanding, respecting and ensuring respect for different cultures and legal systems. It is to welcome and to guarantee a wide array of perspectives by nurturing the exchange of different experiences/ideas/perspectives.

The perennial question posed by the philosophically-inclined lawyer is ***'What is law?'*** or perhaps ***'How to change laws?'*** We pose an associated, but no less fundamental, question about law which has received much less attention in the legal literature. It is: ***'Who is law for?'***

Our research not for officials, sponsors or others but for you, “whoever you are. Wanderer, worshipper, lover of leaving — it doesn’t matter...”. We have an attitude of thought which gives primary importance ***to human beings.*** For us every person counts. Our research has the humanist emphasis. In this project we’re going to see how to really protect human rights through the legal instruments to create the better future today. For us the future is now.

This research is into/for ***sustainability***. Sustainability has many different definitions, but its essence is articulated by the 17 Sustainable Development Goals (SDGs), 2015. Sustainability is a complex area to manage. Recently ESG (Environmental, Social and Governance factors) have been changed. We are keeping up to date with ESG developments. Our research intends to increase awareness that a failure to address these matters can be detrimental both financially and socially. To contribute to achieving SDGs, being aware of the most urgent needs for our digitalized and globalised world, we will conduct the ***sustainability-minded project*** to discover, to navigate a transition to a sustainable future, that means its importance.
This research supports ***change,*** and also is the change. The crisis has accelerated

digitalisation and the transition to a more sustainable way of living. We call upon to not only adapt to a changing economy and society, but to lead positive change on a grand scale.

How to really protect the human rights through the legal instruments? - is the research's main question.

We mean the actual existence of this protection; that which is not imagination, fiction, or pretense; that which has objective existence, and is not merely an idea.

The research will be conducted at Studio Legale Lauricella research-business hub, located in Cefalu (PA), in the Arab-Norman Circuit, unwound between Palermo, Cefalù, and Monreale (UNESCO World heritage, 2015).

With this project we draw everyone's attention to Sicily. Famous worldwide for its great historical, natural, and cultural treasures, Sicily has six ***World Heritage Sites***, not to mention its ***Intangible Cultural Heritage***: ***Mediterranean Lifestyle***: a true way of life, a regime, both environmentally friendly and good for human health.

Significance of the Project. The state of the art.

The sovereignty of states to enact and enforce laws within their jurisdictions has been recognized since the Treaty of Westphalia in 1648. There are now, however, accepted global legal norms that hold states accountable for not complying with them in a national legal regime: health, climate, justice, human rights, environment etc.

From political/justice crisis we have passed to multi-dimensional human rights catastrophe. The time to act is now, otherwise we will miss the challenges of our generation and irremediably jeopardise the wellbeing of future generations. Social inequality and widespread poverty press for new solutions to build a better world. The COVID-19 pandemic that has shaken our world has put this inequality into stark relief, hitting the world's vulnerable the hardest.The future of our planet is in danger, demanding immediate action. Despite wide recognition that justice (art 47 ECHR) is one of the most basic rights of democratic citizenship, unfulfilled legal needs are at a tipping point in many parts of the justice system around the world. The Justice Crisis assesses what is and isn't working in efforts to improve civil and family justice. It is enlightened in "***The Justice Crisis. The Cost and Value of Accessing Law"***, ed by Trevor C.W. Farrow and Lesley A. Jacobs, (2021), in the papers by A.Schiavello "***La grida canta chiaro"…o forse no. Qualche osservazione a partire da un esercizio di interpretazione giuridica; L'insostenibile leggerezza dell'incertezza del diritto,*** (2020), dealt with the structural vagueness of the legal measures enacted by the Italian legislator to manage the Covid-19 pandemic. A.Schiavello asks: Can we demand more certain norms? Is personal liberty taken in due account by the legislator? An era of innovation is disrupting and overturning old ways of organising and working, presenting new challenges and opportunities. The legal profession is at the threshold of fundamental change.
This research is the first project-length treatment to present new challenges and opportunities for human rights protection through legal instruments, describing and explaining how legal orders can be interwoven, and what to do about it. Coining the terms

"inter-legality"and ***"legal polycentricity"*** this project provides research on the history, human rights, justice, *as primary areas of inter-legality and legal polycentricity*, the concepts of Legal ecosystem, Integral Ecology, Legal Mindfulness, Evolutionary Jurisprudence, Legal Mediterranean Lifestyle, and normative developments prompted by inter-legality and legal polycentricity.

Description of the project. The special aims.

Human Ri ght sand Justice. Research points out the inter-systemic character of Living Law, Creativity in Law, Justice Metamorphoses in contexts of ***legal polycentricity*** and ***interlegality.*** The research's backround is ***the transformations of law beyond the Stat****e.*

We begin with Michael Polanyi. His 'polycentricity' was a method of decision making where numerous decision makers mutually adjust their decisions to their expectations of what will pass muster with the community of decision makers, without the use of any common blueprint. We'll argue that Polanyi's idea of polycentricity—once disentangled from Lon Fuller's borrowed, but unrelated, use of the term—has the potential to illuminate much for lawyers.

From several elements in human rights law's functioning that are liable to come across as 'muddling through', polycentricity helps us glean a sophisticated philosophical method primed to cut through difficult moral problems.

Against such a background we propose to conduct the research using ***analytic philosophy*** and ***science*** (quantum physics, quantum mechanics, optics etc)

The project intends to apply ***scientific areas*** in ***two ways***: *the question under study; the Puzzle.*

We distinguish ***Research Topic*** from ***Research Puzzle***. A puzzle is a question that heads toward a concrete answer, deals with possible objections, is transparent about using a methodology appropriate to its success conditions, and in principle is unsolvable without the help of, at least some, empirical data. The following example clarifies this difference:

Our research question is: *What do the positivist and the living law's proponent have to say to each another on the role of a judge in human rights protection?*

Quntum theory puzzle: *What quantum theory findings (e.g. Davide Fiscaletti's) are more or less compatible with the role of a judge in human rights ptotection?*

Starting from the quote by Aleister Crowley, written in Cefalu: *"Science is always discovering odd scraps of magical wisdom and making a tremendous fuss about its cleverness",* we move through the Carlo Rovelli ***Helgoland*** (2020) to the conclusion that ***Emptiness (no-self) is the essence of Justice and human rights.*** We put it for discussion.

Mehr Licht! The theory of evolution is among few ideas in intellectual history have been so captivating that they have overflowed the discipline from which they came (the model of natural selection created by Charles Darwin) and spilled over into everything else.

One of the central purposes of this research is to bring to light the ***evolutionary jurisprudence***. At the turn of the twentieth century however each of the influential evolutionary models in jurisprudence was closely tied to a particular political view about the role of the state in the allocation of scarce resources. Within such a fundamentally political paradigm, the question how the law itself evolves was little more than a detail.

Today every idea of jurisprudence to resolve the current crisis incorporates a theory of change, but not every theory of jurisprudence qualifies as 'evolutionary.'

We propose the evolutionary theory of ***Energy - Engaged Law***. The challenge of energy engaged Law is a new perspective on Law. The ideas of Carlo Rovelli and the discovery of self-consciousness in reasoning that mark the beginning of the modern era contribute greatly to our understanding of ***Energy-Engaged Law as evolutionary.***

Starting with Ernest Shurtleff Holmes's ***the Science Mind****,* a practical philosophy for abundant living, *we*'are going to conclude that our jurisprudential theory explicitly focuses on legal change and makes use of a particular model to explain how legal change occurs.

We pay attention to the idea by Henry Adams in the best-known autobiography of ***the Progressive Era***: the model had the potential to lead "to some great generalization which would finish one's clamor to be educated". "Natural selection seemed a dogma to be put in the place of the Athanasian Creed . . . ."

We put ***Mindful approach*** to law and legal services into ***the transformations of law beyond the State***.

At the end we aim to resolve the dichotomy: ***Real Human Right Vs. True Human Right.***

We're going to conclude: *when human right is real, it always finds a way to be ptotected through legal instruments.*

See Sicily and Die! We look at ***legal mindfulness*** and ***Legal Mediterrarenean Lifestyle*** as contributions to a framework of social values for ***sustainability*** transitions and ***legal ecosystem*** creation.

Starting from ***the Evolutionary ideas*** during the period of ***the Enlightenment***, we propose a new path to spiritual awakening: ***the evolutionary enlightenment.***

We forward the idea that the ***Medetterranean approach to evolution*** is the respect for human rights, the support for everyone: physical persons, small scale producers, cooperatives, big companies, and the involvement of everyone in well being. "Come, come, whoever you are.,,"

Our special aim is to create ***the Legal Meddeterranean Lifestyle ecosystem***, the scientific value, the healthy high standard of living and legal service delivering for everyone.
We forward the idea: a true way of life and work, the Mediterranean lifestyle is good for your health as well as bringing social, economic/labor, integral ecology and legal service delivering benefits.

It is not only about food, but also about ***sustainability***, ***integral ecology and the human rights protection*** through legal instruments. We are convinced that ***local*** and ***global*** can be complementary, and that it is possible to transmit local values and traditions on a global scale in the respect of sustainability.

We see the modern/future Enlightenment in ***integrating East and West in a new vision of evolutionary jurisprudence.***

C. Rovelli's ***Helgoland*** (2020) pushes us to tear across a universe made, not of particles, but of the relations between them. Relationships take place at all levels and among all species in networks and systems, in many ways which we overlook or simply do not know about. And in considering solutions to the current crisis, we aim to propose the comprehensive solutions which consider the interactions within and with systems.

It flows fro**m** ***the theory of everything (TOE or ToE)***, from the understanding that everything is closely related. Against this background *we* aim to analyse the interaction between ***interlegality, legal polycentricity*** *and* ***integral ecology***. Integral ecology is a key concept in project's parts on human rights and justice.

We intend to compare the ideas from ***Russia, Italy, Islam and Japan,*** applying ***Practical Philosophy.*** We don't aim to get lost in the labyrinth of symbols that distance us from reality. We aim to motivate positive action that can create a better world.

Putting Mindful approach to law and legal services into the Interlegality, the research proposes to reconstuct the supra- States law. In this regard, the issues concerning supra States law the research offers for discussion are the ***Sophia*** and ***the Creativity.***

We take ***Russia*** and ***Sicily*** as case studies for the birth in Sicily and Russia of a formidable power incomparable with the rest of the world, an intellectual determined to reform, changing the institutions, values and culture of the Old Regime. ***Sicily*** and ***Russia*** make the differences, in the good sense***.***

We use innovatively ***the decoloniality of knowledge*** to re-learn ***Sicilian and Russian heritage*** that have been pushed aside, buried, discredited by the forces of modernity.

From Russian Enlightenment legacy we take ***Sophiology***. We put forward the "In***Sophia***nation" which means the wide-spreading Sophiology, accompanied by modern science (quantum physics, per es). We take the **Creativity** from Sicily, where the fight against the Ancient Regime took shape with *the creation of an original constitutional and republican reading of rights.* We begin with ***Domenico Caracciolo***, Thinker and Reformer, a free spirit among the best known of the time, the man who tried to 'illuminate' Sicily.

Tackling this problem obliges us to accept the challenge of ***Global Enlightenment***. Our project takes into a***cc***ount the ideas from Islam and Japan, which could connect Russia, Sicily with other culters.
We intend to investigate whether the Sophia in the Islamic world an**d** Japan can be connected to the modern/future Enlightenment. We put it for discussion.

We put forward the idea that *Russian Sophiology and Sicilian creativity and Islamic and*

Japanese Sophia, can help to accept globally the modern crisis challenge to Human Rights. Our rock is the ***Mediterranean Lifestyle***, considering it the main road to balance, and a model that can be replicated in other areas of the world. We intend to show this in our project.

We pay attention to the ***American special reading of rights*** which has influenced on Russian and European legal order.

Fathers and Children. The research intends to study ***history***, to study change. We begin with ***Humanism*** and ***Enlightenment***, the words associated with the birth of ***rights bearing Man.***

Starting from ***Italy, Florence***, in the last decade of the fourteenth century, ***humanism*** brought new lymph to the life. The ***humanist*** emphasis on the value and importance of the individual brought about social and political change in Europe. ***Enlightenment humanism*** was more advanced than Renaissance humanism in its secular orientation.

To understand our present crisis we look to ***Enlightenment humanism history*** for answers. We're going to illuminate the successes and failures of the past to find way out the modern human rights and justice crisis. We turn to the values of the long nineteenth century, 1789 – 1914. Having knowledge of Enlightenment history allows us to see where we are coming from, which in turn allows us to understand our present. It not only reveals the past, but it also helps us create a better future.

We see ***Humanism*** and ***Enlightenment*** as a cultural revolution with a legacy of values that still live today. Their legacies endure in our times, whether we aspire to orient ourselves by them or contest their claims. Whenever norms of secularism, human rights, or justice are debated, we are positioning ourselves vis-à-vis the Humanism and Enlightenment, which provides important resources for ***Critical, Creative and Complex thinking.***

We apply ***Critical thinking***, to rigorously question the ideas and assumptions rather than to accept them at face value, ***Complex thinking*** to apply the ability to interconnect different dimensions of reality and ***Creative thinking*** to have the ability to consider the crisis in a new way, including analysis, open-mindedness, problem-solving, organization, and communication.

We are going to develop the Immanuel Kant's dictum, "*Have courage to use your own reason!"*. It succinctly captures the Enlightenment claim of the evolution through courage to use one's own mind without another's guidance. Dare to know! (Sapere aude) is therefore the motto of the enlightenment.

The specific objectives. The specific questions.

This proposal is organized in a highly interdisciplinary manner. It focuses on normative structures, case-law, legal realities. The research prioritizes the theoretical framing of supra states transformations of law and the historical-conceptual analysis deploying composite scientific apparatuses interplaying, if needed, international law, constitutional law, private law, procedural law. Also it aims to unite top-level academic study in judicial

politics by using research from comparative law, philosophy, theory of law, theories of justice, rights of human being, evolution.

We put our vision into practice.

Our specific objectives are:

- to formate and reshape the relations between Human Rights, Justice and Reality to change the legal service delivering, the human rights protection;

- to challenge dichotomous visions of Enlightenment discourses, by studying Enlightenment legacies with the impact of recent developments within natural sciences (quantum optics/mechanics), to analyze its role in the establishment of new Enlightenment vision and the role of the last in the relations between Human Rights, Justice and Reality.

It aims *to contribute to a definition of* ***real human right vs true human right.*** Importantly, all human beings should be treated as ends and not means.

This line of enquiry will make it possible to fill a clear gap in current views of the ***"long nineteenth century"***. We intend to fill this gap by investigating, from a global perspective, key aspects of the inter- and supra-state relations globally, taking:

- ***Energy (Sophia)*** as ***the New Enlightenment language:*** Energy is one of the possible concepts for understanding Sophia.

- ***The science*** as the ***channel*** of the ***Enlightment's legacies***

transmission. - ***The Judicial Discretion*** **(Creativity)** as the limit.

- **Evolution** towards *global* ***Mindful Approach to law and legal services***, ***global New Enlightenment*** as its ***direction***.

All these points have not been investigated satisfactorily.

Bringing together a wide range of sources who stems from a variety of different academic backgrounds, this project aims to answer following ***specific questions***:

Could inter-legality and legal polycentricity be linked with regular legal mindfulness and Legal Mediterranean Lifestyle?

How does it affect traditional legal concepts such as 'justice' or 'legal order/legality' or 'judicial discretion'?

How does it affect the legal service delivering and justice achievement?

And what are the normative implications?

State of study. Innovation of this research.

We put here one part of the sources we use, another part is in the *"Proceeding with the Study"*.

Philosophers addressed the question of justice within the structure of social life. Most popular was the social contract with the premise that only those actions, laws, or social structures that have the consent of society are just. The most notable philosophers of the

period include Hobbes, Locke, Hume, Rousseau, Smith, Kant, and Schopenhauer. Justice is expressed through preservation of the natural rights of each individual and creation of enabling conditions, through moral education, allowing individuals to pursue their own moral perfection. Rousseau's conception of justice is inherent in the nature of human beings. Kant's conception of justice is grounded in his theory of morality in the form of a categorical imperative. *Inter alia,* Askari Hossein, Mirakhor Abbas (2019), in *Conception of Justice in the Age of Enlightenment* and Mario A. Cattaneo (1984) in *Metafisica del diritto e ragione pura. Studio sul platonismo giuridico di Kant,* confirm it.

That the Italian Enlightenenment contributed significantly to the reflection on justice is a known fact, and certified by an extensive more or less specific bibliography. Some names have entered the collective mind: *Cesare Beccaria (Dei delitti e delle pene)*, *Franco Venturi*, *Lodovico Antonio Muratori*, his most significant work, *Della pubblica felicità (1749)*, covers many fields of public administration; the columns of Italian periodicals (among others, the Milanese periodical *Il Caffè*, directed by the Verri brothers and published between 1764 and 1766).

From the Russian flows we choose the *Sophiology*, seeing in Sergey Bulgakov a consistent, staunch propagandist of *Solovjev's* philosophy, starting with his 1902 article "*What gives the philosophy of Vladimir Solovjev to the modern consciousness* ", which was included in the collection "*From Marxism to Idealism.*" Two figures played a key role in this transition from Marxism to idealism,- *Immanuel Kant and Vladimir Solovjev*. And if in 1901 in *Peter (or Pyotr or Petr) Berngardovich Struve* 's writings we find that Solovjev's liberalism is important to us, the struggle for human rights is important to us, and all this Solov'ev's metaphysics is a dark forest in which it is better not to meddle, then in 1903 P. Struve and S. Bulgakov change their point of view and say that it is Solovjev's metaphysics that is the banner of idealism, and not just of idealism, but of militant idealism, *idealismus militants*. We assure you that in Russian culture the concept of "*militant idealism" i*s born earlier than the concept of *"militant materialism."* And under the sign of militant idealism, the first Russian revolution of 1905 is taking place. And under the sign of militant idealism, our present research is doing. Precisely militant idealism, not militant materialism we forward for the discussion, *Militant Idealism, accompanied by science*. And regarding the great importance of Soloviev's sophiology we, reflecting the words of *Sergei Sergeevich Horuzhy*, say: "in***Sophia***nation without annexations and indemnities." We put forward the "In***Sophia***nation" which means the spread of Sophiology, accompanied by science.

Ranging from Italy of *Filangier*i and *Beccaria* to Russia of *Solovjev, Bulgakov, Berdyaev, Koni, Struve* we deal with today's great debate on the problematic link between human rights and market autonomy, between politics and justice, individual rights and community rights, despotism of states and of religions and freedom of conscience.

We've found and studied a lot of modern writings (in English, Italian, Russian) on the Enlightenment reforms, justice, circulation of ideas on justice (*The Justice Crisis*, *ed by Trevor C.W. Farrow and Lesley A. Jacobs, (2021*), *Hossein Askari, Abbas Mirakhor (2019), Frazer Michael (2010), Resnik J, Curtis D. (2007), Imbruglia Girolamo (2020),*

Beatrice Pinna Caboni (2019), Alibrandi Rosamaria (2015), Collection of Judicial Reform of 1864 (2015)), etc

With pleasue we've found the writing by *Vincenzo Ferrone (2019), Storia dei diritti dell'uomo. L'illuminismo e la costruzione del linguaggio politico dei moderni; a* lot of studies dedicated to Human Rights, to the gender rights *(Makienko M, Panamaryova A, Gurban A (2014), Poole Randall A. (2010), Nicolaus G(2010), Gaarder J (2018), Oppo A.(2008), Khamidulin Artem (2017) Gerashchenko AI (2018)*), to a broad field of study covering issues related to the "basic freedoms and rights to which every person is entitled", all have grabbed our attention. There are many topics and researches, fell under the realm of Justice as human right: *Access to Justice and Right to an effective remedy and to a fair trial.*

Justice is the recurring theme of *Leonardo Sciascia*'s works, or rather the lack of it. His sense of justice was pessimistic and disappointed, accompanied by the use of human reason of *the Enlightenment matrix*, however.

Regarding the current crisis, we've found with pleasure the papers (2020) by A.Schiavello "*La grida canta chiaro"…o forse no. Qualche osservazione a partire da un esercizio di interpretazione giuridica; L'insostenibile leggerezza dell'incertezza del diritto*, dealt with the structural vagueness of the legal measures enacted by the Italian legislator to manage the Covid-19 pandemic,.

We paid attention to Mysticism and Politics in *Voegelin*'s *Philosophy*.

About discretionary justice we've studied many American/European/Russian writings: *R.Dworkin (1963,1977 etc), K.S.Davis (1969), D.J.Galligan (1986), M.Storme (Ed),(1994), H.Snijders (ed) (1996), A.A.S. Zuckerman (ed) (1999), D Abushenko (1999), N.Trocker&V.Vorano (eds) (2005), O. Papkova (2005), F.Francioni (ed) (2007), A.Barak (2006), E.Storskrubb (2008), Graver, Hans Petter (2015); (2018)* etc.

We've found with pleasure *Il Rule of law secondo Ronald Dworkin. Qualche osservazione critica* by *Aldo Schiavello (2016).*

There is the special writing: *Schwartz Louis B, Justice, Expediency, and Beauty (1987)*.

The certain number of modern researches regarding *Justice* and *Judicial Discretion* are led in the dimension of political regime: democratic, semi-authoritarian, authoritarian. The American authors write on Discretion, Discretional Power/Interpretation, Judicial Activism; Italian authors prefer to turn to the creative judicial interpretation, living law; in Russian jurisprudence there is the tendency to use Judicial Discretion and other american standards.

Focusing on the Discretionary Justice and *Ronald Dworkin*, on *A. Schiavello* (2020) *La scienza giuridica analitica dalla nascita alla crisi*, particularly focusing on *Alf Ross*'s approach to law and justice, we're going to draw a general conclusion:

Judge's ambition to manipulate Justice's object (the law) is bound to be frustrated.

We apply *a scientific theory of law*, developed by *Alf Ross* throughout his academic

career. Ross claimed that sentences pertaining to validity of rules must be empirically verifiable. *Aldo Schiavello* in his article *La filosofia "scientifica" di Alf Ross* (2018) shows that in the legal-philosophical debate there is still a lot of space for Ross and also for a rereading, through new lenses, some of his theses.

Regarding the impact for social sciences of recent developments within natural sciences (especially the implications of complexity theory, quantum mechanics) we've found with pleasure *Stuart Holland, Juozas Kasputis, Jody Jensen: Advanced Research on the Global Economy, Social Scientific Inquiry in an Age of Uncertainty (2017), Roberto Bin, A Discrizione del giudice. Ordine e disordine: una prospettiva "quantistica", (2014).*

In the multidisciplinary study of quantum physics we distingiush *Carlo Rovelli (2016) (2020).*

There is a lack of writings devoted to *Prudentia, Phronesis* in Amercian and Russian legal literature. Mostly Italian specialists write on Beccaria´s idea, Prudentia, Phronesis. *Sophiology* is a study topic of Russian authors, for the most part.

Both *Judicial metamorphoses* and *Happy Justice* aren't the popular subjects of discussions. The majority of writings is devoted to the judiciary problems. *Creative Justice (2017)* by *Mark Bank* examines issues of inequality and injustice, too.

While all these studies are theoretically and empirically very rich, but to our knowledge, no academic research has yet tried to bring together *the* ***Enlightenment legacy of Italy and Russia,*** viewing it in *a global legal perspective* with the impact of recent developments within *natural sciences* (complexity theory, quantum mechanics), to analyze its role in the establishment of new reality, of new relation between Human Rights, Justice and Reality.

We basically agree with what has been done by the scientists and we propose to extend the opinions to a "missing case".

Proceeding with the study.

Theoretical area of the research:

The legacies of the Enlightenment	***What to study***
Circulation of ideas on Human Rights and justice in the framework of the art.47 ECHR: What was Justice in the long	Proceeding from: the Kant's *Fiat justitia, pereat mundus* (1795); -Theory of Justice by Alexander Radishchev, based on Rousseau,

nineteenth century in Italy and Russia? What were the rights of human being?	-The freedom rectrictions by the power, following Radishchev A, "*Journey From Petersburg to Moscow"* (1790) -Marxist theory of justice, based on socialism; On the Jewish Question by Marx (1843): "The idea of the rights of man ... is not an innate idea; on the contrary, it is acquired in a struggle against the historical traditions in which man has been educated up to the present time. ...". We pass to - L Zdekauers "*L'idea della Giustizia e la sua immagine nelle arti figurative*" (1908); - to the judicial iconography, in particular, starting from "*La Giustizia, la spada e la bilancia"* by Prof. Mario Varvaro, University of Palermo; - to a woman with a crowned head who wields a sword with her right hand and holds a scale with her left; to analyzing Justice language in the Enlightenment. We promote the idea: Iustitia with a sword and a blindfold means that rights of man are inconvenient politically and economically. Iustitia is censured.

Human rights, Justice and Sophiology, Berdyaev's Androgyne; Islam, Japan. What's Sophiology? What is the Sophia? What's Sophiology in rights of human being? What's the Sophia in Justice and human rights? What's Sophia Prudentia-Phronesis in Justice? What's Iustitia Sophia-Prudentia-Phrones is in human rights? What's Androgyne in Justice? What does Androgyne mean for human rights? What's the Sophia in Islam?	Initially we turn to - the teaching on Sophia by Vl Solovjev, Solovjev's metaphysics, idealism, - Sophiology, the official Russian paradigm (its content); then we pass to - Berdyaev's *The person, in his entirety, is bisexual, androgynous,* to see the Sophiology in Justice, in equal rights of men, equal gender rights before the court, also. We have the special attitude to the symbols of *Iustitia Prudentia-Sophia -Phronesis*, to the virtues. Going from Kant's prudence (*klugheit*), Tommaso Briganti's "*Pratica criminale delle corti regie e baronali del Regno di Napoli"* (1770), we pass to -Antonio Genovesi's re-reading of the doctrine of *prudentia*

What's Tenrikyo (Sophia) in Japan?	*(wisdom)* and virtues, - to his late-eighteenth-century man of government, who is able to put into practice his knowledge, with a view to achieving his own happiness and that of the citizens of his state; - to the logic of knowledge of the Nature; - to Sophia in Islam; Japanese *Tenrikyo*. We promote the ideas: - "in***Sophia***nation without annexations and indemnities"; - Iustitia, accompanied by Sophia, Prudentia, findes its practical realization in Phronesis. - Iustitia-Prudentia-Sophia-Phronesis, together, is real Justice, where the need for the issue of gender rights is erased, the rights before the court become equal rights.

	To accept the challenge of Global Enlightenment: The Dialogue with Islam, Japan is possible through Sophia.
Human rights, Justice and Living Law, Judicial freedom of decision: What's Living Law? What's Judicial Feedom of Decision? What's Judicial Discretion/Discretiona ry Power?	With proceeding from the Montesquieu's separation of powers, Ehrlich's "*Judicial Freedom of Decision: Principles and Objects"* (1903), we take *the main characteristics* of - Enlightened absolutism, Legal Enlightment, Normative Pluralism, Judicial interpretation, Legal positivism, starting from the writings of Prof. Aldo Schiavello*;* - judges's activities *contra legem, supplendi causa, sine legge*; - precedents, *stare decisis*; - the main judicial reforms (in Germany, France with its influence on Italy and Russia); - the method of *François Gény, the Radbruch formula, Holmes's predictive theory, the balancing of interests by Pound and Heck* (the supporting materials: "*The Nature of the Judicial Process"* by *Benjamin N. Cardozo, Judge Posner's Reconstruction of Property Theory, R.Dworkin's Hercules, Dynamic Statutory Interpretation by Eskridge, Scalia's new textualism; the sentences no. 274 of 1976 of the Constitutional Court of Italy, no. 10739 of 2015 dalla Cassazione)*;

	- the ideas of *Ehrlich, Gény, Kantorowicz, Jhering, CB Bonesana, C Esposito, I. Pokrovsky, S. Belyazkin, A. Koni, H Kelsen*, etc. we arrive to *Living Law supporters and* *opponents*. We propose: Justice as human right is Energy, Practice of Law and the judges can't hide behind the formal text of the law (they aren't *bouche de la lois)*, their interpretative/discretionary activity is creative and full of value options that they should state in their decisions. The discretion of judges increases and with it the need for more effective control. Discretion itself is limit.

The Beccarian idea of Justice: What' the Beccarian idea of Justice?	We study *On Crimes and Punishments* (1764) and its critics, with special attitude to the Justice Face by Beccaria (without sword and blindflod, with the scale at her foot).
Human rights, Justice and its metamorphoses: What are the matamorphoses in Justice? What is its role?	Initially we turn to - the rebel nobile spirits of *Alberto Radicati di Passerano, of A. Radishchev* - to A.Koni's "*the insubordination of judges to the passionate demands of public opinion.. is a great guarantee of real justice..*" to share - I. Kant's "*Have the courage to use your own intelligence is therefore the motto of the enlightenment"* (1784) - Bentham's recommendation to judges: *"populus me sibilat, at ego mihi plaudo"* (1898) to pass to - the confidence in the magistrates (Antonio Genovesi, *Lezioni di commercio o sia d'economia civile*, 1769), to continue with the analysis of two cases-metamorphoses and their role for a man, for society, for a man (his rights) in society: - the Bruneri-Canella famous judicial and media case that took place in Italy between 1927 and 1931; - the widely publicized Zasulich trial, taken place in Russia,

	1878. We arrive to Transformation, Evolution, Judges-Mystics regarding Human Rights and Justice.

Human rights and Creative Justice: What's Creative Justice? What's creative legal interpretation? What's creative Judicial Discretion?	We start from Alf Ross's: "the law does not derive its validity form some a priori principles, but from the fact that it is actually applied by the judges (behaviouristic aspect of validity), because they feel bound by the rules (psychological aspect of validity)." We pass to Creative Justice concerning *the compensation for non-material damages'* proceedings, using: - Gabba Carlo Francesco, *Sulla pretesa risarcibilità dei danni morali* (1896), - Cesareo Consolo G, *Trattato sul risarcimento del danno in materia dei delitti e quasi delitti* (1908), - Minozzi Alfredo, *Studio sul danno non patrimoniale* (1909), - Semyon Belyatskin's *Compensation for moral (non property) harm* (1910); - the Melchiorre Gioia's *doctrine on the compensation for non-patrimonial damages;* *- the Joseph Pokrovsky's* opposition to creative justice; - Russian and Italian law and case-law on creative justice, to demostrate *pro e contro* Creative Justice. We promote the ideas Judicial Discretion and Justice, on Creative Justice definition, Creative legal interpretation, Creative Judicial Discretion.
Human rights, Justice and circulation of Science ideas: What are science ideas, applicable in our study?	Starting from Carlo Rovelli's '*There is no such thing as past or future*', we proceed with the Antonio Genovesi's *Elementi di fisica sperimentale ad uso de' giovani principianti* (1779), where he compares his main ideas with the most recent ideas in physics and proposes an original essay on the origins of society, reconciling a traditional conception of universalistic ethics with a social application of Newtonian notions of centripetal and centrifugal forces to unify a universalistic with a utilitarian conception of law and justice, an ideal with reason and a contemplation of the immutable nature of human beings with a descriptive

	analysis of the customs of different peoples. We pass to a theory of everything, Light, quantum optics etc from Newton to Einstein. We promote that Phronesis involves the ability to deliberate well in order to make moral and just decisions that result in action that is discerned as best for human rights, for human flourishing.
To accept the challenge of Globalasation of human rights, to the pursuit of Global Enlightenment, of Well being and Happiness.	Starting with "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*" (1776, The Declaration USA), we pass to - the Antonio Genovesi's *It is the law of the universe that we cannot make our own happiness without making that of others* (1765); - the idea of the right to happiness (Gaetano Filangieri (1780-88), - Antonio Muratori's *Della pubblica felicità* (1749) - the principle of conservation and the principle of tranquility, to arrive in conclusion to *Equilibrium, Neutal Mind, Kalokagathìa, New Enlightenment* etc
Conclusion	New Enlightenment, Russian Sophiology, accompanied by science, and Italian legal enlightment legacy can accept the challenge of Globalisation of human rights. Berdyaev's Androgyne can resolve the gender rights problems. A person who is androgynous may engage freely in what is seen as masculine or feminine.

Outcome we wait for is **our writing** (book) with its practical utilization in policy recommendations that serve the public good on the local, national, regional and global levels.

In communicating our science, we don't seek to put too much emphasis on the information we want to convey. *The works which we do, these witness concerning us*[1]

1 John 10:25

Mehr Licht! Fathers and Children of Justice Human Right. See Sicily and Die we would title our project.

The title benefits from *Fathers and Children* (1862) by Ivan Turgenev, just like the title of Dostoevsky's *Il delitto e la pena* benefits from Cesare Beccaria's *Dei delitti e delle pene* (1764) or as well as *the long nineteenth century* concept is an adaption of Fernand Braudel's 1949 notion of the long 16th century 1450–1640.

To See Sicily and Die in the title benefits from *To See Paris and die* by great Il.Ehrenburg[2], expanding the famous sentence *See Naples and die*. The phrase "*See Naples and die*" was first recorded by Johann Goethe in his diary (1787) . *Mehr Licht! (*More light! By Goethe) was a plea for increased enlightenment before dying.

Scheduled work plan.

The proposal can be realyzed in three years with one year prolongation .

2021

November -December Introduction to Inter-legality, Legal Polycentricity, Legal Mindfulness,	Creativity in Law, Evolutionary Jurisprudence, Legal ecosystem, Mediterranean Lifestyle including.

2022 January March	Circulation of ideas on Justice and Human Rights
April-July	Sophiology, Berdyaev's Androgyne
Septem ber -Decem ber	Living Law and Judicial freedom of decision
2023 January	The Beccarian idea of Justice
February March	Justice metamorphoses Creative Justice
April	Circulation of Science ideas

May July	The wellbeing right, the pursuit of happiness
September - December	Conclusion
2024	Formating

2 One of the most effective Soviet spokesmen to the Western world.

January June	

We don’t pretend to give all thoughts, all cases, all proves and circumstances. *Not everything that counts can be counted, and not everything that can be counted counts*.

Management Risk

Corona virus lockdown etc

Methodology

We intend to use if (and when) appropriate: Decoloniality of knowledge, Case study method, Complex Thinking, Creative research, Legal Analysis, Qualitative research, Sophism, the Delphi method, scientific methods within law/politics, considered from a philosophical perspective, the impact for law/politics of appopriate developments within natural sciences (especially the implications of complexity theory, quantum mechanics), Thinking Hat, Mead's theory, Holonomic brain theory, the Stream of consciousness, TOE Theoretical Framework, Henology, Univocity of being, Critical Thinking, the three sieves of Soctrates.

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Prevoius research activity

My previous research was devoted to the **Evolution of Judicial Discretion,** in general**,** and to the **Compensation for non pecuniary damages in disability claims,** in particular**.** I am calling for the legal profession to consider the profound human and spiritual questions raised by the practice of law. In this research, we share some of our thoughts on this challenge, and how to deal with it. It is well known that many judges are unhappy. Many drink. Many kill themselves. I was a judge. I know what it means.

It is certainly true that each individual's psychological problems contribute to these tragic statistics. However, the crisis in the profession also arises out of a spiritual problem — one that relates directly to what we do as lawyers.

By "spiritual problem" we mean (1) a fundamental human dilemma, (2) that cannot be resolved solely by psychological means (3) but may be worked through or transcended through spiritual or reflective practices, perhaps in conjunction with psychological strategies.

Working with Human Nature - it's a Judge's Difficult Task. Just as some in the medical profession have begun to question why their profession has historically avoided questions related to physicians' encounters with death, it is time for the legal profession to recognize that judgering calls into question our relationship to suffering, to each other, to life.

Like physicians who must deal with illness and death every day, judges routinely deal with human greed, ego and selfishness. Then, there is judge's own selfishness and their own egotism — perhaps the most painful parts of this dilemma. When a judge continually strives to resolve the disputes according to law and case law, human goodness and human connectedness can fade into oblivion. A person may gain the world but lose his soul. The Crisis in the Profession is a Spiritual Crisis, we think

In current research we examime **Judicial Discretion** as a *Spiritual Path*. We discuss the Importance of Balance and Reflection.

To achieve this goal we compare how Judicial Discretion is being designed and realized in different national-international conditions. The principal research aims to find out, explain the **Evolution of Judicial Discretion**.

For comparison we take the unique dimension of the **Compensation for Non-material Damages**. **The compensation for non pecuniary damages** shows more brightly Judicial Discretion in decision-making of a judge of any country, the Community.

This proposal takes **the disability claims** as a case study.

[5] In **the attachment 4** you could find my research done at the Faculty of Law, University of Pavia, Italy

[6] In **the attachment 5** you could find my research done at the Faculty of Political Sciences, University of Pavia, Italy.

[7] In **the attachment 6** you could find the evaluation of my research (Russian Part) done by the People's Friendship University of Russia, Moscow (Professor V. Bezbakh)

Non material damages often come up after a violation of personal integrity which leads to the **disability**. Non-pecuniary *damages* claims enable people with disabilities to achieve what they want for the compensation to have the life whether at home, work or in the community.
Also this proposal aspires to contribute to discussions about the **Evolution of Judicial Discretion** in general.
The chief question this proposal purposes to answer is:
How does Judicial Discretion operate in the disability cases (in the framework of the Compensation for Non-material Damages)?
To answer this question, a differentiation could be made between *national and international* magnitudes of Judicial Discretion. The *national* approach to JD (*in the framework of the compensation for non-material damages*) questions the peculiarities of a state (Russia, Italy, Sweden etc) and the relevance of the *international* provisions in national setting, while the international measurement inquires for the thoughts and reasoning which affect, navigate, corroborate JD in a state.
This research will explore and develop recommendations for law (civil procedural, private, disability) and judicial reforms in light of **the United Nations Convention on the Rights of Persons with Disabilities.**

The research makes sense of **Judicial Discretion** by assuming it has **a evolutionary process.**
In this setting the idea of **"legal consciousness"** may be relevant. The starting point of our research is **Weber's ideal types of law**.[8] We try to understand them in the light of the ideas:
-on **the legal consciousness** of **Russian legal scientist I.Ilyin** (the ideologist of Putin's Rule),
-on **the Evolution** of **French philosopher PT de Chardin**,
however, this lead us to their modification.

The research interprets complexity as **the axis of evolution of the matter into legal consciousness (in judge), to Top Value.** We refer to the Roman legal maxim – ***Discretio Est Scire Per Legem Quid Sit Justum.***
This project will merge the methods, theories and insights of social sciences, the law and public policy.

STATE, COMMUNITY AND JUDICIAL DISCRETION
Law and Judicial reforms are in progress as in Russia, so in other countries.
In our previous researches (from 1993) we found: **Courts have always played an important role in a state.** Whether interpreting Constitution and other legislation, examining the legal status of terrorism suspects or if (or how) people can protect their rights and freedom, a judge in a modern state exercises the discretion (Barak, 2006, Papkova, 2005). Many authors note the worldwide ubiquity of courts and judges involved in resolving disputes and answering questions with heavy policy implications.[9]
The level of JD is high in decision-making of a judge.
JD is based on **the Separation of Powers**. But JD can place the judge in the position of a legislator.[10]
We start from our ideas that **Justice is defined by Judicial Discretion and Judicial Discretion can't be decontextualized from politics.** (Papkova, 2005).
We hypothesize that the field of **JD Evolution** deals chiefly with **Law and Society.**
Law and Society. For Barak, judge is to understand the purpose of law in society, to help the law achieve its purpose, to protect Constitution and democracy.[11] Condividing the opinion of A.Barak, we put forward the amendment that the law of a society is a living organism.[12]

[8] https://journals.openedition.org/revus/2443
[9] Shapiro M, Stone A. The New Constitutional Politics in Europe, (1994), 26, Comparative Political Studies, 409; Gibson J, Calderia G, Baird V. On the Legitimacy of High Courts, (1998), American Political Science Review, 92.
[10] Papkova O. Judicial Discretion, Moscva, (2005), 152; Posner Richard A. The Role of the Judge in the Twenty-First Century,(2006), 86 B.U. L. REV. 1063.
[11] Barak, A, The judge in a Democracy, (2006), Princeton, 3.
[12]Dickson Brian, A Life in the Law: The Process of Judging, 63 *Sask. L. Rev*.373, 388 (2000),Cardozo Benjamin N., The Paradoxes of Legal Science 10–11 (GreenwoodPress 1970) (1928); Rehnquist William H, The Changing Role of the Supreme Court, 14 *Fla.St. U. L. Rev.,* 1.

It is based on a factual and social reality that is constantly changing.[13] For Franklin and Kosaki courts are originally intended to be "republican schoolmasters," teaching the public to support the rights and liberties of their fellow citizens.[14]

The research starts form our conclusion that **the entrenchment of Judicial Discretion by the rule of law is not a lawmaker`s whim but it is a result of socio-cultural and historical development of society and law.[15]**

The Evolution of JD in **Law and Society** deals with **Rule of Law** (Carothers, 2006; Morlino and Magen, 2008)[16]**, Judicial Independence** (Barak, 2006, Papkova O, 2005) and **Legal Consciousness**.

The **Rule of Law** is considered to be a necessary condition for the development of a successful democracy (Carothers, 2006; Morlino and Magen, 2008). For a state to be called a "rule of law state" (or "Rechtsstaat"), certain basic elements and institutions must be in place. Among these are: Separation of Powers; Legality of Administration, in particular the Principle of Legal Certainty and Unity, part of which are, inter alia, the Principle of Reliability, the Prohibition of Retroactive Acts, and the Principle of Proportionality; The Guarantee of Fundamental Rights and Freedoms and Equality before the Law. In this context, independent role of a judge has emerged as one of the pillars of the Rule of Law.

The subject **of Judicial Independence** major concerns **Judicial Discretion**. Independent and impartial judges are not something to be taken for granted. Courts in the whole of Europe are challenged in their ability to withstand pressure from the executive power. Legislators seek judicial compliance with their policies. There are strong pressures on judge`s decision-making, on JD in Russia, also (Papkova O, 2005).

The European Commission states: "recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern".[17]

Prof.Levinson and Gerhardt want to know what we mean by the concept of "Judicial Independence." The problem in answering the question is the difficulty of separating the debate from the politics surrounding it.[18]

We contribute to debates whether the problems of Judicial Independence, the Rule-of-Law are resolved on the basis of the correspondence of **Judicial Discretion** with the level of **Legal consciousness of a nation** to counterbalance the ideas of **the United Nations Convention on the Rights of Persons with Disabilities.**

Legal consciousness is defined by Ewick and Silbey as the process by which people make sense of their experiences by relying on legal categories and concepts.(Ewick; Silbey, Patricia; Susan (1998)). Seron and Munger explain that "in addition, class may affect legal consciousness: Law may mean different things depending on an individual's location in the various hierarchies of status, prestige, and knowledge associated with membership in a social class" (C.Seron; F.Munger (1996))

Legal consciousness is a collection of understood and/or imagined to have understood, legal awareness of ideas, views, feelings and traditions imbibed through legal socialization; which reflects as legal culture among given individual, or a group, or a given society at large. The legal consciousness evaluates the existing law and also bears in mind an image of the desired or ideal law (Kaugia S).[19] The Great Soviet Encyclopedia (1979) defined **legal consciousness** as " the sum of views and ideas expressing the attitude of people toward law, legality, and justice and their concept of what is lawful and unlawful. Legal consciousness is a form of social consciousness. Legal ideology, the system of

[13] Rehnquist William H, The Changing Role of the Supreme Court, 14 Fla.St. U. L. Rev., 1.

[14] Franklin Charles, and Liane C. Kosaki. Media, Knowledge, and Public Evaluations of the Supreme Court." In Contemplating Courts, ed. Lee Epstein.Washington, DC: Congressional Quarterly Books

[15] Papkova O.A. Usmotrenie Suda,/Judicial Discretion/(2005), Moscva, 64-199.

[16] The position is also often labeled as embedded liberalism (World Bank, 2004).

[17]https://ec.europa.eu/commission/sites/beta-political/files/protection-union-budget-rule-law-may2018_en.pdf

[18]Sanford Levinson, Identifying "Independence," 86 B.U. L. REV. 1297 -1299 (2006); Gerhardt J, What's Old Is New Again, 86 B.U. L. REV. 1267 (2006); see also: Russell (2001, 12),Martin Shapiro (2008: 34), Feld and Voigt (2003)

[19] https://www.juridicainternational.eu/index.php?id=12433

legal views based on certain social and scientific viewpoints, is a concentrated expression of legal consciousness." [20]

This proposal begins with the thought that Evolution of JD is still to a significant extent determined by the differences of legal consciousness, influencing many aspects of socioeconomic, historical, political life. This point could be applied as to **the Evolution of international Judicial Discretion** (which deals with the differences of legal consciousness of national judges) so to **the Evolution of national JD** (which deals with the differences of legal consciousness of individual judges).

Evolution of Judicial Discretion concerns **activism of a judge** (Barak, 2006, Papkova O, 2005). For M. Boudin, judges are indeed lawmakers, but this role can only remain beneficial and secure if it is employed with due regard for the legislature. When courts act as reformers and effect dramatic innovation, they set themselves up against the democratic process and invite a backlash (Boudin,2006). For Posner, judges are political actors and (sometimes) legislators who are motivated by the dual desires of making the world a better place and of playing the "judicial game" (Posner, 2006). Professor Er.Chemerinsky argues that judges clearly decide cases based on their politics and other values (Chemerinsky,2006).

We hypothesize that **the foundations and principles of the judicial activism, stated by law, but not followed from a national\communitarian need, result in the dichotomy of the natural legal consciousness and the positive legal consciousness**.

We advance the idea that this divarication is the failure of judicial activism, law-making and the result of the legal consciousness`s deformation and blemish.

We state that no evolutionary future awaits Discretion of a single judge except in association with JD of another judge. We put forward the idea on **Collective JD** and argue in French Lamarckian terms[21] for **the Evolution of Judicial Discretion**, primarily through the vehicle of **the education of judges** (Papkova O., 2005).

The research sets worth the ideas of **Ivan Ilyin** (the ideologist of Putin's Rule)

The reasons for choosing Ivan Ilyin.

Ivan Alexandrovich Ilyin (1883–1954) is **Russian philosopher and legal scholar**. Although forbidden under the Soviet regime, Ilyin`s thoughts and works have come to be more and more appreciated over the last fifteen years, especially since his earthly remains were re-interred in Russia in 2005. Like all prophets, however, he was of course mainly ignored, unappreciated and even persecuted in his own times.

Ilyin, who died over half a century ago, is the prophet of the new Russia which is being born and which alone can give the contemporary world a viable future, providing that it is given time to grow to fruition in contemporary Russia.

One of the problems he worked on was the question:

What has eventually led Russia to the tragedy of the revolution?

He answered that the reason was "the weak, damaged self-respect" of Russians. As a result, mutual distrust and suspicion between the state and the people emerged. The authorities and nobility constantly misused their power, subverting the unity of the people. The alternative way of Russia according to Ilyin was to develop due the **consciousness of law** (правосознание) of an individual based on morality and religiousness.

He considered the **consciousness of law** essential for the very existence of law. Without proper understanding of law and justice the law would not be able to exist.

Ilyin`s theory claims to be a leading Russian political and philosophical-legal idea, which is alternative to **the West European paradigms**.

Our starting point is that **the Evolution of JD** concerns the foundations, stated by law, e.g judicial independence, the-rule-of-law state,etc. In line with this point we hypothesize that the JD is **the art of**

[20] https://encyclopedia2.thefreedictionary.com/Legal+Consciousness

[21] https://simple.wikipedia.org/wiki/Jean-Baptiste_de_Lamarck

law. We hypothesize that the Evolution of JD in international and national settings depends significantly upon the synthesis of the foundations, principles, established by law, and some **Top value, that a judge is devoted to serve.**
The research sets forth a sweeping account of the unfolding of the Judicial Discretion and the evolution of the matter to **legal consciousness**, to ultimately a reunion with Top Value "Omega Point". Here we debate on the meaning of the integration in Omega Point of **human rights and state\Communitarian interest on the ground of the common aim, common culture**. (in the disability cases – on the ground of the Convention mentioned above) [22]
We put forward the **orthogenesis**, the idea that evolution occurs in a directional, goal-driven way. Our starting point is the idea of **French scientist PT de Chardin**.[23]

The reasons for choosing PT de Chardin.

We found that **the Evolution of Teilhard** adds light to the ideas of I.Ilyin and develops them. A Jesuit priest, paleontologist, and philosopher, Pierre Teilhard de Chardin (1881–1955)
argued eloquently that evolution was really part of a divine master plan. Today his middle way must still hold appeal for those who are put off both by the willful ignorance of creationists and by the hard-headed atheism of Richard Dawkins. We support the synthetic model of evolution. The Teilhard's language is in fact largely poetic rather than philosophical or scientific. We intend to put it into legal language.
We discuss it on the basis of our case study: **The Compensation for non-material damages in disability claims.**

The overall project will empirically explore how fraught the process of the compensation for non-material damages is for many persons with disabilities in light of their lack of control or voice over the process and circumstances of their life. This will be informed by an investigation in salient features of national and international law that has acted either as a barrier to autonomy – by presumptions and stereotypes about the helplessness of persons with disabilities – as well as a facilitators to autonomy – primarily in the form of autonomy-preserving legal processes such as supported decision-making. Exploring the public policy dimension will reveal how these issues can be best framed and advanced through advocacy and policy reform. It is understood that ' life' decision-making involves access to and the quality of palliative care services as well as decisions to continue and well contunue one's own life in accordance with one's own will and preferences.

Demarcation of the Study
Research scope

It is a systematic, developing research, interdisciplinary by nature. Law, Human Rights, Legal Culture, Sociology, Psychology, Philosophy of Law, Science of Evolution are involved in this task.
It's **innovative** by nature.
There is no another research which combines **Law, Spirituality, Disability and Science of Evolution**.
There is no another research which at the same time refers to the ideas of **Ivan Ilyin and PT de Chardin.**
There is no another research devoted to the **Evolution of Judicial Discretion**.
There is no another research which seeks to resolve the problems of **the disability through the Evolution of JD** (in the compensation for non-material damages).
Judicial Discretion remains the mystery as for legal professors so for legal practitioners. The questions of **the compensation for non-material damages in disability cases and of the Evolution of JD** are of burning theoretical and practical importance.

[22] https://en.wikipedia.org/wiki/Orthogenesis
[23]https://books.google.it/books?id=RHCqN_lM5bYC&pg=PA93&lpg=PA93&dq=orthogenesis+de+chardin&source=bl&ots=O8n70jTbwD&sig=ACfU3U1V9JDlraNIk8F3wTx79qnSayKcBQ&hl=it&sa=X&ved=2ahUKEwj_wuW6IvgAhULMuwKHR4iDvsQ6AEwA3oECAkQAQ#v=onepage&q=orthogenesis%20de%20chardin&f=false

The goal of this research is to answer the question: How to be the Best Judge You Can Be. We could say it is a Guide to Physical, Mental, Emotional, and Spiritual Wellness.
The goal of this research is to equip a new generation of judges, legal practitioners to respond to global challenges facing persons with disabilities and decision-makers (judges) in Europe.
The goal of this proposal is to give legitimacy, through this research, to the lived experience of persons with disabilities, as a basis for law reform and to expand knowledge in the area of disability research, and in particular disability decision-making policy.

The research will not only shed light on the nature of Judicial Discretion in the disability cases but will also give a useful contribution to the scholarly discussion **on the Evolution of JD.**

RESEARCH MAIN OBJECTIVES

The main objective is this study of **the Compensation for non-material damages in disability claims and its impact on the Evolution of JD.**
We plan to answer the questions**:**

- Non-material damages and disability.
- Disability cases and the compensation for non-material damages.
- Judicial Discretion and the protection of disability rights in such cases.

We plan to collect the material on **the Compensation for non-material damages in disability cases in Sweden** (with shadow of Judicial Discretion) and to put them into discussions.

We aim to develop social work as a practice.

DESIGN AND METHOD.

We intend to move through Judicial Discretion, Compensation for non-materiald amages, Disability, Spirituality, Evolution. The questions we indicate will be as about individual\collective persons so about the interest European society might have in protecting spiritual issues in general as the bearers for future generations in Europe. One part of our research intends to discuss private law (non-material damages), the legal issues of disabIlity (in Europe and in national comparative perspective) the Judicial Discretion and the public sphere in European society and the European Court of Human Rights (ECJ) jurisprudence regarding disabilty issues. Another Part will discuss the ideas of I.Ilyin and PT de Chardin. The third part of "spiritual analysis" intends to combine two parties and discuss law, the spiritual, evolutional issues, the well being values and the public sphere in Europe, and the case-law of ECtHR in its current situation. We pay attention to the issue What Makes a Value or Claim or Choice "Spitual", the theoretical model of the judicial role in Europe, rooted in our analysis and proved by it, the rule of law and the legitimacy. We intend to draw on a wide variety of sources: legal, extralegal and those collected from other academic and popular disciplines.
Hard law. We will use legal sources on both the national and European levels and international agreements. The European sources include first of all European treaties and conventions both under the European Union and the Council of Europe systems. Further, on the national level constitutional sources as well as ordinary laws will be analyzed. We will use soft law and other nonbinding interpretative documents concerning the interpretation and application of European law (resolutions, recommendations, etc issued by the organs of the COE or the EU).
We will analyze ***case law*** (European and in some cases national levels). Case law on the European level includes both judgments of ECJ rulings and of the European Court of Human Rights (with the emphasis on the case-law of ECtHR). In addition, when available, cases from national courts will be analyzed. We are going to tabulate the cases of ECtHR.
The research refers to ***literature*** comprising legal, philosophical, political science and sociological perspectives on the judicial role and spirituality.
Languages. We could use Russian, Italian and English. We would like to learn Swedish, also.

If it is necessary to read materials in other languages we will use the assistance of professional translators.

Comparison as a background for further theoretical discussion. The goal of this project is a critical evaluation of the judicial discretion in the formatting and shaping the relations between law and public sphere. For that reason, certain specific areas are chosen as test cases of that commitment. Firstly, it concentrates on European-wide legal standards and discourses and compares them with legal standards and discourses in particular states. Secondly, in some parts the research engages in a comparison of national standards. Thirdly, it compares legal and non-legal standards.

The cross-national analyses of Europe's patterns of spiritual and moral orientations are going to be presented in this research are all based on the European Values Study survey data and data gathered within the framework of the World Values Study, directed by Ron Inglehart. We want to underline, however, that a comparison is treated as a basis for further theoretical discussion and the consideration of issues of the judicial discretion.

The method of selecting examples. The first step is identifying the European standard, whether strictly legal, based on hard law and case law or based on strengthened soft law and documents issued by European institutions. The second step is comparing this identified standard with national practices least compliant or totally non-compliant with it.

a) Plans for the future

The current research leads us to the answer to the following questions:

- What is the Evolution of Judicial Discretion?
- What is the legal consciousness? The role of the legal consciousness in the Evolution of JD.

We intend to put our findings into the monograph dedicated to the Evolution of Juducial Discretion (on comparative perspective). For this, we intend to make the research into *Sweden, France and England*, and to improve our knowledge on *Russia*, also.

We aim to implement our finding in practice, to improve social needs of non protected persons (disability).

Research experience and qualifications

Research environment and scholarly networks

- 2013 – 2017, Research at Law Faculty, University of Pavia, Italy and People's Friendship University of Russia, Moscow;
- 2013, autumn semester, Research at the University of Pavia, Italy; Law Faculty, Faculty of Political Science.
- 2011-2012, Research at Law Faculty, University of Insubria, Italy
- 2010- 2011, Research at Law Faculty, University of Ferrara, Italy and People's Friendship University od Russia, Moscow
- 1998, summer term, Research at the Institute of East European Law and Russian Studies, Leiden University, the Netherlands
- 1995, spring semester, Research at Law School, Leiden University, the Netherlands
- 1993- 2011, Research at Law Faculty, Moscow State University.

Supervision experience:

Name of the doctoral student	Melnik, Taras	Ponka, Viktor
Year of degree	2007	1999
Thesis title	New Russian Standards: Rights and Law on Bankruptcy. Comparative Analysis With the European Union	Building a New Society: Right and Law on Mortgage in the Russian Federation
Doctoral student's current work/position	the businessman in Ukraine	the Dean of the Faculty of Law of People's Friendship University of Russia, Moscow

Participation in scholarly conferences (from 2000)

- "Comparative Legal Aspects of Civil Legal Relations in the Modern World", the Peoples' Friendship University of Russia, Moscow, January 22, 2016.
- "Why Have We Lost Trust To Court? Changing Values as Well as Institutions". (Почему Мы Потеряли Доверие к Суду? Изменяющиеся Ценности и Институты) – The Role of Science, Religion and Society in Moral Person-Making, Donetzk, Ukraine, 2007.
- "Judicial Rule-Making: Return to Theory" (Судебное Правотворение: Теория) – Methodology of Scientific Cognition, Saratov, Russia, December, 2007;
- "To Make Justice: Image of a Judge" (Имидж Судьи, Персональные Качества Судьи Для Осуществления Правосудия) - On Necessary Characteristics of Future Civilization, Moscow, November, 2007
- "Abuse of Rights in Trial" (Злоупотребление Правом в Судебном Заседании) – Cooperation of Science, Education, Practice, Saratov, Russia, June, 2007;
- "Influence of International Law on Court Activity in the Russian Federation" (Влияние Международного Права На Деятельность Суда в Российской Федерации) – Economics and Social Development, Moscow, April, 2007
- "Rulings of Constitutional Court and ECtHR and Courts in the Russian Federation" (Постановления Конституционного Суда и ЕСПЧ и Суды в Российской Федерации) - Annual International Scientific Conference "Lomonosov" at Moscow State University, April, 2007;
- "What is the Niche of a Court in Sovereign Democracy?" (Ниша Суда в Суверенной Демократии)
- Sovereign Democracy and Justice at the Institute of USA and Canada (Academy of Science)- Moscow, April, 2007
- "Principles of Civil Procedure after the Treaty of Lisbon in the European Union" (Принципы Гражданского Процесса После Лисбонского Договора)- Comparative Law and The Problems of Private Law at People`s Friendship University of Russia, Moscow, March, 2007
- "Unification of Civil Procedure in the EU" (Унификация Гражданского Процесса в Европейском Союзе)- Annual International Scientific Conference "Plekhanov Reading" at Plekhanov Economics Academy, Moscow, March, 2007.
- "Legitimacy, The Rule of Law and Court: European and Russian Standards" (Правовая Норма,Законность и Суд: Европейские и Российские Стандарты) -The Lessons of "the New Course" for Modern Russia and the Whole World at Moscow State University of International Relations – February, 2007

- “New Value on the Old Ground: Analysis of Adversarial System in the RF” (Новые Стандарты на Старом Фундаменте: Анализ Состязательной Системы в Российской Федерации) - February Revolution of 1917, History and Modern Times at Russian State Humanist University.-Moscow, February, 2007.
- “Applicable for Russia: Court Discretion as a Power; Judicial Discretion as an Authority?”
- (Усмотрение Суда как Власть, Усмотрение Суда как Полномочие: Применимо ли в России?)- Annual International Scientific Conference “Lomonosov” at Moscow State University, April, 2006;
- “Reasonable Term of Court Procedure (Interpretation by European and Russian Courts)”
- (Разумный Срок Судебного Разбирательства: Толкование Европейскими и Российскими Судами) – Values of Society, Values of Intelligence, Moscow, April, 2006.
- “Human Rights and Court in the Russian Federation” (Права Человека и Суд в Российской Федерации) – Roads of Russia: Problems of Social Cognition, Moscow, February, 2006;
- “Justice and Morality and Court in the Russian Federation”(Справедливость и Нравственность и Суд в РФ) – Modern Society: Postmodern Territory, Saratov, Russia, November, 2005
- “Back to “Liberte, Egalite, Fraternite: Freedom, Equality and Judicial Discretion” (Назад к “Liberte, Egalite, Fraternite”: Свобода, Равенство и Усмотрение Суда)- Annual International Scientific Conference “Lomonosov” at Moscow State University, April, 2005;
- “Freedom and Equality as Judicial-making” (Свобода, Равенство как Судебное Творение)
- Annual International Scientific Conference “Plekhanov Reading” at Plekhanov Economics Academy, Moscow, March, 2005“Abstract and Concrete Person under the New Russian Legislation” (Абстрактный и Конкретный Человек перед Новым Российским Законодательством) – Social Ideal, Saratov, Russia, 2004
- “Interpretation of Justice by European Courts and the Supreme Courts in RF” (Толкование Категории Справедливости Европейскими Судами и Верховными Судами в РФ) – Russian Society, Challenge of Globalization, Moscow, 2004.
- “Right to Choice in Court Activity: Common Rule For All Europe” (Право Выбора в Судебной Деятельности: Общее Правило Для Всей Европы)- Annual International Scientific Conference “Lomonosov” at Moscow State University, April, 2004;
- “Society, Law, Judge and Religiousness” (Общество, Право, Судья и Религиозность). The Person and Christianity, Yalta, Ukraine, 2004
- “Freedom in Evaluation of Evidences” (Свобода Оценки Доказательств)- Annual International Scientific Conference “Plekhanov Reading” at Plekhanov Economics Academy, Moscow, March, 2004.
- “European and American Writings on Judicial Discretion” (Европейские и Американские Труды по Усмотрению Суда) Annual International Scientific Conference “Lomonosov” at Moscow State University, April, 2002.
- “ECtHR + ECJ= Advantage and Omission for Europe” (ЕСПЧ +ЕС=Выгода и Упущение для Европы)- Annual International Scientific Conference “Plekhanov Reading” at Plekhanov Economics Academy, Moscow, March, 2002.
- “Compare With European Standards: Motivation within Judicial Activism” (Мотивированность внутри Активности Суда: Сравним с Европейским Стандартом)- Annual International Scientific Conference “Lomonosov” at Moscow State University, April, 2001.
- “Has a Judge Accountability to Society?” (Есть ли у Судьи Ответственность перед Обществом?) – Democracy, Past and Present: The Test of Time, Donetzk, Ukraine, 2001
- “Access to Justice: What does It Mean in Europe?” (Доступ к Правосудию: Опыт Западной Европы)- Social Management: Experience, Study, Education, Saratov, Russia, 2001.
- “Justice, Freedom, Equality Under Law and Religion in Russia” (Справедливость, Свобода, Равенство: Право и Религия) – The Person and Christianity, Yalta, Ukraine, 2001.

- "Right to a Fair Trial (Compare with European Standards)" (Право на Справедливое Судебное Слушание: Сравним с Европейскими Стандартами) - Annual International Scientific Conference "Lomonosov" at Moscow State University, April, 2000.
- "Attitude of Court to Law" (Отношение Суда к Закону)- Annual International Scientific Conference "Sokratov Reading" at International University in Moscow, February, 2000.

b) Fellowships

- 2013, CICOPS Fellowship, University of Pavia, Italy; Law Faculty, Faculty of Political Science, University of Pavia, Italy.
- 2011, Landau Network-Centro Volta, Cariplo Foundation fellowships; Law Faculty, Insubria University, Como, Italy,
- 1998, Infopravo Grant for Research; Institute of East European Law and Russian Studies, Leiden University, the Netherlands,
- 1995, Tempus Fellowship; Law School, Leiden University, the Netherlands,
- 1993-1996, Moscow State University Graduate Scholarship (fully funded scholarship for doctoral studies)
- 1985-1990, Moscow State University, Law Faculty, Stipend for Best Students

c) Collaborations

- During my collaboration with UNIFE, Italy,
  the collaboration between UNIFE e PFUR (People's Friendship University of Russia, Moscow) was organized;[24]
- Joint research was done (University of Insubria, Italy, and People's Friendship University of Russia, Moscow). [25]
- During my collaboration with UNIPV, Italy,
  the Cooperation between UNIPV, Law Faculty, Italy, and PFUR, Moscow, was started (Active now).

[24] In **the attachment 7** you could find the Collaboration Programme.
[25] In **the attachment 8** you could find the final scientific report.

Attachment A, Research Portfolio

The research done for the "School of Specialization for Legal Profession", University of Pavia; Commercial University Luigi Bacconi of Milan; Italy.

THE INTRODUCTION

What to study? We are going to study **the "formatting" and the reshaping of the relations between public sphere and religions in Europe which are made by the European Court of Human Rights**. Our approach devoted to the **decision-making process of the ECtHR`s judges**. The analysis of their judicial activity focuses on *the individual decisions of justices* regarding *religion*, which are explained in terms of *policy preferences, values, and attitudes*. Our analysis is not limited to the courtroom or to the preferences of the judges on the bench, but includes broader processes of interest mobilization.
Our project rejects the idea of a change of heart by the European Court of Human Rights and instead argues for a reinterpretation of the Court`s ruling in ***Lautsi v Italy*** (3 November 2009). In our view, that decision was not a break with earlier rulings but rather the culmination of arguments about regulating the freedom of religion in Europe.
We argue that the Court`s decisions included not only debates over individual\collective freedom of religion versus police power, but also debates about *legal ideas and legal doctrines*, picking by the Court for its rulings, *thus providing changes in the paradigm of religion* in Europe.
We suppose that these legal debates evolved in the period from 1976, resulting in a foundation, on which the ECtHR could base its ruling in the *Lautsi v Italy* case. We argue that a Court decision can often accomplish a great deal more that legislative action. Our intention is to unearth apparently and read every reported ECtHR case concerning religion from 1976- to nowadays. Having tabulated these cases, we hope to find **how is the court influenced by the nonlegal paradigms of the debate? (for instance recognizing a "dominant" culture,"Leitkultur"); Which legal doctrine is developed by the Court?**
This research cannot be easily classified as human rights, constitutional, international or comparative law research or political, social sciences research. It includes elements of all these types of analysis but it focuses primarily on the case-law of ECtHR regarding religion.
The key terms and the leading themes used are *religious pluralism, equality, the rule of law, legitimacy, the rule that judging should be neutral and apolitical, historical-interpretive account of judicial politics*.

Why to study it? The issue of religious resurgence is reinventing by different Western States (Europe and North America). Now in Europe we're seeing the emergence of new forms of religiosity. It ties together with an increasing religious activism in the public sphere, which is bound to new religious movements (evangelicalism) and Islam.
These new religious movements are not associated with a given culture. Islam has been rooted in Europe for decades through a huge wave of labor immigration. Hundreds of thousands of Spanish-speaking migrants from Latin America converted to evangelical Christianity in Spain between 1992 and 2008. New religious movements have spread globally (Jehovah's Witnesses, Scientology). The Catholic Church has been influenced by charismatic forms of religiosity, including Opus Dei, Legion of Christ.
The religious movements are becoming international actors. We are confronted now with such international religious networks as the Deobandi Islamic networks, the Salafis. The Catholic Church and the Muslim League push for changes in legislation (opposition to same-sex marriages and abortion). The nexus of religion and politics continues to blur as religious networks go global.
This is connected with the spread of new forms of religiosity. Faith is now a personal choice and an experience. Secularization is no more a prerequisite for democracy than a "reformation" of Islam is a condition for rooting democracy in the Middle East. The leadership of Egypt's Muslim Brotherhood wants to maintain Islam as a central reference.
This whole process of individualization combined with de-culturation has another unexpected consequence—the concept of **religious freedom** as an individual human right. Freedom of religion as a human right has become a binding requirement across boundaries and regions, enhanced by UN institutions, international courts, and some nations.

Now the promotion of a concept of freedom of religion and a mix of social and political stress more linked to the individualistic American approach than to the European tradition of religions with close relations with the state influence on the process.
Importantly, that church and state are separated, *de jure or de facto.* So, governments have little leverage on this process.
The development of "freedom of religion", as a standard and transnational binding requirement, has been enhanced by, *inter alia*, international courts. This growth has greatly been driven by the US government: the gauge of religious freedom is chiefly an American standard, a case that has excited intense opposition in certain countries like Russia. The issue here is that the rise of "religious freedom" slights, bypasses or refutes many national legal tenets and practices. It contributes to destabilize the existing compromises and gives a new visibility to religion in the public sphere.
The European Court of Human Rights ruled against the compulsory display of the crucifix in Italian classrooms. This and a host of other initiatives risk altering the traditional balance and consensus on the place of religion in the public sphere, which differs dramatically across boundaries, cultures, and societies. Domestic courts tend, and are often bound, to apply these new international standards to redefine **what a religion is** supposed to be. These standards led to the granting of tax-exempt status to Jehovah's Witnesses in France and the British appellate court refusing to recognize a Jewish believer by considering his mother's religion.
European domestic courts tend to create a doctrine usually based on decisions of ECtHR. It seems that the process of unifying and redefining **what religion is**, is done without engaging in a clear political option: this creates uneasiness and anxiety among public opinion, it questions the issue of legitimacy.

THE STATE OF THE FIELD

Secularization and religious practices have been extensively studied in different sciences (in Anthropology: Clifford Geertz, 2002, in Psychology: Freud S., 1975, in Sociology: Durkheim, E., 1971). Some sociologists have studied how Muslims adapt their practices to a Western context. Changes brought in the religious fields by "new religious movements" and new forms of religiosity (evangelicalism) have been widely studied. (O. Roy, E. Shakman Hurd). Much of the research employs solely political science and sociological perspectives and methods, (Byrnes, Katzenstein*, 2006)*.
In a strictly legal analysis of religious issues in Europe, a purely comparative focus and human rights analysis dominate (Goldschmidt (ed)*, 2007)*. Some works, like of Thorson-Plesner*, 2008,* attempt to analyze European problems of law and religion together with analyzing the same issues in other countries of the world. There is also an array of research on how courts deal with new religious challenges. Roger Trigg, *2012,* pays attention to the topic as *Free to Believe?* The impact of the adoption of new legal paradigms has also been studied (Joseph Weiler, 2003,[1] M.Ventura, P. Annicchino)

The literature on **the judicial role** exists in Europe and the United States. While a major part of the US-American writings investigate the *politics* of judicial action and the *politicization* of the legal system (Shapiro, Martin/Alec Stone Sweet, 2002), research on European courts confines itself to analyzing the *effects* of judicial action, often describing them in terms of *juridification*.
In Europe the landscape is somewhat fragmented, and there is no coherent theoretical framework integrating the different streams in the literature. Research on the European Courts has developed rather independently from the area of judicial politics, using mainly its own paradigms drawn from international relations and theories on European integration (Burley, Anne-Marie/Walter Mattli, 1993; Garrett, Geoffrey, 1995).

[1] The book is discussed by Srdjan Cvijic and Lorenzo Zucca, *Does the European Constitution need Christian Values?*, Oxford Journal of Legal Studies ,2004.

Research on European courts has concentrated on the macro-level *institutionalist* wing and deals almost exclusively with the *effects* of court decisions. In what way does the European Courts contribute to European integration (Burley, Anne-Marie/Walter Mattli, 1993; Weiler, Joseph H.H., 1994)? How do courts influence policy processes (Stone, Alec, 1992) and public policies (Jackson, Donald W./C. Neal Tate (eds.), 1992)? Under what conditions do courts block or foster policy change (Landfried, Christine, 1994; Tsebelis, George, 1995; Volcansek, Mary L., 2001)? It is also the outcome-perspective which nourishes the debate on courts as one of several regulatory agencies and which links courts to policy analysis (Guarnieri, Carlo/Patrizia Pederzoli, 2002). Many of these studies find more or less a process of *juridification* in which judicial actors, procedures and categories gradually dominate or displace legislative politics (Barreiro, Belen, 1998; Hirschl R, 2004).
The concept of *juridification* involves a particular understanding of the legal system. The work on European courts emphasizes the *relative autonomy and distinctiveness of the legal sphere.* The bulk of the literature does not regard judicial and political action as interwoven, but they are described as separate ideal types: legal action is said to be "rule laden" while political action is "interest driven" (Stone, Alec, 1994).
The European perspective stresses the impact of *the "rule of law"* on politics. Courts are perceived as distinctive insofar as the legal system "generates a kind of policy-making style itself" (Shapiro, Martin/Alec Stone, 1994). Research on Europe confines the analysis to the effects of the rule of law on politics and public policies.
While all these studies on religion, freedom of religion and the role of European courts are theoretically and empirically very rich, but to our knowledge, no academic research has yet tried to bring *together the impact of the secularization, rooting of Islam in the West, global changes in the religious market, the spread of a new paradigm of freedom of religion, all as global phenomena, on the public sphere and the judicial role in the establishment of new rules of the game, thus providing changes in the paradigm of religion.*
We basically agree with what has been done by the scientists and we propose to extend the opinions to a "missing case".

THE PROJECT DESCRIPTION

We agree with Professor Trigg that in recent years there has been a clear trend for courts in Europe to prioritize equality and non-discrimination above religion and that neutrality in the application of the law is not the same as neutrality in the basis of law. We share the opinion of O.Roy that freedom of religion should be understood in terms of individual human rights, not minority rights. We agree that in the field of law and religion European Court of Human Rights acts as a unique laboratory of concepts and tools (M.Ventura). We support P. Annicchino`s claim that the role that the ECtHR cannot be compared to the role that the U.S. Sup. Court has within the system of separation of powers. We share all these opinions. But we basically disagree with the argument that judicial discretion plays a role only rarely, but that, in most cases, the application of law is "fairly straightforward" (De Franciscis, Maria Elisabetta/Rosella Zannini, 1992). We claim that the application of law by judges is *never* straightforward because judicial arguments and judicial methods cannot deliver unambiguous decisions.
That is why we are (also) interested in the question of *how politics influences jurisprudence*. We consider that courts are influential political actors and call to share the goal of *demystifying the discipline of law*. Once one takes law seriously, the question arises of whether we can conceptualize judicial behavior as a *choice* between political *or* judicial action. In my monograph in Russian language on *Judicial Discretion*, 2005, I emphasized that in trial legal clarity and accuracy can never be achieved, but judicial discretion always involves political decisions. It seems more appropriate to assume that judicial decisions are shaped and channeled by the obligation of courts to deliver principled decisions resting on legal basis.

Our core topic is *the importance of legal ideas and legal doctrine for court decisions.* The particular achievement of this approach is the rediscovery of **the rule of law**. We assume that legal procedures and legal ideology shape not only the interactions but also the preferences of the judges and of society at large. In this perspective, *courts shape politics through the development of legal doctrine*.
The process of shaping legal doctrine into another direction unfolds step by step over long periods of time. The results deriving from this type of analysis can be *surprising.* This is especially the case with regard to the interpretation of the era of redefining the relationship to religions in West countries, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements (evangelicalism) and with Islam. That is why we suggest that it is not *the strategic account but the historical-interpretive account* of the judicial role in the establishment of new rules of the game, thus providing changes in the paradigm of religion**,** is most promising for the development of our research.
We would agree with Volcansek that research on European courts should look more closely at the politics of judicial action.
This approach has particular advantages, especially with regard to its application concerning religious issues.
First, we can evaluate whether and how political actors (e.g. interest groups, parties) try to influence the development of concepts, tools regarding law and religion in the official process which takes place before the court makes a decision.
Second, a court decision does not occur out of nowhere, but responds to a legal discourse unfolding over a longer time period – months or years. In most cases the universe of competing legal concepts is obvious before the judges make a decision, and the court merely picks one of them, perhaps with some modifications (e.g. paragraph 56 of the decision demonstrates that the concept of neutrality applied by ECtHR in the *Lautsi v Italy* case represents a transposition of the French version of strong secularism). This means that political interests have to be translated into legal language in order to become successful. We can analyze how these concepts and translations emerge, how they are linked to political interests, which intellectual and material resources are used to help them become the dominant norm, and to what extent they are selected by the court. Methodologically, we can make use of the framework provided by Sociology.
Third, this approach also resumes the European tradition of analyzing interest group politics, thereby deflecting the research perspective *from corporatist policy-making toward the role of legal action*. In policy fields which are considered as particularly legalized, as the area of relations between public sphere and religions in Europe, this might be an especially promising endeavor. In this context, our research could learn from another large body of US-American literature on law and politics, namely those studies that analyze how interest groups have used the legal system to foster social and policy change (Barnes, Jeb, 2006).
The next and major advantage of our account is that we neither glorifies nor denies the role of law, but we assume that the development of the paradigm “What religion is in Europe” is a process heavily influenced by politics. If Alec Stone (Stone, Alec, 1992) is right in claiming that Europe suffers from a tradition of the separation of law and politics, our project to demystify this is more important in Europe than anywhere else. It would also be extremely useful to reveal that the “formatting” and the reshaping of the relations between public sphere and religions in Europe (and therefore court decisions) can be analyzed as a political process of political interest intermediation.

THE RESEARCH DESIGN

We intend to move through the stages of development of legal principles and their refinement. The questions we indicate will be far less, of course, about individual\collective persons and far more about the interest European society might have in protecting religious issues in general as the bearers for future

generations in Europe. One part of our research intends to discuss law, the legal issues, the religious values and the public sphere in European society and the European Court of Human Rights jurisprudence regarding religious issues legislation from 1976 to 1993. Another Part will discuss the era, which lasted from 1993 to 2009 (we suppose for the moment). Next period of "religious analysis" intends to start from the case of *Lautsi v Italy* in 2009 and discuss law, the legal issues, the religious values and the public sphere in Europe, and the case-law of ECtHR in its current situation. We pay attention to the issue *What Makes a Value or Claim "Religious*", *the theoretical model of the judicial role in Europe, rooted in our analysis and proved by it, the rule of law and the legitimacy.*

We intend to draw on a wide variety of **sources:** legal, extralegal and those collected from other academic and popular disciplines.

Hard law. We will use legal sources on both the national and European levels and international agreements. The European sources include first of all European treaties and conventions both under the European Union and the Council of Europe systems. Further, on the national level constitutional sources as well as ordinary laws will be analyzed.

We will use **soft law** and other nonbinding interpretative documents concerning the interpretation and application of European law (resolutions, recommendations, etc issued by the organs of the COE or the EU).

We will analyze **case law** (European and in some cases national levels). Case law on the European level includes both judgments of ECJ rulings of the European Court of Human Rights (with the emphasis on the case-law of ECtHR). In addition, when available, cases from national courts will be analyzed. *Inter alia*, we will pay attention to the British appellate court refusing to recognize a Jewish believer by considering his mother's religion.

We are going to **tabulate** the cases of ECtHR.

The research refers to **literature** comprising legal, philosophical, political science and sociological perspectives on the judicial role and religion (European and American).

Languages. Research concentrating on Europe is in large degree limited by the understanding of languages. The language of the included sources is primarily English. The interpretation of legal sources relies in the majority of cases on the English translation. If it is necessary to read materials in other languages we will use the assistance of professional translators.

Comparison as a background for further theoretical discussion. The goal of this project is a critical evaluation of the judicial role (ECtHR) in the formatting and shaping the relations between religions and public sphere. For that reason, certain specific areas are chosen as test cases of that commitment. Firstly, it concentrates on European-wide legal standards and discourses and compares them with legal standards and discourses in particular states. Secondly, in some parts the research engages in a comparison of national standards. Thirdly, it compares legal and non-legal standards.

The cross-national analyses of Europe's patterns of religious and moral orientations are going to be presented in this research are all based on **the European Values Study** survey data. Use is also made data gathered within the framework of **the World Values Study**, directed by Ron Inglehart.

We want to underline, however, that a comparison is treated as a basis for further theoretical discussion and the consideration of issues of the judicial role (ECtHR) in the formatting and shaping the relations between religions and public sphere and **What a religion is** in Europe.

The method of selecting examples. The first step is identifying the European standard, whether strictly legal, based on hard law and case law or based on strengthened soft law and documents issued by European institutions. The second step is comparing this identified standard with national practices least compliant or totally non-compliant with it.

The periods, we delineate, will do track major shifts in the European Court of Human Rights doctrine regarding the relations between public sphere and religions in Europe. Liberally defined, the era of religion in the European Court of Human Rights lasted from *the Kjeldsen, Busk Madsen and Pedersen v Denmark* Case in 1976, related to conscientious objection to sex education in school, through the

Cambpell and Cosans Case v. United Kingdom in 1983, related to the opposition to having children physically punished at school, to the triumph after 1993, with the *Kokkinakis v. Greece* case, which involved the right to engage in proselytism. The triumph means that the Court began an itinerary of decisions adopted in the light of Article 9 of ECHR or in the light of other articles, but with a clear reference to religion—eg Article 8 (right to privacy and family life)[2] or Article 10 (freedom of expression)[3]. At this stage, we already have a significant number of ECtHR appropriate cases.
The identification of the thematic examples – *inter alia*, reproductive rights, freedom of speech or education, is dictated by the recent emergence of new standards and convergence criteria in regard to these topics on the European level. These new interpretative standards include, *inter alia, Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion.*
The basic criterion for the selection of state law examples is based on the tangible disproportion between the declared commitment to European principles of equality, religious pluralism and non-discrimination and the practical effect of the legal norms and their application by national courts on the surface level.
The critical approach. The legal method in this research employs nearly all of the known techniques of legal research. In addition to the comparative element, the leading methodological approach is critical. Our step consists of unmasking criticism of either legal practices or norms.
The important theoretical constructions. We intend to use a few theoretical constructions. The perspective we employ is **the liberal democratic perspective**. The key term and the leading theme used is **"religious pluralism".** Also we will concentrate on **equality, legitimacy, the rule of law** as the founding values of the European polity. And we will use the rule that **judging should be neutral and apolitical**. To this end, I want to suggest making use of **the historical-interpretive account of judicial politics**.

THE PAY-OFF OF THE PROJECT.

We suppose that this project is going to make a major contribution to European and Russian political science and jurisprudence.
New dissertation would lead me to a Full Professor Position at University and, what is more, I would be honored to join the European scientific community.

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[2] For instance, in Hoffmann v Austria (23 June 1993), or Palau-Martinez v France (16 December 2003). And also in the more recent cases Obst v Germany and Schu¨th v Germany, both of 23 September 2011.
[3] For example, Otto-Preminger-Institut v Austria (20 September 1994), Wingrove v United Kingdom (25 November 1996) and a number of other cases after them.

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Attachment 1, Research Portfolio
The evoluations of my research (1993-2011) by Professors of different countries: Prof. M.Treushnikov (MSU,Russia), Prof. V.Bezbakh (PFUR, Russia), Prof. W.B.Simons (Tartu Univ.), Prof. C.Stolker (Univ.of Leiden), Prof. P.Nappi (Univ.of Ferrara)

Letter of recommendation for Olga A.Papkova

Date:

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Dear Sir or Madam,

I am glad to recommend you Associate Professor Olga A. Papkova, the brilliant professional, intelligent and uncommon person, whom I have known for more than 20 years, since 1987, when she was my bachelor-level student. I am confident that she has the necessary academic, personal, and teaching ability qualifications to be an excellent teacher or professor in her field.
I am Michael K. Treushnikov, Senior Professor, Dr, Head of Civil Procedure Department, the Faculty of Law, Moscow State University, Honoured Scholar of the Russian Federation; member of the Scientific Advisory Board of the Supreme Court of the Russian Federation; member of the Council for Doctoral thesis of the Faculty. I have been working at the Faculty of Law of Moscow State University, Russia, since 1973; since 1988 I am the Professor of Moscow State University (Russia). I have been Olga Papkova`s Professor, Supervisor, Chief and it gives me the opportunity to recommend her to you as a talented perspective teacher, researcher, because of her competence, deep knowledge and experience.
Olga Papkova has been my promising motivate student, assistant, sophisticated fellow of the Department of civil procedure, law faculty, Moscow State University. Talking about any of these periods I can unreservedly name Olga Papkova as a reliable, observant, vigorous person; mature, efficient scholar, academic, truly interested in scientific work. She is with Law Faculty since 1985. Since 2001 she is an Associate Professor of the Department of Civil Procedure.
When I was her Professor and Teacher she was one of my best students, always got high intelligence level, analytical ability and excellent marks. Olga Papkova showed superior academic skills through her attitude for learning, her participation, and her entrepreneurial spirit. I was sure that in a short time Olga Papkova would be a good specialist in our field, but I didn't think that thus much.
Her thesis under my supervision was excellent -- comprehensive, insightful, and well focused, detailing the history of ideas in the interrelationship between civil justice and judicial discretion, showing the significance of major streams of thought in civil procedure and the ways in which they have examined the paradigms of civil procedure and judicial discretion in civil procedure.
A little bit later our joint work, already as colleagues, was successful and fruitful. Participation in conferences, teaching process, administrative activity, speeches on the meetings of the Department permit me to say that Ass. Professor Papkova is a great professional and brilliant researcher (who at the same time perfectly knows English), her academic achievements, her writings are deep and significant. I have never encountered any other scholar that has the interest and passion for research and teaching that Olga Papkova has.
I have read with deep appreciation her book, *Civil procedure in the Member States of the EU*, 2000. As a person who reviewed her another scientific writing (Title: *Court Discretion*, 2005), I can mark with great pleasure that among other scientific works this comparative research of the paradigm of court discretion is important, serious and considerable, it can help civil proceduralists skillfully use such intricate instrument as discretion. Must add, that scientific work gives the valuable information as for judges as for theorists of law. Judges can find in the

monograph answers on lots of questions which appear in time of consideration and settlement of a case, while lawyers – the base for further researches of the court discretion's paradigm. This scientific writing doesn't have any analogues in domestic civil procedure.
Her major accomplishments are:
-1990, defense of the master-level paper with distinction (Title: *Legal Profession in Civil Procedure*, under my promotion);
-1997, defense of PhD dissertation, *cum laude* (Title: *Judicial Discretion: Preliminary Inquiry*, under my supervision);
- *successful scientific activity*: two monographs; publications in scientific journals; participation in conferences; fruitful collaboration with other universities; administrative duties.
- *More than 13 years of fruitful teaching:* Lecture and seminars, bachelor-level, master-level students, supervision on undergraduate, graduate, postgraduate students, of MA theses (approx. 10-15 per academic year), coordination of courses, participation in discussions on the Department`s conferences, *inter alia* on the Draft of the new Civil Procedure Code of RF, promotion of PhD students.
Olga A.Papkova is well prepared to teach in areas of Civil Procedural law of Russian Federation, Court Discretion, Arbitral Procedural Law of Russia, International Civil Procedure, European Civil Procedure, theory and history of civil procedure.
Personally, Olga A.Papkova is a very serious minded and diligent scholar. She has wide-ranging interests in history, philosophy, and literature as well as in civil procedure and judicial discretion. Her communicative abilities, tactful and honest behavior, leadership qualities, achievement of any goal give her the opportunity to work as in team as an individual researcher, both. Also an important point is that students are fond of her teaching style, her lectures always are interesting and full of listeners. As a teacher, she brings great depth to her discussions and is concerned with the individual development of each student. To support my recommendation I want to add that for many years our students select Ass.Professor Papkova as the best lecturer, who can make every routing material interesting and accessible.
Her range of personal acquaintance with major scholars in Russia as well as in Europe enhances the vitality of her teaching and builds connections for students and readers which are quite unique.
She is a person that fights for her dreams, never gives up, tries to go further than where she has to (here, I would say, "goes above and beyond"), has a great attitude for life and work, shares her passion with students and colleagues, and always tries to give her best.
In short, Olga A. Papkova is a very knowledgeable, thorough, and reliable scholar, teacher, and writer. I regret on her decision to leave the Department and to research abroad. We will miss her. Therefore, I recommend Ass.Professor Olga A. Papkova without reservation, and tell you honestly she will prove valuable to your programme.

If you need any additional details or information, feel free to contact me.

Yours sincerely,

Professor Dr. M.K. Treushnikov (Треушников М.К.)

Государственное образовательное учреждение высшего профессионального образования
РОССИЙСКИЙ УНИВЕРСИТЕТ ДРУЖБЫ НАРОДОВ (РУДН)

ЮРИДИЧЕСКИЙ ФАКУЛЬТЕТ

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_____ №_____

на №_____ от_____

Letter of recommendation for Ass.Professor Olga A.Papkova

March 24, 2011

117198, Russia, Moscow,
Miklukho-Maklaya Street, 6
Humanitarian Corpus, Law faculty,
Telephone\fax number: +7 (495) 433-14-28
e-mail: civilrudn@rambler.ru

Dear Sir or Madam,

I am pleased to write a letter of recommendation on behalf of Olga A.Papkova, a very special and very talented person. I have known Olga for about 15 years, since she was Assistant Professor of Law Faculty, Moscow State University, and I believe I can offer a unique perspective.

I am Senior Professor, Dr, Head of the Department of Civil and Commercial Law of Peoples Friendship University of Russia, Moscow, Honorary Worker of Higher Education of the Russian Federation (1997), Arbitrator of the International Commercial Arbitration Court at the RF CCI, Member of Advisory Board of Committee on Foreign Affairs under Federal Assembly of Russian Federation. I am a founder of scientific school of comparative research in the basic institutions of private law - property, contract and tort obligations. Prospects for my research are determined by comparative law, private law. The teaching courses are: 1) civil and commercial law of foreign countries 2) legal regulation of trade in the European Union, and 3) History and methodology of private law in Russia. I am at law faculty, Peoples Friendship University of Russia, Moscow, since 1977.

Ass. Professor Papkova is one of the best scholars I have come across, in all aspects of teaching, scientific research and personality.

Students and colleagues often remark that Ass.Professor Papkova is blessed with considerable talent in teaching and scientific research. What many of them overlook is how hard Ass.Prof. Papkova works to cultivate her talent, whether it is the development of her knowledge in civil procedure; giving lectures, seminars or of her writing skills as she works through scientific papers. I know of the effort that she put into the *Course of Lectures on Civil Procedure in the EU* of 2000 because she shared early drafts with me. I also appreciate the time that she put into her

of 2000 because she shared early drafts with me. I also appreciate the time that she put into her analysis of *European Civil Procedure* because she stopped by periodically to share her enthusiasm for the subject and her progress with it.

Ass.Professor Papkova is an outstanding lecturer. We took part in different conferences together. She has given many speeches in the field of European Civil Procedure and Russian Civil Process. Success in these interscholastic activities requires extensive research and persuasive skills.

Few young scholars demonstrate the genuine intellectual curiosity that Ass.Prof.Papkova has exhibited over and over -- a curiosity that is often accompanied by her excitement or enthusiasm for a scientific or teaching subject.

When I decided to invite a lecturer on *European Civil Procedure*, Ass.Professor Papkova was most helpful in giving a course of lectures that led to the appreciation by students.

What I most admire about Olga Papkova is her remarkable ability to interest students in the subject and add personality to the course material. Students can feel as deep knowledge as energy and optimism radiate from her teaching. Her creative teaching style makes students listen attentively to her.

She is also extremely organized; she is always available for students and colleagues. The time she spends to give feedback for the assignments helps everyone understand what the most important points were.

Ass.Professor Papkova does not only teach exceptionally well but she also cares a lot about the level of understanding of each student. She is one of those rare scholars that take the extra effort to make sure all students that need extra help are accommodated, despite her busy schedule. Regarding this third-level students of Law Faculty say that, "Prof. Papkova is the most caring professor that they have ever known. Her lectures are highly organized and very usable, and the level of attention she gives to her students is unsurpassed."

We all have to strive to achieve the best. At universities, the effort of a professor makes all the difference in helping students to reach their full potential. If we would have professors like Ass.Professor Papkova teaching everything, then I am positive that every student will be eager to learn and achieve the most even in a stream as hard as European and domestic Civil Procedure.

Ass.Professor Papkova is likable, enthusiastic, trusting and trustworthy scientist and teacher. On a personal level, she can be described in terms of strong qualities. For a person of such intellect she is remarkably open-minded, willing to see the value in other people's perspective and experiences. She is modest. She has an ability to bring a novel perspective from which the most mundane situations can be seen as refreshingly entertaining.

I consider Olga Papkova to be a person of great knowledge and talent. She is also an engaging teacher. She belongs in the classroom; she belongs in academia. I would very much like her match to our residency program. Even though I hope to see her among our staff, I recommend Ass.Professor Olga A.Papkova for an academic position with great enthusiasm.

Yours faithfully,

Professor , Dr, Vitaly V. Bezbakh

To the Fellowship Committee

It is with great pleasure that I write this letter of recommendation on behalf of Dr. Olga A. Papkova in my capacity as Professor of East European Law at Leiden University Faculty of Law (on leave as Visiting Professor at the Center for EU-Russian Studies (CEURUS) and the Institute of Constitutional and International Law of University of Tartu Faculty of Law).

For several years in the 1990s — initially with funding from the European Commission (TEMPUS program) and, later, supplemented by resources from The Netherlands Foreign Ministry (MATRA program) — my predecessor in Leiden F.J.M. Feldbrugge and I facilitated scholarship programs in Leiden (and in Nijmegen and Leuven) for the 'brightest and the best' students and faculty from the CEE/CIS region. Dr. Papkova was one of those selected to participate in this mobility program.

The period of her *Tempus* study and research time in Leiden (1995), when Olga was a Russian PhD candidate, marked the beginning of our scholarly acquaintanceship; she returned to Leiden again in 1998 for a period of further research. This has afforded me a fine vantage point from which to assess Olga's academic capabilities and interests and her relevant personal qualities.

She has been consistent in her desire to broader her academic horizons — what I would, in other terms, characterize as her intense craving for knowledge — and has always taken her scholarly responsibilities very seriously. She has developed her research skills in an outstanding fashion: the way in which she is able to combine the findings of her domestic research with the thoughts and ideas which she distills from English-language (and now other foreign-language) literature is most impressive. Her English proficiency is, of course, critical in this regard and is at an extremely high level for a non-native speaker, something which is not that frequent for good scholars in Russia.

Dr. Papkova is deeply interested in European civil procedure and spends most of her spare time studying the specialized literature in this field. Her industry has led to an admirable level of academic output — two monographs in the Russian language (*Civil Procedure in the Member-States of the EU*, 2000 and *Judicial Discrétion*, 2005) — and to a position as associate professor at the prestigious (as you undoubtedly are aware) Moscow State University Law Faculty. I am also extremely pleased and proud to note that she has published in English in a quarterly law journal (*Review of Central and East European Law*) of which I have been the General Editor for several years. I am looking forward to being able to publish more of Dr. Papkova's work in our journal and, hopefully, also as a monograph in our series *Law in Eastern Europe* (both published by Royal Brill Publishers of The Netherlands.)

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At present, she is a Visiting Professor at the Law Faculty of the *Universita degli studi di Ferrara* (Italy). While this is another welcome step in her professional progress, it is typical of Olga that she is eager to continue this process of comparative research and to put more of the results of her work into writing. In particular, she is yearning to further investigate and evaluate the field of European Civil Procedure: The Method and History of Law.

I fully support her plans to continue turning her scholarly dreams into reality. Dr. Papkova is, in my experience, mature and dependable. She is a hard worker, and works well under pressure; as her academic record well reflects, she has become a highly qualified teacher and scholar. These are, to my mind, the qualities — combined with her creativity and intelligence — that will continue to be critical to her in achieving the further success in her profession which she has set for herself as her goal. I firmly believe that these qualities and achievements go into making her of world-wide renown, one of the criteria in your Call for Fellowships. The fact that she is an extremely able organizer and, also, that she has fine leadership skills and a keen spirit of teamwork, are key factors which will help to ensure that her continued research will be productive and also which should enable her to harmoniously interact with those around her.

I have no doubts that Olga will achieve further success in pursuing her dreams and look forward to keeping in contact with her.

It is, thus, that I offer myself as a referee to you and your committee for her application to continue her research and writing. I respectfully request that her application be looked upon favorably so that she may further broaden her understanding of the role and of the rule of law in foreign jurisdictions as well as in the Russian Federation: obviously, crucial issues in our time.

Should you have questions or require additional information, please feel free to contact me.

Yours faithfully,

Prof.dr. W.B. Simons

Tartu
12 April 2013

UNIVERSITA' DEGLI STUDI DI FERRARA

To whom it may concern,

I am writing this letter to give my recommendation for Ass. Professor Olga Papkova. I am the Rector of University of Ferrara, Professor of Law, member of the Academy of Sciences of Ferrara.

I know Ass. Professor Papkova through our collaboration at University of Ferrara, Law Faculty, in 2010-2011.
Ass. Professor Papkova first approached me a year ago about the possibility of research, transfer of knowledge and cooperation at the faculty of law, the University of Ferrara, for 2010\2011. We described the general outline of the project via mail. I evaluated her proposal highly. I was glad to know about her scientific interest in knowledge on Italian Law and Politics.

During academic year 2010\2011, Ass. Professor Papkova demonstrates the ability to work independently with great creativity and enthusiasm.
Ass. Professor Papkova was introduced to other professors of the faculty of law to cooperate and transfer of knowledge. The cooperation includes giving seminars and lectures (in English) for PhD students on the problems of *Impact of European Convention on Human Rights and Decisions of ECtHR on Judicial Practice in RF, Law and Politics in RF*, debates, discussions. Ass. Professor Papkova excelled in each one of these subjects.

Her interpersonal skills are excellent. The other professors meeting with Ass. Professor Papkova comment favorably about collaboration with her. They say that Ass. Professor Papkova gets along well with everyone, pulls her own weight on the cooperation, and has the ability to compromise with professors and students. At the moment the staff, the professors of the faculty of law note what a pleasure it is to cooperate with Ass. Professor Papkova.
PhD students of the faculty of law comment that Ass. Professor Papkova has excellent teaching skills.

I was especially taken by Ass. Professor Papkova's deep knowledge within Russian Law and Politics and European judicial procedure, creative mind and independent work ethic. She awoke my interest in her close subject "*Judicial discretion*". Ass. Professor Papkova continues to research at the University in the fields of European Law and Politics, the role of a judge, generating interesting hypotheses. By the end of the summer she is going to prepare the scientific paper that will be directly relevant to our cooperation. She is learning Italian language with interest and enthusiasm. These illustrate her high level of motivation.

In summary, Ass. Professor Papkova is clearly one of the best international scholars I have met before. I think she would be an outstanding asset to your program. I give her my recommendation.

Sincerely,
Professor Pasquale Nappi 

Attachment 2, Research Portfolio
Research done at the University of Ferrara (with collaboration with PFUR - People's Friendship University of Russia, Moscow)

2010

UNIFE, PFUR

O. PAPKOVA

DISCRETIONARY JUSTICE:

RUSSIAN AND FOREIGN PERSPECTIVES

[DISCRETIONARY JUSTICE]

As a result of the civil procedure crises in Russia and abroad of the last twenty years and a very little body of academic research on the influence of judicial discretion on the improvement quality of justice, there is a growing consensus that reforming the civil procedure supporting judicial discretion should be an important component of judicial reforms in many developing countries. But the consensus is unwieldy, 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. The first question is: “Why discretionary justice?” We identify the nature of judicial discretion and review the concept of judicial discretion, its variety, the pressures on discretionary justice and discretionary justice for individual parties. Further, we answer the second question: “Why perspectives of the development of discretionary justice?” and seek our understanding of what can be done that is not now done to minimize injustice from exercise of judicial discretion and more importantly how can the quality of discretionary justice on civil and commercial cases administered by courts be improved; should we do much more than we have been doing to control necessary judicial discretion in different countries. We concern as justice so injustice in civil procedure so the samples of injustice offer the best possibilities for improving quality of justice. The third question is: “Why the comparative study of discretionary justice?” We review the major reforms that have affected judicial procedure at first instance in Russian Federation and in Italy, England, France, Germany, Spain, United States, and essays – in the light of theoretical analysis and international comparison – their consistency with the main goal of improving the quality of justice on civil or commercial case for particular parties that is administered by the judge who exercises discretion. If civil procedure reform is to succeed, the commonly advocated principles of discretionary justice in the international community must be brought down to the local judicial realities. We focus on the initiatives of transnational civil procedure, namely harmonization mechanism in Russia and harmonization mechanism in EU and their influence on discretionary justice. Initiatives of transnational civil procedure into just, fair and procedural efficiency trial and control of the exercise of necessary judicial discretion will be difficult but necessary. The reform on improvement of discretionary justice to find the optimum degree for each judicial discretion in each set of circumstances needs to ensure the proper functioning of the judiciary and be feasible and enforceable.

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Discretio est scire per legem quid sit justum

INTRODUCTION

As more countries make a transition to improvement the quality of justice, the focus of the civil procedure reforms debate has broadened from the goal of procedural efficiency to the procedural guarantees of fair trial.
Acknowledging that civil procedure reform is a vast topic, this paper focuses on discretionary justice in Russia and foreign countries such as Italy, France, Germany, Spain, England and United States, perspectives of the development of discretionary justice, and the creation of regulatory control mechanisms in line with best practice of the exercising of discretion. The research, focused on the ordinary proceedings of first instance, aims to evaluate the Russian and foreign judicial reforms, taking into account the role of judicial discretion in civil procedure. The ever increasing European Procedural harmonisation in the last time is not creating a consensus among the Member States that the transnational reform of discretionary justice is an essential component of civil procedure reform. This situation can be corrected by continuing academic research showing that the efficiency of justice of the legal systems, in terms of both the procedural efficiency and the procedural guarantees of fair trial, depends significantly upon the place of judicial discretion in the system, and the mechanism of its control.
Although some consensus has been reached and several professors, judges and bodies have begun promoting the meaning of discretionary justice, the consensus is unwieldy as there are still many forces against discretionary justice and very little writings about the phenomenon of judicial discretion. This paper first concentrates on the question: what can be done to assure that the exercise of discretion by judges 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. Main emphasis is on the discretionary aspect of discretionary justice. Do the judges have too much or too little discretion to do justice, to balance procedural efficiency and procedural guarantees of fair trial? Our subject is justice on civil and commercial cases, done by judges, for particular parties. Our concern is limited to the exercise of discretion of judges to get procedural efficiency and fair trial. Our emphasis tends to be much more on injustice than on justice, so the samples of injustice offer the best possibilities for improving quality of justice.
The problem of what to do about judicial illegality in the exercising of discretion is the major focus of this essay. This is especially difficult.
Forces against discretionary justice include lawmakers and professors who connect judicial discretion with the danger of arbitrariness, tyranny, abuse and injustice. On the other side, one of the main allies of discretionary justice is the opening up of the quality of justice and the increased interconnectedness of civil procedures that allows persons from all over the world to "vote with their feet" and be sure that judicial protection and judicial discretion are just, fair, efficient. The first lesson of this analysis is that the design of discretionary justice reforms needs to consider the reality of local civil procedure that may oppose reform and work on mechanisms to control, check and appease broad judicial discretion.
Secondly, we attempt to identify what constitutes civil procedure reform in the field of discretionary justice. There is no "onesize-fits-all" set of regulatory mechanisms to control judicial discretion. More importantly, rules and mechanisms that work in the countries of one procedural model might not succeed in the countries of another model. We are going to explain the objectives underlying the procedural models, identify the main features and evaluate the degree of judicial discretion that ensure their proper exercising. One of the steps in our inquiry into how to improve the quality of discretionary justice on commercial and civil cases is to locate discretionary justice in legal systems, to establish links between procedural models and exercise of discretion and justice.
This paper learns on a review of the major reforms that have affected judicial procedure at first instance in Russian Federation, from the early 90s and questions – in the light of theoretical analysis and international comparison – their consistency with the main goal of improving the quality of justice on civil or commercial case for particular parties that is administered by the judge who exercises discretion. Our research is devoted to the answer the question: how much discretion should a trial judge has to design procedures for a given lawsuit? The principal finding is going to be that the efficiency of justice of the legal systems, in terms of both the procedural efficiency and the procedural guarantees of fair trial, depends significantly upon the place of judicial discretion in the system. We are going to make clear that the divide between the procedural systems is more pronounced in the degree of

judicial discretion than on the quality of laws themselves. Civil Procedure law reform needs to be considered in the local context of discretionary justice.

If civil procedure reform is to succeed, the commonly advocated principles of discretionary justice in the international community need to be brought down to the local civil procedure realities of each country. Our tasks are limited by the discretionary aspects of discretionary justice and include the basic theoretical analysis of major developments in the field of procedure on civil and commercial cases in mentioned seven countries, *viz:* improvement of the legislation of civil procedure; improvement of the judicial system; changes of the types of civil procedure; influence of the European Convention on Human Rights and the Rulings of European Court of Human Rights on discretionary justice (in Russia and in Italy). the initiatives of Transnational Civil Procedure; the judicial practice of exercising discretion by national courts of first instance in Russia, Italy, Spain, France, Germany, England, taking into account the domestic changes, initiatives, improvement (or non-improvement) of the quality of discretionary justice in conducting a particular case. There is a lot of work that needs to be done to translate international and national discretionary justice initiatives and principles into real discretional role of the court of first instance in civil procedure. The final chapter of the post modern discretionary justice novel remains unwritten.

The organization of the paper is as follows. Section II briefly reviews the subject of the paper. This section answers three questions. The first question is: “Why discretionary justice?” The subsection evaluates the nature of judicial discretion, i.e. the concept of judicial discretion, the variety of discretion, discretionary justice to individual parties, pressures on the discretion of a court and whether there exists a legal trap to consider the phenomenon of discretionary justice for developing nations. While the results show little evidence of a legal trap, they do confirm that disclosure standards and enforcement of judicial discretion is systematically different in European countries according to the procedural model. This fact has the implications for discretionary justice. Next subsection of Section II answers the second question:”Why perspectives of the development of discretionary justice?” First, blindly copying the laws from the countries, included in our study – Italy, Spain, France, Germany, England, United States - and providing discretionary rights to courts will not necessarily work in Russia and *a contrario*. Second, reform needs to be in accordance with the local civil procedure system.

Further, the subsection of Section II answers the third question: “Why the comparative study of discretionary justice?”and attempts to translate the challenges imposed by the judicial (civil procedure) local realities into improvement the quality of discretionary justice reforms. The first part give the limited data on the avenues open for discretionary justice reform in Spain, Italy, France, Germany, England, United States, in the initiatives of transnational civil procedure in European Union and Russia and emphasizes the need to create venues that allow judicial discretion to play a larger role. The second part devoted to proposals for discretionary justice reform in Russia and argues for their translation into workable reform.

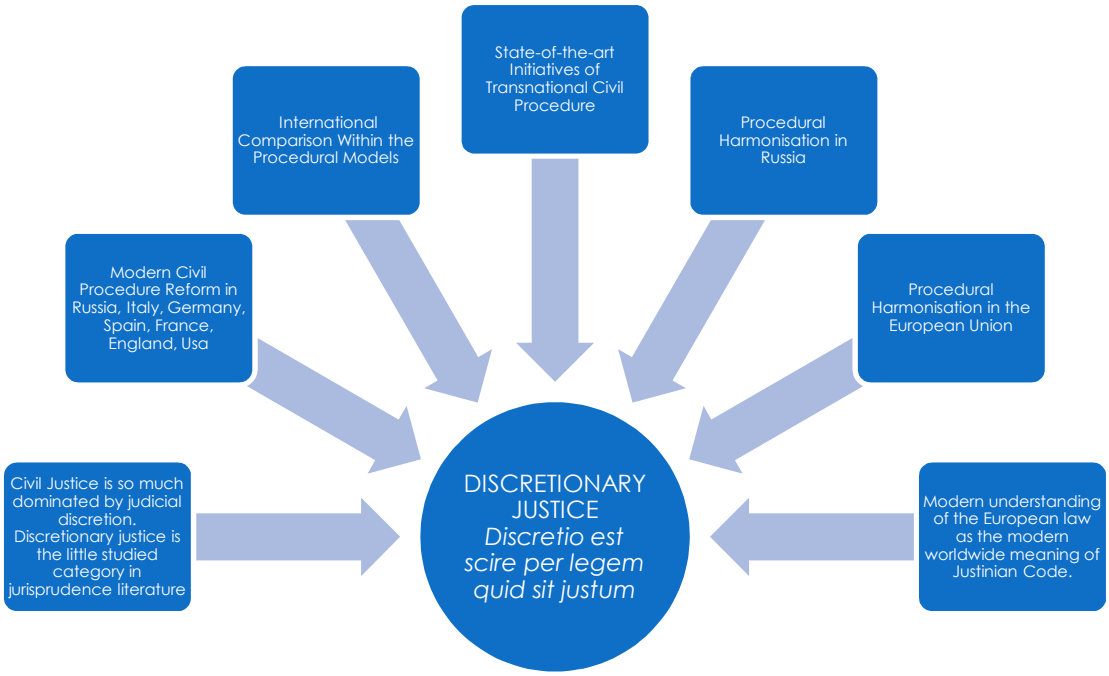
Each section aims to provide some lessons, suggestions for reform and to make some recommendations for the structure of future reforms of discretionary justice in developed countries.

Sections III, IV, V conclude with the background, the objectives, the method, respectively.

Discretionary Justice

THE SUBJECT

This is the Roman legal maxim: "*Discretio est scire per legem quid sit justum*".[1]
This inquiry will be devoted to discretionary justice on civil and commercial cases, perspectives of its development in Russia and abroad.
The state of the art of the research can be reflected by the following scheme:



WHY DISCRETIONARY JUSTICE?

Courts administer *justice* in all advanced nations of the world.
Courts play a central role in both the legal and political processes in many countries. Legal actors have a stake in making sure that legal processes and procedures are perceived as legitimate, both by the general population who might use the legal system, and by the professionals who operate it. A relatively constant series of issues about whether courts provide justice and are fair, efficient, serve to structure alongstanding debate about how courts operate and the best rules of process to determine the degree of judicial discretion for resolving of disputes and substantive legal claims.
So, according to the abovementioned Roman legal maxim, the exercise of judicial discretion may mean *justice*. However, in judicial practice it may mean either beneficence or tyranny, either reasonableness or arbitrariness, injustice, as well.
Judges on civil and commercial cases in Russian Federation indicate surely that judicial discretion associates with justice, only.
Justice in conducting civil and commercial cases is so much dominated by judicial discretion. Why?
My opinion in my book is that there are two answers in Russian civil procedure: (1) much discretionary justice is now governed by rules; individualized justice is often better; (2) much discretionary justice is because the lawmaker does not know how to formulate imperative, precise rules.[2]
In modern Russia discretion is the cornerstone of activity of the court, mainly. Judicial discretion is a mystery as for general public so for legal practitioners and law professors, largely. Some federal 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, Chief of the Staff of the Supreme

[1] *Latinskie Juriditeskie Izreteniya (Roman Legal Maxims). Moscva, 1996, p.135*
2 *Papkova O.A. Usmotrenie Suda (Court Discretion). Moscva, 2005, p. 12.*

Arbitral Court of Russian Federation 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."*[3]

Hitherto dichotomy discretion and justice remains one of the little studied category in the jurisprudence literature. Long time the problem of court discretion was criticized in the Russian scientific world and rejected by judicial civil practice. It was assumed that each legal problem had one legitimate solution. 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 court discretion. In spite of this, as M.V. Baglay comments, the court discretion existed in those days, and is particularly necessary now, "but ,unfortunately, nobody wrote about it to help us in taking advantages of that complex tool".[4]

Now, in the early 21 century, the phenomenon of discretion has not been examined exhaustively. Signs and reasons of discretion are not defined. Some legal scholars questioned the legality of discretion.[5] Until now comprehensive comparative legal study of judicial discretion has not been done in Russia. There is a cautious attitude to discretionary justice in Russian jurisprudence literature. First of all this is connected with the danger of arbitrariness. So, 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?"[6]

In this paper, I will side for reasons that have not been fully explored before.

Most critics of judicial discretion focus on such risk of abuse or tyranny and give short shrift to competency concerns. This is a mistake. The pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is empirically unsupported and at best highly questionable. In fact, judges face serious problems fashioning case-specific procedures to work well in the highly strategic environment of litigation, and these competency problems deserve much more serious attention than they have received to date.

If we were not so accustomed to broad trial judge discretion over procedure, we would probably think it a rather strange way to manage the litigation environment. 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.

In Russia the litigation environment, with its system, self-interested, and strategic elements, is a far cry from this situation.

We will consider the phenomenon of discretionary justice.

The inquiry will not be into question of what is justice, we will concentrate on the discretionary aspect of discretionary justice. Do the judges have too much or too little discretion to do justice, to balance procedural efficiency and procedural guarantees of fair trial?

Our subject will be justice on civil and commercial cases, done by judges, for particular parties. Our concern will be limited to the exercise of discretion of judges to get procedural efficiency and fair trial.

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 discretionary justice.

"Formal" means procedure in the courtroom according with the procedural legal norms. "Unreviewed" means lack of a check by a superior authority. "Exercise of discretion" means activity to make a choice: 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.

Our emphasis will tend to be much more on injustice than on justice, so the samples of injustice offer the best possibilities for improving quality of justice.

Some typical illustrations will show types of injustice that are now prevalent in Russian discretionary justice.

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3 Drozdov I. "Sudejskoe usmotrenie – kraeugolnii kamen` sudejskoj rabotii" ("Court Discretion is the cornerstone of a judge`s job") in "Zakon" 2010, №1, p.10

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

5 See Starykh U.V. Usmotrenie v nalogovom pravoprimenenii (Discretion in tax law application). Moscva, 2007, p.27 6 Pravoprimenenie v Sovetskom Gosudarstve (Application of law in Soviet State). Moscva, 1985, p.47

1. B. wrote and published the article in the newspaper that the Judge O. was a mouthpiece of the Mayor of the city. The Judge O. brought the claim for compensation for moral damage *versus* B in a court. The court sought from B. to O. 20 million. According to the Article 1101of Civil Code of RF (hereinafter – CC RF) 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.
2. 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 CC RF). The court did not apply the category of equity as a general principle of attribution, set out in the Article 1 CC RF. The justice was not reached.
3. 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.
4. 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.
5. 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 CC RF, written evidence is admissible in such case. Court carried injustice.
6. 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.
7. 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.

The problem of what to do about judicial illegality in the exercising of discretion will be the major focus of this essay. This will be especially difficult.

THE NATURE OF JUDICIAL DISCRETION.

THE CONCEPT OF JUDI CI AL DI SCRETI ON. It would be helpful at the outset to have a clear working definition of procedural discretion. Now, however, the concept is extremely difficult to define.
Currently in the Russian legal science the unified approach to the definition of court discretion has not been developed. Within the theme of research legal scholars define judicial discretion as the concept which includes: a freedom of a court[7], a discretionary power[8], an authority[9], a law application activity, the choice of several legal alternatives. Each of these provisions is controversial. We are going to examine them.

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

[8] *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*

In our opinion in Russian civil procedure the discretion is a law application activity.[10] Number of Russian scientists has the same opinion.[11] Application of legal rules in the jurisprudence consists of the summing of contentious relations specific under the determination, enshrined in the legal norm. E. Vaskovsky wrote that the summing up is a kind of syllogism in which the major premise is a legislative rule or set of rules and a small parcel are the facts of this particular cases, and conclusions, arising from them, provides an answer the legal question.[12]

We specified that the application of legal norms in the jurisprudence involves three steps: 1) legal analysis of the circumstances of the case, and 2) analysis of legal norms, and 3) the interpretation of the law. In our opinion the discretion is carried out in two operations: a legal analysis of the circumstances of the case and in the interpretation of the law.

We will concretize the exercise of discretion in each of these operations.

For the purpose of our study we propose to single out the key provisions of the definition of judicial discretion and justify our position, comparing it with the views of Russian and foreign specialists.

The key elements of the concept of court discretion can be the following: (1) the use of judicial discretion is provided by legal norms; (2) judicial discretion is carried out according with a procedural form; (3) judicial discretion must be motivated by the court; (4) the category of choice is the key element of judicial discretion;(5) the choice is bounded by limits.[13]

The elements of this concept will need special emphasis.

(1).Especially important is the proposition that court discretion is as bounded to what is legal or to what is given by the rule of law so includes all that is inside of “the general and specific limits” on the court`s activity. This phraseology is necessary so the exercise of judicial discretion seems illegal or of questionable legality. So, A. Barak notes that discretion is not there, where the choice is between legitimate opportunity and illegitimate opportunity ... The existence of alternatives is not determined by its feasibility, but by its legality.[14]

(2).Furthermore, the concept “judicial discretion” should include the procedural form.

The primary source of discretion to fashion case-specific procedure lies in the Civil Procedural Code (hereinafter – CCP RF). There are two main ways discretion operates in Russian civil procedure: CCP might delegate discretion explicitly, or it might facilitate discretion indirectly by using intentionally vague language that invites flexible interpretation.

Article 150 CCP RF is perhaps the most notable example of a rule that explicitly delegates broad discretion. Article 150 authorizes judges to hold pretrial stage and conferences and “take appropriate procedural action” with respect to a wide range of preparatory matters (points 1-13) and trial. It specifically contemplates broad case management and active 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”.

Discretionary 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 her 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, none of these Articles 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.

It is important to be clear that my focus will be on procedure. The proper balance between rule and discretion depends on context, and I will explain more fully on comparative ground: Has the procedural context at least four distinctive features:

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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.

9 *Barak A. Opt.cit, p.13 Bonner A. Primenenie Normativnykh aktov v grazhdanskom processe. (Application of Legal Acts in Civil Procedure), Moscva. 1980, p.42. Abushenko D. Opt.cit, p.143-144.*

9 *Abushenko D. Opt.cit, p.143-144.*

10 *Papkova O. Opt.cit, p.211-214*

11 *Bonner A. Opt.cit, p.42, Abushenko D. Opt.cit, p.12.*

12 *Vaskovskiy E. Rukovodstvo k tolkovaniu I primeneniu zakonov (prakticheskoe posobie) (Guide to Interpretation and Application of the Laws (Text-book),. Moscva, 1997, p.6.*

13 *Papkova O.A. Opt.cit,.p 39-40*

14 *Barak A. Sudeyskoe usmotrenie (Judicial Discretion). Moscva, 1999. p.15-16*

-Is procedure meant to operate as a tightly integrated system?
-Is it vulnerable to intense strategic manipulation?
-Does its design entail complicated tradeoffs between settlement and judgment quality?
- Does its central agent, the judge, face the limitations that constrain his ability to gather and process the information necessary to make optimal discretionary decisions?

(3).If judicial discretion is embodied in the Ruling of the court, it must be motivated.
Article 6 of the European Convention on Human Rights enshrines the duty of judges to make reasonable judicial acts. European lawyers note that the requirement of motivation of judicial decisions is part of the unified principle of justice.[15]
The practice of Russian courts demonstrates that the implementation of discretion in the modern civil procedure or motivated poorly or not motivated at all.
(4).Another side of the concept is that the exercise of judicial discretion deals with a choice: what to do or to do nothing or to do nothing now.
We note that most definitions of judicial discretion in Russian jurisprudence literature include the provision of the category of choice.[16] 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 definition of terminology. The codes of RF should not have such notions as "reasonable limits", “sufficient time ", etc, so their application does not improve justice.[17]
We believe that at its core, 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, discretion refers to a subjective perception or belief on the part of a judge that she 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 will focus on the normative perspective. Roughly speaking, a judge has discretion in a normative sense when he is under no moral or legal obligation to make a particular choice and no one can authoritatively demand that he does so.
Discretion is exercised not merely in final dispositions of cases but in each interim step; and interim choices are far more numerous than the final ones. Discretion is not limited to substantive choices but extend to procedures, methods, forms, timing and many other factors.
We will consider the limits of choice in Russian and foreign civil procedures.
So, choice of the court in Russian civil procedure can have the following special bounds fixed by legal norms:
-List of the conditions set forth by alternative legal norms. For example, the Articles 144 CAP RF and 216 CCP RF 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 e.
-the categories of equity, good faith, expediency, reasonable, morality. Russian courts are faced with difficulties in the application of these categories, as they are the novels in Russian legislation.
For the purpose of our study we will give the comparative analysis of the limits of choice.
THE VARIETY OF JUDICIAL DISCRETION. Little attention is paid to the study of the variety of judicial discretion in the Russian legal literature. Thus, according to A. Bonner, the main factor, which has a significant impact on the kinds of judicial discretion, is the variety of legal norms. 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".[18] 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 mode, when the court selects from several legitimate options, contained in the legal norm 2. frame type, where the court is limited to clear-cut boundaries, 3. Mixed type.[19]
In our opinion, the classification of judicial discretion may hold for various reasons. Importantly, the issue of

15 Access to Civil Procedure Abroad. Ed. By H.Snijders. London, 1996. P.25. 16 Inter alia, Abushenko D.B. Opt cit, p.6, Barak A. Opt.cit, p.14
17 Rassahatskaya N. Problemy sovershenstvovaniya grazhdanskogo processualnogo zakona (The Problems of Improvement of the Law on Civil Procedure), Tver, 2000, p.59.
18 Bonner A. Opt.cit, p.44.
19 Abushenko D. Opt.cit, p.11

varieties of the discretion must express the essential features, the advantages of judicial discretion and discover the features, the flavor and the effects of the phenomenon. It is not correct to set the goal of creating a comprehensive list of examples of discretion. What variety would be correct?

DISCRETIONARY JUSTICE TO INDIVIDUAL PARTIES. Without trying to draw precise lines, this essay is concerned primarily with a portion of discretion and with a portion of justice – with that portion of discretion which deals with justice, and with the portion of justice which influences on individual parties.

This paper will carefully examine the efficacy of case-specific discretion, explains why and when general rules can be superior, and urges rulemakers to draft rules to control the exercise of discretion. Encouraging quality settlements and producing quality judgments 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 not the broad discretion judges currently enjoy.

I propose that the legislator should justify in clear terms how much discretion to delegate and in what form. In this regard, the legislator should review the various methods for guidance or control of discretion. This paper will discuss and illustrate such methods.

PRESSURES ON DISCRETION OF THE COURT. Discretionary justice is often complicated by pressures, personalities and politics. In Russia judicial power still remains seriously dependent, firstly, from the executive power, which still provides its financial security in direct violation of Article 124 of the Constitution of the Russian Federation.

Worthy financial and material support of judicial activities will allow not only achievement of a higher efficiency and speed of judicature, but also obtaining the level of respect from both the State and society which is required for successful work of the judicial power.

As for the personnel policy of the executive power, one of the signs of the contempt it demonstrates towards the court lies in the regular delaying of judges' reassignments. In this respect, the process of appointment and especially renewal of judges' powers is absolutely non-transparent, which creates a possibility for the executive power to use undue influence on discretion of individual judges, in particular, and on the discretionary justice, in general.

Owing to the above and because of the still remaining rather "limited dispositive legal capacity" of courts in complicated social disputes, the public status of judge remains low. Guarantees of court independence exist almost only on paper. Insufficiency of such guarantees predetermines the pliability of a court`s discretion to pressure from the "siloviki" (law enforcement and state security agencies).

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

Within the framework of discretionary justice, it is necessary to resolve a whole number of organizational, material and legislative problems connected with professional activities of judges.

Most important is the personnel problem. Realization of improving quality of discretionary justice is impossible without proper staffing — each court should be provided with enough judges and other staffers for efficient effectuation of justice. It is necessary to develop and approve normative standards of workloads for judges and staffers in order to come up with the courts' level of strength.

WHY PERSPECTIVES OF THE DEVELOPMENT OF DISCRETIONARY JUSTICE?

Judicial systems in most developing countries are perceived to be in crisis: cases take too long, cost too much, and are littered with dishonest judges. Litigants are dissatisfied with the process, creditors rare use bankruptcy laws and shareholders feel it would be impossible to win a case against the controlling investor in a local court. Even though there is little consensus on exactly what judicial efficiency means or how to measure it, people seem to agree that it is low. As a result, several countries have opted to implement judicial reform in the hope of improving the efficiency of civil procedure. Judicial reform efforts, both in developed and in developing countries, have been varied and have met with mixed success.

Specifying the optimal set of challenges within the framework of judicial reform for any given country will be here de-emphasized.

Our main concerns will be:
-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 degree of judicial discretion in conducting civil or commercial cases by the court of first instance.
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.
The central inquiry of this essay will be what can be done to assure that the exercise of discretion by judges means justice. More precisely, the central inquiry will be what can be done that is not now done to minimize injustice from exercise of judicial discretion. The answer will be, in broad terms, that we should eliminate much unnecessary discretion and that we should do much more than we have been doing to control, to structure and to check necessary judicial discretion. The goal will not be the maximum degree of controlling, structuring, and checking; the goal will be to find the optimum degree for each judicial discretion in each set of circumstances to do justice.
This symposium of essays will be concerned with improving the quality of justice on civil and commercial cases that is administered by judges who exercise discretion. The central question will be: how can the quality of discretionary justice on civil and commercial cases administered by courts be improved?

WHY THE COMPARATIVE STUDY OF DISCRETIONARY JUSTICE?

We agree that the comparative lawyer cannot restrict his field narrowly. More than any other academic, he must be prepared to find new topics for discussion and research.[20]
We are going to examine 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").[21]
Can it be satisfactory within our research to group localisms under the broad headings of the "adversarial" and the "non-adversarial" alone and regard other localisms as being derivatives of one of them? There is today an increasing interest in mixed legal family systems in Europe. For instance, Jan Smits published a monograph "THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED
LEGAL SYSTEM". Furthermore, Andrew Harding, whose main interest is in South East Asia, categorically tells us that all Eurocentric comparatists fall into the "legal families trap". He says that, *"Legal families tell us nothing about legal systems except as to their general style and method, and the idea makes no sense whatsoever amid the nomic din of South East Asia"*.[22]
I suggested a "family trees" approach within which legal systems could be classified just according to the place of discretionary justice in them. In our opinion, namely "adversarial" and "non-adversarial" systems reflect the profoundly different power of a judge in conduct of the case, in the exercise of judicial discretion, exactly. Theoretical analysis will show the advantages and the limitations of discretionary justice within the models.
Of course, an increase of the role of courts 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 history of Russian civil procedure through to its current form provides good examples of the legislative efforts to converge both classical systems and to create the best system for Russia.
I am sure that a study of legal systems already mixed can provide valuable lessons for these mixing systems, and the study of how they work is fruitful in the field of discretionary justice. In fact, mixed legal systems have always

20 Lawson F. H. The Field of Comparative Law, 61 Jurid. Rev. 16 at 36 (1949).
21 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.
22 Harding A. Global Doctrine and Local Knowledge: Law in South East Asia. 2002. (51) International and Comparative Law Quarterly, 36 at 51.

been the "laboratories" of comparative lawyers, our "vantage point". As already alluded to, today such systems have gained a special place in the process of European integration. Jan Smits says that mixed legal systems will provide "inspiration". In my opinion, the experience of Russia is consequently of great importance for the future developments of European law.

Our task will not be to examine the structures of the adversarial process and of the non-adversarial process; instead, we assume that each reader knows it`s conception; we will concentrate on the discretionary aspect of discretionary justice.

We are going to explain the objectives underlying the models, identify the main features and evaluate the degree of judicial discretion that ensure their proper exercising.

I NTER N ATI ON AL COMPARI SON [23] 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 on commercial and civil cases will be to locate discretionary justice in legal systems, to establish links between procedural models and exercise of discretion and justice.

Those location will be in the court of first instance in Russia or any of the six countries will be included in this study – Italy, England, France, Germany, Spain, United States.

The courts systematically find facts and apply previously existing law; such injustice as may be thought to result is in the nature of discretion of the judge who applies the law to the facts, not the product of basic provisions of the procedural system.

By and large, the same is true of judicial discretion based on systematic fact-finding and application of existing law.

The largest clusters of injustice in all seven countries lie in the exercise of judicial power in the absence of systematic fact-finding, within the reach of previously existing law, beyond the controls of the result. In other words, the most injustice in the exercise of discretion in case involving identified parties probably occurs when judges exercise unrewiered discretion in conducting the case in the court of first instance and within the kind of procedural protections. This essay will focus on such discretionary justice.

In my 2005 book, USMOTRENIE SUDA (JUDICIAL DISCRETION), I 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"*.[24]

On the basis of the limited samples we have taken of English and American discretionary justice during my study and research in the Netherlands, I believe that remark probably applies about equally to the six countries included in our study.

Our research will learn on a review of the major reforms that have affected judicial procedure at first instance in Russian Federation, from the early 90s and questions – in the light of theoretical analysis and international comparison – their consistency with the main goal of improving the quality of justice on civil or commercial case for particular parties that is administered by the judge who exercises discretion.

The principal finding is going to be that the efficiency of justice of the legal systems, in terms of both the procedural efficiency and the procedural guarantees of fair trial, depends significantly upon the place of judicial discretion in the system.

The research, focused on the ordinary proceedings of first instance, will aim to evaluate the Russian and foreign judicial reforms, taking into account the role of judicial discretion in civil procedure.

The emphasis in this paper will be on the distinctive aspects of the Russian discretionary justice on civil and commercial cases, because Russian procedural "exceptionalism" appears to have been the special target of the improvement of justice. The objective will be to contribute to a better understanding of the Russian civil procedure system on comparative legal ground, not only by Europeans and transnational reformers but also, and perhaps more importantly, by Russians themselves. One might think that the main pitfall of comparative analysis would be a tendency to view one's own system in an unduly favorable light, whether for reasons of cultural or national chauvinism, or simple familiarity. This effect exists, but it is an obvious problem. The less obvious but equally

23 *According to particular features of each country.* 24 *Papkova O.A. Opt.cit, p.11.*

serious problem is the opposite tendency to romanticize the comparative system exactly because it is different: as the expression goes, “the grass is always greener on the other side of the fence.”
While there is some evidence of the “grass is greener” phenomenon within the European Union and in United States, mainly, it may be a more serious problem in Russia, especially for civil procedure.
Domestic criticism of the Russian civil procedure system has been loud and long, and already has led to an erosion of some distinctive characteristics of the system, notably in the judge`s role (and the meaning of judicial discretion) in exercising of justice on civil and commercial cases.
It is not clear that the trend is justified, and it may be moving Russian civil procedure in precisely the wrong direction.
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.
It seems appropriate to ask the following questions in connection with the goals of the research topic: Is everything needed to be done to improve the quality of justice in each country? Was the degree of judicial discretion identified correctly? Are additional measures and corrections required?
Our tasks will be limited by the discretionary aspects of discretionary justice and will include:
a) the basic theoretical analysis of major developments in the field of procedure on civil and commercial cases in mentioned seven countries, *viz:*
- improvement of the legislation of civil procedure;
- improvement of the judicial system;
- changes of the types of civil procedure
- influence of the European Convention on Human Rights and the Rulings of European Court of Human Rights on discretionary justice (in Russia and in Italy).

b) the initiatives of Transnational Civil Procedure;
c) the judicial practice of exercising discretion by national courts of first instance in Russia, Italy, Spain, France, Germany, England, taking into account the domestic changes, initiatives, improvement (or non-improvement) of the quality of discretionary justice in conducting a particular case.
We have received the limited data on the civil procedure reforms abroad. On this basis we are going to start our comparative study.
ENGL AND. 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 .[25]
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. Accordingly, the CPR entrusts the control of litigation to the judge.
The new strategy consists of a more sophisticated and comprehensive set of guidelines for the exercise of discretion. Our goal will be its examination according with the abovementioned tasks.
UNI TED ST ATES. Also in the United States, another country dominated by the principles of the common-law tradition, there have been similar changes made since 1970. Though to a lesser extent in comparison with the English system, the judge (so-called managerial judge) now exercise 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. Our goals will be the examination of measures to facilitate a more adequate and time-efficient management of the lawsuit; of the introduction of the *Civil Justice Reform Act* (CJRA) (in November 1990) and the role of judicial discretion in the conduct of the case; the *Federal Rules of Evidence* (FRE – enacted in 1975 and amended in 1994).
FR ANCE. In France the judge has played a significant role and exercised the discretion in the conduct of civil cases. Our task will be to examine whether that has been strengthened by the reforms of the last years.
GERM AN Y. The most recent and important reforms of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO) were enacted in 1976 and in 2002. The ZPO of 1877 was still based on the idea that an active role in the proceedings is to be taken by the parties fighting for their rights; accordingly, judges should seek to minimize

25 See CPR, Part 1, r. 1.1: “These rules are a new procedural code […]”. The rules concerning service have been amended by the Civil Procedure (Amendment) Rules 2008, and came into effect on October 1, 2008

discretion in the course of the proceedings. Our task will be to learn the recent reforms – especially those of 2002, i.e. court discretion to manage the procedure.

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

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

Our tasks will be the examination of the structure of the ordinary trial procedure, *juicio ordinario*; the aim of the EC; relevant discretionary powers of a judge for these purposes.

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 "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?

Our goal will be the examination of the role of discretionary justice in: the reform of 1990; the special procedure for corporate disputes; application of the competitiveness law, which opt for a procedural model where a judge has discretion to manage the case, but the law gave the possibility to the parties to choose the *rito societario* (special procedure for corporate lawsuits); application of the Law 69\2009, of June 18; implementation of the Convention of Human Rights and Rulings of European Courts of Human Rights by the national courts.

RUSSIA. In today's Russia, judicial reform is a key issue for development of justice in the country. It is critically important for us to find proper links between the terms "judicial reform", "exercise of court discretion" and "improvement of justice".

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

In modern 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. This document still remains legally valid and applicable.

For the past of 17 years, considerable progress has been made in improving quality of justice on civil and commercial cases In Russia.

IMPROVEMENT OF THE LEGISLATION OF CIVIL PROCEDURE is one of the main characteristics of the modern stage of development of Russian law. The new Constitution of 1993 is the main achievement. It is 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 recently, also.

Code of Arbitral Procedure of RF (further – CAP) entered into force on 1 September 2002. Code of Civil Procedure of RF (hereinafter – CCP) entered into force on 1 February 2003.[26] 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.

The novelty of the Codes, their importance for the improvement of justice require careful consideration of the judicial practice of exercising court discretion in order to identify and address shortcoming of legal regulation, leading to injustice.

26 *Arbitrazh (commercial) state courts should be distinguished from arbitral tribunals, which also exist in Russia. Arbitrazh courts are charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens.. Therefore two kinds of adjudication procedure exist in Russia: arbitrazh and civil procedure. The Arbitrazh Procedural Code regulates arbitrazh and the Civil Procedure Code regulates civil procedure.*

Improvement of court activities in civil procedure has already been implemented. It aims the reducing civil court delay and streamlining the process. One of the main feature of modern Russian legislation is increasing of the role of discretionary justice.

Inclusion in new CCP of RF the chapters on a court writ[27] 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, proving, 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 do not completely solve the problems of improvement of the civil procedural legislation; besides, certain amendments and addenda are even erroneous since they have failed to achieve their primary objectives: improvement quality of justice.[28]

My opinion is that the new CCP of RF is called to solve the problems of effectiveness of discretionary justice in civil cases. It is assumed that the Code is based on a principally new conception which, preserving justified ideas of lawfulness, should, at the same time, proceed from the fact that the new code must expressly regulate the correlation between private and public interest.[29] The private interest must prevail in matters concerning the exercise of discretionary justice in consideration of jurisdictional matters.

Measures for effectiveness of justice in civil cases must not be reduced only to adoption of a new, though more accomplished CCP of RF and other legislation.

As known, the effectiveness of even very accomplished laws may be reduced to naught by their improper application.

So, we are going to examine what measures must be taken for fundamental improvement of court activities, in particular, improvement of discretionary justice by judges capable of proper administration of justice in terms of their professional and moral qualities, etc.

I MPROVEMENT OF THE JUDI CI AL SYSTEM. The main changes of the judicial system of RF are the following: the Constitutional Court of RF and arbitratzh courts have been established, the right to establish constitutional (statutory) and magistrate's courts has been granted to the subjects of the Russian Federation. The court-martial legislation has been adopted that has expressly determined their competence and organizational structure.[30]

During evaluation of the development of civil procedural legislation in modern Russia, the difference between its judicial system and the judicial system of the majority of other countries has to be taken into account. In the Russian Federation disputes following from civil legal relationships are given consideration by two types of courts: courts of general jurisdiction and commercial courts.

Our task will be the examination whether the aforementioned organizational measures taken for improvement of the judicial system in Russia produced a positive effect on discretionary justice.

In the course of the discussion on the judicial system reform by Russian professionals many suggestions about establishment of a multi branch system of specialized courts in the Russian Federation have been advanced. For example, it was suggested to establish administrative[31], land[32], labor[33], patent[34], and some other specialized courts (tax, juvenile, etc.). Article 26 of the Federal Constitutional Law of RF dated 23 October 1996 *On the Judicial System of the Russian Federation* [35] gives certain grounds for such suggestions.

Practical realization of the idea of establishing specialized courts in the Russian Federation is partly an accomplished fact, which is evidenced by the existence of arbitrazh courts considering disputes arising from civil

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27 *Vikut M.A, Zaitsev I.M., Grazhdanskii protsess Rossii (The Civil Process in Russia). Text-book, Moscow, 1999, pp. 25-26 (the author of the chapter is Zaitsev I.M.).*

28 *Shakaryan M. Prinimat li novyi GPK ili podpravlyat staryi? (Is it Necessary to Adopt a New CCP or to Amend the Existent One). Rossiiskaya Yustitsiya (The Russian Justice), 1999, No. 2, p.18.*

29 *See:Panova I. Administrativno-yurisdiktsionnyi protsess. (The Administrative Jurisdictional Process), Saratov, 1998. Gosudarstvo i pravo (The State and the Law), 1999, No.10, p.5-26;.StarilovYu.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 (The State and the Law), 2000, No.5, pp. 12-21.*

30 *Yarkov V. Dostupno li grazhdanam nashe pravosudiye?: (Is our Justice Accessible for our Citizens?). Rossiiskaya Yustitsiya (The Russian Justice), 1999, No. 2, p. 26.*

31 *Lebedev V, Ot kontseptsii sydebnoj reformy k novym ideyam razvitiya sydebnoj sistemy. (From the Concept of the Judicial Reform to New Ideas of Development of the Judicial System). Rossijskaya Yustitsiya (The Russian Justice). 2000, No. 3, pp. 2-3.*

32 *Dikusar V, Zemelnye sudy - v Rossii? (The Land Courts - in Russia?). Rossijskaya Yustitsiya (The Russian Justice), 2000, No.3, pp.2-3. 33 Khristoforov A, Meshcheryakov V, Rossii nyzhen patentnyj sud. (Russia Needs a Patent Court). Sovetskaya Yustitsiya (The Soviet Justice), 1993, No. 23, p.6.*

34 *Mironov V, Istoriya trudovogo prava: teoriya i praktika (History of the Labour Law: Theory and Practice). Gosudarstvo i Pravo (The State and the Law), 1998, No. 12, pp. 58-59.*

35 *Collected laws of RF. 1997, No. 1, Art.1.*

and administrative relations in the business sphere, courts-martial, the competence of which is considerably extended as regards the civil procedure, and magistrate's courts being established at present by the subjects of the Russian Federation, which «specialize» in consideration of rather simple civil, administrative, and criminal matters. Besides, some of the authors, in support of their suggestions, refer to the experience of other states (Germany, France, the USA), which have developed a large-scale system of specialized courts. Without rejecting, in principle, the idea of establishment of specialized courts in the Russian Federation, we would like to learn how the establishment can influence on discretionary justice.

Our opinion is that in view of the absence of necessary legal and economic prerequisites for establishment of the wide-scale system of specialized courts in RF, the problem related to improvement and effectiveness of justice should be solved by: a) specialization of judges of current courts (common, arbitration, courts-martial), and b) further improvement of the legislation of civil procedure.

The contemporary Russian juristic literature contains a lot of suggestions aimed at introduction of amendments and addenda to the civil procedural legislation in order to enhance the effectiveness of justice. It is suggested, for example, that the rates of statutory duties be reduced depending on the financial status of a claimant (an applicant); reconciliation procedures for pretrial settlement of a dispute be introduced; procedures for consideration of new categories of civil cases (related to emancipation, forced hospitalization of mentally sick persons) be provided for in the CCP; jurisdiction of civil cases be extended; obligatory provision of free legal assistance be stipulated; certain procedural rules regulating proceedings in cases arising from administrative relations,[36] etc.

We are going to examine it on the comparative ground.

CH ANGES OF THE TYPE OF CI VI L PROCEDURE. The Russian Constitution of 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 of 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 commercial courts showed that a complete refusal of the court activity may result in that the attainment of justice is not possible.

During the drafting of the new CCP, lengthy discussion was conducted in respect to determination of the party exercised discretion. The Soviet CCP of 1964 regulated the process in an investigative (non-adversarial) aspect. We assume that Russian culture combines in itself features of both procedural models and accordingly cannot be unambiguously related to one of them.[37]

In my opinion, in modern Russia according with the new CCP of 2002 there is a peculiar combination of discretion of the parties and court discretion, which have been established in the law. The expression of this principle in concrete articles is a relatively complex problem for discretionary justice. The new 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 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, the role of the court in accordance with the new CCP is somewhat intensified as compared with the amendments of 1995, but at the same time the court does not take on itself the function of investigation in a civil process as was done in accordance with the CCP of 1964. The CCP of 2002 was developed on the base of a combination of adversarial model with the role of court discretion.

So, the new Russian CCP of 2002 established a kind of "golden mean" between the discretion of the court and the initiative of the parties. Our task will be to examine could such situation to improve quality of discretional justice.

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36 Pastukhov V. Chto lyudyam ne nravitsya v rossiiskom pravosudii? (What do persons not like in the Russian Justice?). Rossiiskaya Yustitsiya (The Russian Justice). 1998, No.8, pp.22-23.

37 Russian lawmakers in different historical periods had opposite views on whether Russia belonged to one or another procedural model. Therefore, the legal system in our country 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 decade, 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 models correspond by themselves to the principles of Russian society.

However, the situation is far from being perfect. Reforming an old system run by old people is a tricky task. In his "SUDEBNAY REFORMA V PROSHLOM I NASTOYASCHEM" ("JUDICIAL REFORM, PAST AND PRESENT"), 2009, Deputy Chairman of the Supreme Court of RF V.Zhujkov contemplates advantages and disadvantages of the judicial reform in RF. As of 2009, observers of justice in Russia, including President of RF Dmitry Medvedev, recognized that 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?

I suppose that it is necessary to change the tactics of the legislative work to remedy the situation. We think that henceforth, the principal attention should be given to improvement of the legislation of civil procedure, in particular, the types thereof, rather than to costly and complicated organizational arrangements like establishment of the system of administrative courts. The suggested measures, coupled with a small increase in the staff number of judges and arrangements for their specialization, will promote quicker and more efficient improvement of discretionary justice.

Our task will be to examine what amendments and changes of Russian civil procedure deal with judicial discretion and improvement the quality of justice.

-Is it necessary to introduce reconciliation procedures in order to relieve the courts of the cases which could be adjudicated without a complicated and costly judicial procedure?

-Is it necessary to consider so called indirect and class actions has arisen in connection with the market reforms in the economy? Since the current CCP does not clearly regulate the procedure of consideration of actions filed to protect the rights of an indefinite circle of persons, this problem should also be solved.

-How could be improved trial *in absentia*, since the one currently in effect contains many controversies and inaccuracies?

-What elaboration in the CCP does require proceedings in cases arising from public relations?

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 Russian Government's recognition of the authority of the European Court of Human Rights (hereinafter - ECHR). The main idea of international human right law is *"to bring human rights home"*. The core of this idea is in Article 1 of the Convention – the basis for the domestic application of the European Convention.

Although most official Russian statements reflect positively on the application of the Convention by Russian courts, particularly by the Russian Constitutional Court (the latter is true to a certain extent), I have found that to date the impact of the Convention on the Russian legal system in terms of its implementation by domestic courts is unsatisfactory.

First, let's see THE LEGAL BASIS FOR THE APPLICATION OF THE CONVENTION IN RUSSIAN LAW.

The CCP and the CAP have been created on the base of the new Russian Constitution of 1993, the most important international acts relating to protection of civil rights and takes the practice of the European Court for Human Rights in Strasburg 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, the Convention on the Protection of Human Rights and Fundamental Freedoms. 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 ECHR 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 in the legislation. This mechanism deals with discretionary justice.

Now we will explore THE JUDICIAL PRACTICE OF APPLICATION OF THE CONVENTION. The modern result is that the impact of the Convention on discretionary justice in Russia, in terms of its implementation by domestic courts, is unsatisfactory.

Application of the Convention and of the legal positions of ECHR by Russian courts of first instance is complicated by a number of problems. 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 positions 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."*[38] 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 of RF Convention is incorporated into the Russian legal system as an international treaty and is a priority to the federal law"*.[39]

The determination of the place of ECHR`s rulings in the system of Russian law is also modern. So, M.Marchenko concludes that the binding force of Court`s rulings deals with just complaints against Russia.[40] According to V.A. Kanashevskogo, O.I. Tiunova, P. A. Laptev: *"Just the acts 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. Russian courts can not ignore other Court`s decisions because of the rule of precedent"*[41]

The case law of the ECHR may be transformed into Russian domestic jurisprudence gradually.[42] The Russian Federation recognized compulsory jurisdiction of the ECHR in regard to the interpretation and application of the Convention.

Thus, appropriate decisions of ECHR must influence on the discretionary justice in Russia.

The Constitutional Court went further then any statutes or the Constitution itself. In one of the judgments, the Constitutional Court provided an interpretation which "established an obligation to give direct domestic effect to decisions of international bodies, including the European Court of Human Rights."

We shall stress how important this statement of the Constitutional Court is.[43]

Let me 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 the last century. Another example is the Chief Justice of the Russian Supreme Court who has been holding his position for 21 years, since the last century. 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?

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. Unfortunately, the latter changes have not taken place in Russia as of yet.

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

39 Zor`kin V.D. Konstituzionnyii Sud Rossii v Evropeyskom pravovom pole (The Constitutional Court of Russia in European legal field). Zurnal Rossiiskogo prava. 2005. N3. p its Ruling N 4-P, which 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..35.

40 Marchenko M.N.Uridicheskaya priroda I harakter reshenii Evropeyskogo Suda po Pravam Cheloveka (Legal Nature of the Rulings of ECHR) in Gosudarstvo I Pravo. 2006. N2, p.12

41 Kanashevskii V.A. Precedentnaya Praktika Evropeyskogo Suda po Pravam Cheloveka kak Regulyator Grazhdanskix Otnoshenii v Rossiiskoy Federatii (Precedents of ECHR as the regulator of civil relationship in RF). In Zhurnal Rossiiskogo Prava. 2003. N4, p.123.

42Danilenko. Implementation of International Law in CIS States: Theory and Practice," European Journal of International Law 10:1.1999. p. 68.

43 The Russian Federation undertook positive steps within the first decade of its membership in the Council of Europe. On 26 February 2010, the Constitutional Court of the Russian Federation delivered Nevertheless, until today, the opportunity to institute reconsideration of a national case due to a judgment of the European Court of Human Rights has only existed in regard to criminal and commercial cases. The Civil Procedure Code of RF has omitted this issue. Now under the mentioned Ruling the legislator has the obligation to amend the Civil Procedure Code of RF.

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 me start with a 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. 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.[44]
This answer is indicative of the way Russian judges deal with the issue of implementation of the Convention – judges are 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.
Now the question is whether this situation exists because the judiciary lack knowledge on the Convention? Or is it because of the quality of discretionary justice? During the comparative jurisprudence research we will find the answer.
We shall be optimistic. It took the United Kingdom about 50 years to incorporate the Convention.
Further let us use of the experience of the harmonization in the field of civil procedure already accumulated by the countries.
INITIATIVES OF TRANSNATIONAL CIVIL PROCEDURE. The human community of the world lives in closer quarters today than in earlier times. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation. In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems – so-called "harmonization" – so that the same or similar "rules of the game" apply no matter where the participants may find themselves.
Now Russia gets a unique advantage expressed in the opportunity of generalization and use of the experience of the harmonisation already accumulated by other countries.
For the purposes of our study it is possible to divide all harmonisation mechanisms of national civil procedural legislation into 2 primary groups:
1. Harmonisation mechanism in Russia.
2. Harmonisation mechanisms inside the European Union, in the Member States
Our task will be the examination of their influence on discretionary justice.
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.
Our analysis will be highly important to any effective understanding of both Russia's and the EU's future trajectory for improvement quality of discretionary 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.
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).[45]

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44 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 *(as of 25 August 2006).*
45 Diplomatichesky Vestnik, 1994. № 15/16. p. 29–59.

The PCA is a framework agreement, because many of its positions require further development and specific definitions within the framework of special bilateral agreements on individual issues. The important feature of PCA is that it is future-oriented.
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.
At the present stage development of partnership and cooperation between Russia and the EU has taken them to the point of shaping a closer neighbourhood with some features of association.
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.
HARMONISATION[46] MECHANISMS IN 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.
For Russia, the creation of a broad legislative package of cross-border procedural instruments within 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.
Within the European Union there is the policy area of judicial cooperation in civil matters. It is possible that the policy area will affect national civil procedures albeit perhaps in a random fashion. Ostensibly the measures of the policy area solely regulate cross-border cooperation structures rather than the specific national procedures. Developments during 2008 within the policy area evidence a further emphasis on overarching and horizontal measures of consolidation and even of discourse as well as a further emphasis on deepening and developing the current measures as a means to ensure effective implementation.
However, in the long run the salient question to answer will be whether the degree and quality of discretionary justice are enough.
So, the generic civil procedural measures to improve quality of discretionary justice form the focus of this paper and will be examined.
Et sic, a current central question in relation to judicial discretion`s application that will be raised is whether discretionary justice manages to achieve efficiency and whether it does so at the cost of the fundamental guarantees of fair trial. The answer to this question will also affect the evaluation of its current contribution to procedural harmonisation in Europe.
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.
Today, lawyers of Italy, Germany, Holland, Poland are working on the idea of wider application of the principles of Roman law in modern practice. The writing of Reinhard Zimmermann is well known particularly. The author speaks 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 recent improvement quality of justice movement may be

[46] *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.*

characterized as an amazing effort of the world legal community to clarify and virtually enforce worldwide through national judiciary the "ideological" and almost spiritual legal concept of the discretionary justice.

THE BACKGROUND

My opinion is that Russian literature of civil procedural law is woefully inadequate on the subject of discretionary justice, administered by courts of first instance on commercial and civil matters. Over the last 17 years, Russian civil procedural law has been devoted to civil process that involves either formal proceedings or judicial review or judicial reform in Russia. It has two writings that involve discretionary action of a court in civil procedure, such as D.B.ABUSHENKO, SUDEBNOE USMOTRENIE V GRAZHDANSKOM I ARBITRAZHNOM PROCESSE (JUDICIAL DISCRETION IN CIVIL AND ARBITRAL PROCEEDINGS) (1999) and O.A.PAPKOVA, USMOTRENIE SUDA (COURT DISCRETION) (2005). The writing of A.BARAK "SUDEYSKOE USMOTRENIE" (JUDICIAL DISCRETION) was translated into Russian language in 1999. That will be changing during the nearest future, and I am pleased to say that Russian legislators and judges have dealt significantly with problems of discretionary justice.[47]

I know that there is American literature of jurisprudence on the subject of discretionary justice. Jurisprudence in America is too much concerned with judges and legislators.

European lawyers are as much concerned about injustice as American scientists are. In my opinion, they have developed an effective system for improving quality of justice. That is one of the main functions of European courts. The courts are very effective in protecting against injustice, and European civil procedural law that guides and controls them is probably one of the greatest accomplishments in the world`s legal systems.

A further word needs to be spoken about courts on civil and commercial matters. Where are the studies of discretional judicial action in civil procedure? What portion of all judicial action is in fact unreviewable by the superior court?

If court decisions in a particular country are in the millions or thousands, and if the discretion of the civil courts has effect upon judicial practices in cases resolving in civil proceedings, does justice or injustice depend almost entirely upon what discretion judges do and what civil courts decide? If judicial discretion is to be done in the great bulk of court rulings, does it have to be done by the judges who make the decision in each step of a case? Where is the European law that controls such discretionary decisions?

In my writing on Russian discretionary justice, almost two-thirds of the discussion is devoted to the law that constraints judicial discretion. Almost all of that current Russian law of civil procedure is the product of legal and judicial reform during the last 17 years.

In my study of civil procedure in the Member States I found that European civil procedural law does not contain counterpart of the Russian procedural law. Russian legislation on civil procedure also contains no substantial counterpart of the European procedural law controlling the discretionary action of judges; yet some such law is the beginning to develop and may soon become important as for Russia so as for Europe. Those beginnings seems to me to deserve encouragement.

As an illustration of my observation that European civil procedure should be effective, let me point to several modern strands and levels of civil procedural convergence in Europe.

One significant strand comprises the national level procedural reforms that are across the civil and common law divide striving towards the same goal of efficiency and fair trial.[48] Another important strand comprises the constitutional reforms on both the intergovernmental and national levels, in particular Article 6 of the European Convention on Human Rights and the case-law of the European Court of Justice regarding the right to a fair trial, which have forged a mutual European standard for discretionary activity of a judge in civil proceedings.[49] A further level of convergence developed in the second half of the past century on the supranational level within the European Union. The European Court of Justice has in a wealth of case-law emphasised the right to an effective

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47 *Kaufman M.A. Probely v ugolovnom prave I sudeyskoe usmotrenie (The Gaps in Criminal Law and Judicial Discretion). Moscva, 2009*

48 *Zuckerman A. A. S. Justice in Crisis: Comparative Dimensions of Civil Procedure in Andrews, Zuckerman A. A. S (Ed) Civil Justice in Crisis – Comparative Perspectives of Civil Procedure .OUP, 1999. pp. 47-8 and Trocker N & Varano V, 'Concluding Remarks' in Trocker N & Varano V (Eds) The Reforms of Civil Procedure in Comparative Perspective .G. Giappichelli Editore. 2005. pp. 250-5.*

49 *Kerameus K. Procedural Implications of Civil Law Unification' in Hartkamp et al (Eds) Towards a European Civil Code .Kluwer Law International, 2004. pp. 154-5 .*

remedy, which has influenced particular national procedures in relation to for example time-limits, admissibility of certain forms of evidence, neutrality of expert witnesses or the method for apportioning costs of proceedings. In addition the Storme Group's Report on the approximation of the laws of procedure launched a debate regarding civil procedural harmonisation within the European Union. [50]

The balance between the identified themes of convergence is arguably an important issue within the discretionary justice. Hence, a current central question in relation to its application is whether the discretionary justice manages to achieve efficiency and whether it does so at the cost of the fundamental guarantees of fair trial.

I believe that justice or injustice in civil procedure depends almost entirely on what discretion the judges do, and hardly at all the protection and constraints afforded by the state, by legal norms.

The present European civil procedure seems to me exceedingly good. But it has not sufficiently penetrated the areas of unreviewed formal discretionary justice, where the quality of discretionary justice could be not enough high.

The weak spots go back to the intrinsic nature of the human being. Unguided and uncontrolled judicial discretionary activity is exceedingly damaging to justice. The reason I am searching for ways to eliminate unnecessary discretion and to control necessary discretion is not that human beings can not exercise discretion justly. Of course, they can and they do. The reason is that we do not know how to select the ones who can and do; most of our Russian judges in fact exercise discretion justly a part of the time. A large portion of judges may be expected to abuse their discretion to a considerable extent, and only a few are likely to engage in occasional abuse of power that is quite serious. This statement about the basic nature of human beings does not seem to me controversial. Of course, everyone could have his own opinion and disagree with me.

The reason that so little effort has gone into finding ways to minimize discretionary injustice from judges is not a belief that the injustice is insignificant; it is that finding ways to prevent or cure is so complex and baffling task. Such effort in Russia is not numerous and not popular. It seems to be limited in Europe to abstract writings. I asked some professors from leading European Universities what literature exists that treats discretionary justice on the basis of comparative investigations of court action in civil procedure. Everyone I asked gave me the same answer: that so far as he knows, nothing of that kind exists. Many of them were aware of abstract American and European writings about discretionary power, such as K.S.DAVIS DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969), D.J.GALLIGAN`S DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION (1986), M.STORME (ED), APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (1994), H.SNIJDERS (ED) ACCESS TO CIVIL PROCEDURE ABROAD (1996), A.A.S. ZUCKERMAN (ED) CIVIL JUSTICE IN CRISIS – COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (1999), N.TROCKER & V.VORANO (EDS) THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE (2005), F.FRANCIONI (ED) ACCESS TO JUSTICE AS A HUMAN RIGHT (2007), E.STORSKRUBB, CIVIL PROCEDURE AND EU LAW: A POLICY AREA UNCOVERED (2008).

Such literature has little in common with thinking that is based on comparative factual investigation of judicial discretion in civil procedure. In the Netherlands I learned a little of American and English writings on discretionary activity of lawyers or sociologists, but the focus was efficiency of civil judiciary in common-law countries. In European jurisprudence literature we can retrace several analyses that explain the objectives underlying the two or more principal procedural models, identify the main features and evaluate the conditions that ensure their proper functioning. European writers provide any abstract discussion on the results of national judicial reform and transnational initiatives in the field of civil procedure. Case management, managerial judges, allocating resources and devising separate procedural rules based on the complexity or monetary importance of the matter are all elements of what is arguably a mutual current quest for the writings. But the focuses are efficiency and procedural guarantees of fair trial, not the quality of justice. Here and there writings on the subjects, such as access to justice, international harmonization, Europeanization in the field of civil procedure, but nothing I have found deals systematically with the subject.

The abovementioned subjects on which the literature of jurisprudence primarily focuses will be here de-emphasized, so our main concern will be with the vast mass of discretionary justice, that have a little concern with efficiency, procedural guarantees of fair trial and *etc*.

Of course, some study might exist that was not brought out by my talk with professors.

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50 *Storme M (Ed), Approximation of Judiciary Law in the European Union .Nijhoff, 1994.*

If my impression is correct that no empirical research on comparative discretionary justice has been done in Europe and in Russia, than one of my hopes will be that the present study, limited as it is, may lead the way to further research. The subject will call for a good deal of investigation of judicial practices and processes, and it will call for some jurisprudential thinking that will be based on such investigation. The present study will be tiny in comparison with what needs to be done, but it is at least a beginning.

THE OBJECTIVES

In my study of discretionary justice on civil and commercial matters in Russia I have found that discretion is indispensable to modern judiciary and that the cure for injustice can not be the elimination of discretion.[51] But I also found that Russian courts of first instance are shot through with the exercise of improper discretion and I concluded that we can much more to control necessary discretion.[52] My findings was grounded on my knowledge on the situation as before I worked as a civil judge in the court of first instance in Moscow.
I wonder whether European judges know what Russian judges do not know – how to apply the categories (principles) of justice, reasonableness, good faith, morality, and, in common sense, how to avoid the growth of improper discretion, and how to control the exercise of necessary discretion.
A basic knowledge of the policy area of judicial cooperation in civil matters within the European Union led me to develop a hypothesis that Europeans do: they try to build the procedural system, grounding on justify discretionary justice. They know: *Discretio est scire per legem quid sit justum.*
This procedural system does not directly entail harmonisation of national domestic civil procedures and has not taken the form of grand holistic procedural codification.
As such the policy area can be seen to hinder true harmonisation and to create a double standard in the field of discretionary justice. I am sure that the policy area may even have a harmonising effect outside the borders of the European Union on Russia, for example.
The contrast between the Russian and European civil procedure, I thought, might mean that Europeans have a special understanding of discretion that Russians lack.
How do the Europeans do it? What do they understand that the Russians do not understand? These questions seemed worth pursuing. How? In Russia the search for literature turned up nothing significant, except some basic writing. Those I consulted in Universities could not answer my questions.
On that basis, this inquiry was conceived. With the help of senior European professors, I selected enough material for preparing the course of lectures per students: "CIVIL PROCEDURE IN THE MEMBER-STATES". My writing "CIVIL PROCEDURE IN THE MEMBER STATES" was published in 2000. At the same time I identified narrow subjects as samples of what Europeans do about discretionary justice in various contexts.
The countries for international comparison were systematically chosen, to a large extent on the basis of such points as:

- Focus on civil procedure reforms enacted in other countries (England, United States, Italy, France, Germany and Spain).
- England, Italy, France, Germany, Spain are the Member States. Theoretical analysis and international comparison within the European Union will show whether discretion assigned to the judge in the conduct of a civil case plays a decisive role in justice (national and international points).
- United States and England traditionally belong to "adversarial" procedural model; Italy, France, Germany, Spain historically belong to "non-adversarial" procedural system. What convergence between the models will show the international comparison? Have the reforms emphasized the role of judicial discretion or not?
- United States (as Russia) is not the Member State. In the USA there have been the changes of civil procedure made since 1970. 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. I`ve learned a little American jurisprudence literature on discretionary justice. It`s seems to me useful for our study.
- England established a true code of civil procedure (came into force in April 1999): an exceptional instrument for a common law country.
- In France the judge has always played a significant role in the conduct of civil case, and that has been strengthened by the reforms of the last years.

51 *Papkova O. Opt. cit. p. 43-44.*
52 *Ibid. p. 64-199.*

- In Germany the most important reforms were enacted in 1976 and in 2002. In the contrast to the German Code of Civil Procedure of 1877, the recent reforms – especially those of 2002 – sought to strengthen the active role of a judge.
- In Spain the new Civil Procedure Code was introduced (entered into force on January 8, 2001). It replaced the flawed and archaic Code of 1881, that lacked a systematic structure.
- Italy was chosen for comparative analysis and also as a place of the host organization on the following grounds:
a). The Italian reforms of civil procedure have taken the exceptional place among European judicial reforms. At first, they lack a general reform project. Also, they have gone against the prevailing trend in comparison with the reforms that have been recently enacted in other countries. In fact, in Italy there has not been a choice made between the procedural models, as in Russia. Italy is a very good ground for comprehensive comparative study.
b) Italy has the excessive length of civil proceedings and other critical problems which have been the lack of mechanisms to assure that the judge effectively and correctly uses her discretion in the conduct of the case.
c) Italy offers to give new modern meaning to *Corpus Juris Civilis* (inter alia, in the field of civil procedure) to resolve the problem of supranational procedural legislation. It has the importance for my study.
d) I would like to learn Italian language to examine Italian jurisprudence literature and literature on Roman law in original, to interview Italian judges. It is necessary for my teaching and scientific practice to exceed and improve my knowledge in the fields.
- As an alternative to the possibilities existing under the national laws of the Member States there is transnational civil procedure which gives discretion to the judge in the conduct of the case and powers to order inquiries *ex officio*.
Our broad purpose is to take European and Russian discretionary justice, mainly, (American as an optional) to try to get a plurality of countries, to keep each topic enough for through studying, and at the end to try to put together the finding and ideas.
Each investigation will be guided by a memorandum, which lists and explains twenty one particular inquiries that should be made on the subject and questions which we are going to ask Russian and Italian judges.
As the inquiry will progress, the objectives seem to broaden into a comparison of European and Russian (plus American as an optional) systems for limiting and controlling the exercise of court discretion in conducting of civil and commercial cases.

THE METHOD

Our method will have the following ingredients: (1) on the basis of our general Russian, European and American knowledge on theory, abstract thinking, legal rules identifying problems about judicial discretion that seem worthy of study by throwing European light on them; (2) using my own experience of working as a civil judge, interviews with Russian and Italian judges of courts first instance, conducting civil and commercial cases; (3) inspection of files of courts of first instance in Italy and Russia as tools for locating problems about the discretionary justice and the control of the exercise of judicial discretion and about the influence of European Convention on Human Rights and Rulings of ECHR on judicial practice; (4) using published reports of cases decided by courts on commercial and civil cases in Italy, Spain, Germany, France, England and Russia; (5) describing our findings, combining criticisms and ideas with the descriptions; (6) comparing European (domestic and international) experience and ideas with Russian experience and ideas; (6) using judgments in producing a mixture of findings and ideas with the emphasis upon ideas.
So, the first main research method will be examining of writings, theory and legal rules of Europe, America and Russia on the problems about discretionary justice that seem worthy of study by throwing European light on them. I think that laying the theoretical and legislative foundation should usually come first. Developing theory and finding facts can move forward together. In this project I will try to build the advance theorizing on factual foundations.
The second main research method will be using my own experience of working as a civil judge in the court of first instance, Moscow, Russia, interviewing of Italian and Russian judges of courts of first instance, conducting civil and commercial cases.
I first talked with the judge of first instance, the colleague of mine in past, in Moscow, Russia, in 1995, when I was trying to develop an understanding of discretionary justice in Russia and was curious about questions that judges of first instance could answer. Then I became a young member of the Law Faculty of Moscow State University and

spent six months at the University of Leiden, the Netherlands, learning the civil procedure of European Union, writing reports describing the practices and interviewing the Professors of Leiden University.
That Leiden experience was largely the basis for the present project so I mixed the new knowledge on European judicial practice with the data on judicial discretion in Russian civil procedure. I prepared the course of lectures: "Civil Procedure in the Member States", gave the lectures per students on the subject at some Universities in Moscow.
During 2004 I simply went to judges in Moscow to ask what they are doing, how they are doing it, with what success and failures and what ideas they have about how to do it better. As a result, my book on judicial discretion in Russian civil procedure was published.
I am going to do the same activity in Italy and Russia now. An exceedingly useful observation about interviews as a tool for making this kind of study is that they can be designed not merely to find facts about practices and processes but also to develop ideas. In our interviews we will seek both facts and ideas – and mixtures of the two.

ONE FINAL POINT. Some have questioned the usefulness of discretion as an analytical concept. Perhaps it is not discretion itself that matters, but rather what judges actually do with the discretion they have. For example, critics of case management at times seem less concerned about trial judges exercising discretion in the abstract than about their using discretion to manage cases (instead of adjudicate) or promote settlements (instead of conduct trials). There is some merit to this point, but there is also something important to understand about discretionary justice in general. In the strategic environment of litigation, trial judge discretion to design casespecific procedures can create serious problems for justice. Although these problems vary with context, they have common features, and it is important to understand as what those features are and why, and so how the problems can be resolved.

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Attachment 3, Research Portfolio
Research done at the University of Insubria, Italy

OLGA A. PAPKOVA

Bringing Fundamental Procedural Rights Home? – No.

Fundamental Procedural Rights and Principles of Civil Procedure in the EU

About

Let us single out two main provisions.

(I).The main point is the fact that the real fundamental procedural rights deficit lies in the international sphere in the European Union.

The scholars know that the Policy Exchange declared that there is nothing that stops, *inter alia*, the United Kingdom pulling out of the European Convention on Human Rights in a report (_Bringing Rights Home: Making human rights compatible with parliamentary democracy‘ by Michael Pinto-Duschinsky, Forward by Lord Hoffmann PC, edited by Blair Gibbs). This piece of information may be a huge surprise to think tank researchers. Given that the Policy Exchange singles out the most successful legal instrument in international law to date for criticism, a legal instrument that has made concrete advancements for human rights protection in the UK and elsewhere over the past sixty years, where is the real problem? The Policy Exchange Report tells us that the European Convention of Human Rights is troublesome because it has a court – the European Court of Human Rights – to interpret it. This court, says the Policy Exchange, is incompetent and so on.

This charge of being incompetent and many of the other charges the Policy Exchange levies against the European Court of Human Rights rest largely on disinformation.

We need to give a positive understanding of the role and value of ECHR and ECtHR , *inter alia*, in the field of fundamental procedural rights and principles of civil procedure. The judgment about the quality of ECtHR justice system should not be measured simply in terms of incompetency, etc. We need to re-establish ECHR, ECtHR as a public good, recognising that they have a significant social purpose for all ECHR`s member-states and for the EU, within these proposal, at least.

The scope of the fundamental rights laid down in the European Convention on Human Rights has been expanded strongly over the last decades. The Convention on Human Rights is owned by 47 states, not one state alone, it makes sense that there is an international court to interpret the Convention and that that court is made up of judges from those 47 states. With a current waiting list of almost 140,000 cases, the ECHR has in fact become an ordinary court of last instance, which gives plaintiffs a final chance to win their cases by overturning the laws of their own country.

(II).Effective access to justice and enforcement lies at the heart of civil justice. It is a policy objective in European Union to further simplify the enforcement of judicial and extra judicial decisions. Globalization of legal traffic and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate **civil proceedings and cross-border enforcement.** This triggers the debate on the need for harmonization\approximation of civil procedure. In recent years, this debate has gained in importance because of new legislative and practical developments both at the European and the global level. These developments, amongst others the bringing about of the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004), Civil Justice specific programme (2007-2013) and some recent European Regulations introducing harmonized procedures, as well as problems encountered in the safeguarding fundamental procedural rights and in the detection what procedural rights need to be guaranteed and how is this protection to be achieved, require deliberation.

This research project is the first study of Fundamental Procedural Rights and Principles of Civil Procedure in the EU of its kind. The research project tries to single out the actual and the potential roles of European Convention on Human Right and case-law of ECtHR with regard to Fundamental principles of Civil Procedure within the simplification of cross-border enforcement in the EU.

There are considerable bodies of descriptive literature, which analyse (for most of the 15 member states before the enlargements of the EU) the main differences\common features between\of national protection of human rights, European law in the field of civil process,

European Convention on Human Rights (Art. 6), case-law of ECtHR, interpretative principles etc.

In these bodies of literature there is a general sense of satisfaction\dissatisfaction concerning the deficit of fundamental procedural rights, principles of civil procedure in the EU and, of course, harmonization\approximation of civil procedure in the EU. These bodies of literature, however, do not seem to influence each other, and the research on the fundamental procedural rights, principles of civil procedure in the EU is stagnant.

The best explanation for this state of affairs is that most of the literature remains at a quite general stage of reflection **without employment jointly** of: **(I) the experience of**: (a) the European Union in the area of harmonization of civil procedure, (b) the Convention on Human Rights, (c) ECtHR in appropriate interpretation; **(II) the historic background** of Europe in this field.

Aim:

We are not going to focus only on practical problems, but also on fundamental questions raised by the increasing interdependency of legal systems. Which methods can best be used to accommodate enforcement of foreign judicial decisions in a world of multilevel jurisdiction? Which fundamental procedural rights and principles of civil procedure could be derived from the ECHR and case-law of ECtHR? And how can respect for fundamental procedural rights best be guaranteed? Are traditional concepts of national law flexible enough to internalise changes in an international context?

What should be understood in this context by 'principles and fundamental procedural rights'? According to our opinion, it is better not to look for an all-encompassing working definition in advance. Instead, the research should focus on issues that are relevant for all, or the majority of, jurisdictions in the European Union. The aim of the research is **to reveal basic models that are useful for approximation/harmonization.**

The project aims **to tie together ECHR, hypotheses developed in the bodies of historical and theoretical legal literature, appropriate discretion of ECtHR** in case-law leading to a more refined and precise **legal tools, a theoretical framework, a script of fundamental procedural rights, principles of civil procedure in the EU**.

Et sic, the objective is to identify new solutions for important civil procedure problems such as fundamental procedural rights, principles of civil procedure in the EU and the cross-border enforcement by the development and application of creative methodologies. The substantive innovations that this project will propose to make are:

[a] the development of new **legal tools**, which will consistently integrate the accommodation of the particularities of fundamental procedural rights, principles of civil procedure in the EU;
[b] the development of a new **theoretical framework** combining minimum and maximum approaches to fundamental procedural rights, principles of civil procedure in the EU, followed by their translation into clear legal concept to adopt a consistent approach within contemporary and expected future developments with respect to the cross-border enforcement;
[c] the development of a **script of fundamental procedural rights, principles of civil procedure in the EU** that will enable to reveal basic models that are useful for harmonisation.

How:

The research will be based on the supranational experience within the Europe which we consider as applicable for our study.

The main task of the project will be a **dogmatic analysis** of ―European level‖ provisions which could belong under fundamental procedural rights and principles of civil procedure in the EU ―the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention) .The ALI/UNIDROIT Principles of Transnational Civil Procedure (2004), the Treaty of Lisbon, respective EU law will be considered as auxiliary means. The method of research and its general character are defined by that.

In this case **comparative element,** which is only one of the means of analysis of existing rules within dogmatic study of law, should retreat almost to the background. To forego we will overstep the consensus in the comparative legal literature that civil procedure is deeply entrenched in the national culture, historical traditions of each country, so there is the problem whether it is possible to harmonize civil procedure within the EU. The project seeks to find out the background and contents of the fundamental procedural rights and principles of civil procedure in the existing common legal, historic and theoretical space of the European Union, using the experience of harmonization and the results of it.

The historic element will take up more space in our research. To corroborate our theoretical and legal conclusions the historical sketch of the fundamental procedural rights and principles of civil procedure through Roman Law, German Procedural Law, French Civil Process and the procedural law of England and Wales will be necessary. Additionally, it should go without saying that the history of procedure is a natural subject in scientific legal research in an epoch where the creation and proper functioning of the European internal market is high on the agenda. Procedural diversity hinders the functioning of this market and therefore harmonisation of the European laws of procedure is required.

One should make use of the shared European past which (also) exists in the area of procedure. The history of procedure shows us the origins of similarities and dissimilarities between our various procedures. Legal history makes the relationship between the different procedures in Europe clear.

Knowledge about this subject is important for all future lawyers. After all, they will most likely be operating in a European market where national boundaries have lost much of their importance.

More attention will be drawn to **the case-law ECtHR** with particular attention to the role of **judicial discretion** of the named court in finding the fundamental procedural rights and principles of civil procedure in the EU. Decisions of the named court on the most important fundamental procedural rights and principles of civil procedure will be reviewed critically and included in the study.

We argue that judicial discretion in ECtHR within interpretation is instrumental in finding the fundamental procedural rights and developing the principles of civil procedure in the EU. We will test this hypothesis by drawing resources from our conclusions in the monograph ―Court Discretion‖ (2005) and analyzing the appropriate case-law of the court.

Along with this main dogmatic task author pursues another - a **theoretical** one. The fact is that currently civil process in the European Union is in a complicated state in two ways. **On one side** there is a tension with the fundamental procedural rights and principles of civil procedure that emphasize efficiency as a paramount goal and introduce cross-border enforcement in the EU and are useful for approximation/harmonization. **On the other hand** it is a policy objective in European Union to further simplify the enforcement of judicial and extra judicial decisions.

We suppose that the tendency of the theory of liberation from the influence of substantive law views should be the ground of our approach to these initiatives. European Civil Procedural theory must throw off the shackles of substantive law, be on their own feet and build a procedural notion of autonomy, on a purely civil procedural foundation.

What?

This project systematically will relate:

(I) The concept of the principles of civil procedure in the EU, their composition and characteristics. (1) We intend to find out **the notion of civil procedure** with particular attention to the ratio of general legal categories, such as civil procedural relationships and procedural activities. (2) **The concepts of the fundamental procedural rights and principles of civil procedural law** will be examined. We will focus on **the principles as the corpus of basic provisions of civil procedure in the EU**. (3) **The composition of the principles and fundamental procedural rights** will be defined. We will emphasis**: (a) the existing system of civil procedure in the EU, (b) the contents of the formed basic principles and procedural rights. (4) The characteristics of the corpus will be investigated. We will analyse (a) development and (b) consistency of the procedural rights and principles.**

(II). We will continue with **the script of principles of civil procedure and fundamental procedural rights.**

With regard to **the presentation**, the author tends to the greatest naturalness, simplicity and clarity. For this, we introduce the division of research in four parts. The plan is first to analyse appropriate body of law and case-law of ECtHR with particular attention to the role of judicial discretion; further the historic sketch through Roman Law, German Procedural Law, French Civil Process and the procedural law of England and Wales will follow; the third part will devoted to the theory of the principles of civil procedure and fundamental procedural rights in the EU.

Finally we will prove an answer the question: ―Bringing the Fundamental Procedural Rights Home?‖- ―No‖.

Attachment 4, Research Portfolio
Research done at the Faculty of Law, University of Pavia, Italy

Papkova Olga

University of Pavia, Law Faculty

The compensation for non-material damages in the framework of cross-border family law

With Professor Carlo Granelli

1
05.06.2013

Scientific Quality

RESEARCH ISSUE AND QUESTIONS

This research is devoted to the issue of the nonmaterial damages in the framework of cross border family law.

The research is devoted to personality rights (nonmaterial rights). The focus in our research is on private ordering in private (international) law. Cross-border family law is our content driver and socio-legal studies our methodological driver.

Nonmaterial Personality Rightsare a key research domain. We intend to focus our attention on nonmaterial personality rightsin family law and on the protection of these rights.

Nonmaterial rights are the continental counterparts of the Personality rights. Nonmaterial family rights are the continental counterparts of nonmaterial rights and of family rights. They protect physical, psychological and moral identity of family members and of family. We would like to concern the protection of family nonmaterial rights in cross-border family law.

From the outset, the European Community set itself the objective, inter alia, of abolishing obstacles to the freedom of movement of persons.

These free movement rights were originally conceived for the sole purpose of enhancing economic integration and were, therefore, confined to those persons engaged in economic activity as workers and self-employed persons, as well as those giving or receiving services.

The EU competence to legislate on the free movement of persons has evolved overtime as reflected in subsequent Treaties. The Maastricht Treaty constituted a turning point by explicitly introducing the concept of Union citizenship, together with a number of associated rights, such as the right to move and reside freely in all Member States.

In 2009, the Lisbon Treaty recognized the free movement of persons among the objectives of the European Union.

Moreover, Article 45 of the Charter of Fundamental Rights of the European Union (the Charter) also guarantees the right of every EU citizen to move and reside freely within the territory of the Member States. The Charter is legally binding and applicable to the EU since the Lisbon Treaty entered into force in 2009.

Our point of departure is also the article 8 ECHR (right to protection of private life and family life).

Matters on compensation for non-material damages are one of the most controversial and topical in enforcement practice for today. Such matters have the priority also for every national jurisdiction and for the International private law, for European Union Law. This is because the matters of protection of the individual, his non-material rights and benefits are the same priority as the protection of property rights. The institute of the

compensation for non-material damages is one of the most complicated legal institutions, the content and application conditions of which do not have single, stable criteria in research and in the jurisprudence.[1]

Demarcation of the study

Research scope

The question of the compensation for nonmaterial damages is of burning theoretical and practical importance. It is a complicated and systematic project, interdisciplinary and comparative by nature. International Private Law, case-law, European law and European legal culture, Family law will be involved in this task.

Italy and the Russian Federation are the case-study.

Our research begins from the hypothesis that in the compensation for nonmaterial damages we could see the charity of a state, of the Community and of judges. The charity of a state, of the Community became clear in the legislation, the charity of judges – in their case-law on the issue.

Current debates

We aim at further developing the scientific debate on the characterisationand enforcement of nonmaterial personality family rights in every national jurisdiction, in the Community. The characterisation of nonmaterial personality family 'rights' is important in light of the enforceability in private law of the new generations of human rights, such as the right to a free movement for EU citizens and their family members (provisions of Directive 2004/38/EC).

The right for a person to exercise free movement is central to EU citizenship[2] and complements the other freedoms of the EU internal market, i.e. freedom of movement for workers[3], services[4], capital[5] and freedom of establishment[6]. In addition, as people can move freely between Member States, the principle of non-discrimination on the basis of nationality[7], sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[8] forms a crucial component of freedom of movement.

In parallel with the evolution of EU competence, free movement rights have been extended through legislation and case law to encompass not only workers, but all categories of citizens. The following Directives were adopted in 1990: Council Directive 90/365/EEC11 on the right of residence for employees and self-employed persons who have ceased their occupational activity, Council Directive 90/366/EEC12 on the right of

[1]Reale, 2015; Jagusch& Sebastian, 2013; Blake, 2012.
[2] Articles 20 and 21 of the TFEU, introduced by the Treaty establishing the European Community (Nice consolidated version – 'Treaty of Nice'), signed in Nice in 2001 and entered into force on 1 February 2003.
[3] Article 45 of the TFEU, introduced by the Treaty of Nice.
[4] Article 56 of the TFEU, introduced by the Treaty of Nice
[5] Article 63 of the TFEU, introduced by the Treaty of Nice.
[6] Article 49 of the TFEU, introduced by the Treaty of Nice.
[7]Article 18 of the TFEU.
[8] Article 19 of the TFEU

residence for students, and Council Directive 90/364/EEC13 on the right of residence for nationals of Member States who do not hold this right under other provisions of Community law, together with the members of their families. Directive 2004/38/EC14 was subsequently adopted to take account of the large body of case law linked to the free movement of persons and to integrate the fragmented approach of the previous Directives. The provisions of this Directive establish the right of entry and residence in the EU Member States for EU citizens and their family members as well as providing some safeguards against refusals of residence and expulsions.

We specify that doctrine and jurisprudence in Europe concerning the legal protection of privacy includes the scope of protection the privacy of personal memories, the intimacy of the home, married life, secret affairs, leisure etc.

Moreover, article no. 11 of Resolution no. 75-7 of the Council of Europe has established that —the victim should be compensated (...) for physical pain, mental suffering.‖

Physical damage to the personality of the human rights violations are the result of subjective closely related person called personal non rights: the right to life, health, physical and mental integrity.

Handed over the growing number of such damages which have not an economic content, but are caused by the violation of human values such as the very existence of individual, the physical integrity and health, honor, dignity, prestige or tranquility, intimate and personal image etc., pointing out that in reality they cannot be measured precisely, as assessed damagepatrimonial content, the issue of the compensation for nonmaterial damages seemsincreasingly relevant. Consequently, they cannot be repaired or compensated with a certain amount of money. But this is not a reason not to be compensated.

As yet, however, the compensation for nonmaterial damages is mainly researched within the situation of national law and European Union law, whether at the level of comparative national study and at the level of study of cross-border family law.

Our research into the enforcement of personality familyrights – through the compensation for nonmaterial damages – is conducted in our research line Liability.

We focus on the right to self-determination, particularly in family cross-border law. This focus is also connected with our research (which was done) into the compensation for non-material damages in Italy and in the Russian Federation. For example, in the Russian Federation according to the article 151 of the Civil Code the amount of compensation for moral damages is indicated by the plaintiff. We begin from the role of self-determination vis-à-vis the free movement of family members (within the European Union), the family migration and the possible restrictions in State regulation.

New debates

Personality nonmaterial rights are usually brought within the area of private law. We will investigate how personality nonmaterial rights in this regard may be delineated vis-à-vis the family cross-border law, European Law, having regard for the nonmaterial personal

rights (individual perspective: autonomy) and family nonmaterial rights (collective perspective). We thus study family law through the lens of the right to respect for free movement in the European Union, the migration(private life). A very strong connection with private international law is palpable.

This focus is linked with our research into European Union Law Studies which was done at Leiden University and to Course of lectures on Brussel and Lugano Conventions which was hold in Moscow.

At the moment there is the new discussion linked with the obstacles to the right of free movement and residence for European Union (EU) citizens and their families. We intend to identify the remaining transposition issues of Directive 2004/38/EC and the barriers to free movement (including entry, residence and access to social security) to provide an assessment of the main challenges at both EU and national level, and to determine the extent to which these obstacles hinder citizens in exercising their right. Also we intend to examine the existence of legal or practical instances of discrimination, the measures to counter abuse of rights, to compensate the nonmaterial damages, used by Member States, and data on refusal of entry and/or residence, expulsions and the reasons for such decisions. This focus is linked with our research into the compensation for non-material damages in Italy and in the Russian Federation, which led us to the conclusion that very few complaints and petitions have been made concerning EU citizens and their family members being discriminated against on grounds of their racial or ethnic origin in exercising their free movement and residence rights. However, Roma have faced discrimination when registering in another Member State or have been barred from living in caravans and subject to evictions, expulsions and deportations as a result. They also experience barriers in accessing employment, education, financial services, accommodation and social protection.

We propose the new debate in the determination of the personal scope of nonmaterial family rights and their protection (inter alia, linked with the rights before the birth and after the death). Usually, protection is offered from the moment of birth to the moment of death.

Research objectives

This research purposes to further our insight into two issues of increasing academic and social \ legal interest:

* the workings of the compensation of nonmaterial damages as one element of the liability for injury which violates personality rights (individual) and also the family rights (collective);

and, afterwards

* the embodiment of the compensation for nonmaterial damages in international (private) law, in cross-border family law; this principle is not found in some subsidiary provisions or diffuse case law, but is in the very heart of private law (for example, in the Code of Private International law, adopted in Italy in 2004; to examine how it has fared

in practice). It furnishes the best conditions for the elaboration of a concise scientific doctrine of compensation for nonmaterial damages as an integral component of personal injury law of the moral society.

Here in the compensation for nonmaterial damages (in legislation and in case-law) we could see the charity of a state, of the Community and of judges.

Relevance for outline field

The compensation for nonmaterial damages in family cross-border law has never been studied.

Most reviews of nonmaterial damages conduce to be couched in the terms the categories of nonmaterial (moral) damages which include the damage resulting from bodily injury or health, also called bodily harm, consisting of physical and mental/psychological pain, aesthetic damage, injury leisure etc. This category consists in pretiumdoloris‖, aesthetic damage (price of beauty‖), the injuries suffered by young people (pretiumjuventutis).

The next studied category consists of emotional harm, also called damage by ricochet, consisting of distress caused by damaging feelings of affection and love (for example, the damages caused by the death of someone loved). The third category is composed of damages caused by interference with honesty, honor, dignity, prestige or reputation of a person (insults, slander, defamation or other acts of the same kind). The fourth category covers damages consisting of violations of names, nicknames, reputation which is produced mainly by abusive use of these identifiers of the individual or collective entity. Personal injury/damage involves various forms, which is reflected in harming the physical integrity or health of various intensities: some may continue, affecting lifelong one person, others may be temporary and may affect the victim's physical and mental being.

Also the reviews of nonmaterial damages conduce to be couched in the monetary equivalent of non-material suffering and in the category of personal injury which includes pain and damage resulting from physical and/or psychological hurt (pretiumdoloris).

We do not a priori refuse this elucidation and in our comparative study we will do it also, but we believe that it is a simplification, and we raise it for discussion.

This also relates to the link between the compensation for nonmaterial damages and justice.

Here we could see the tradition which defines justice as positive love and benevolence and charity and generosity, not as merely following authoritative sovereign law (as in Hobbes legal positivism‖) or negatively refraining from harm‖ (as in Roman law). Here we couldsee a tradition which is to be found in Augustine, Shakespeare, and Leibniz, which claimsthat justice should not content itself with mere law-observance (since law can be unjust) or with avoiding injury, and that love and charity as the first of the social

virtues should be ascended‖ to and embraced in a completely adequate theory of justice. Here we could see that Justice is goodness measured in millimeters.

We will pay attention to recent legal practice comprising numerous judgments that decided civil compensations: aesthetic damage which is the result of injury consisting of physical and mental pain that occurs when the victim suffers mutilation, disfigurement, loss of a sense organ or a physical or mental infirmity or simply about the scars; entertainment damage is about limiting the human being to enjoy life, consisting of loss of enrichment opportunities, entertainment and relaxation offered by a normal life. Today, the term ―entertainment damage‖ has an international interpretation, which contributed to resolution no. 57-7 of the Council of Europe of 1975, which stated that this type of damaged is suffered by the victim which is no longer able to perform at his former workplace because of a harmful act, even when the measure was not its replacement with another person, or that is forced to make more effort to get the same result of his work and gives rise to compensation (article no. 5 and article no. 10); youth damage (or pretiumjuventutis) is defined as non-pecuniary damage suffered by a particular young human being who sees reduced his hopes for a normal life or kidnapped some recreations of existence; emotional damage has an indirect character and is caused by a person's mental and spiritual suffering caused by feelings of affection and love for a close person. These sufferings are caused by the death of a beloved person, or his infirmities, mutilation, injuries or serious disability. Emotional damage is also called pretiumaffectionis‖..etc

We will try to find whether the Russian and Italian models have the unique approach: towards reasonable and fair compensation for nonmaterial damages; whether in spite of the different criteria and methods of compensation for nonmaterial damages, stipulated *by Russian law, Italian law, reasonable and fair compensation reveals itself* as a multifaceted principle and more as a policy driver than a monolithic operational rule.

The tension between institutions and identities of modern society and justice may nowhere be more undisguised—the features of justice, designed to strengthen the morality of society, may actually weaken and undermine it. We mean the traditional doctrine of freedom of a judge. We support the idea that the criteria taken into consideration to determine the compensation must be motivated. We agree with this opinion, because motivation and compensation to invoke the criteria on which the determination was made precisely reflect her actual ability of the judge to decide, to retain and analyze the damage and it permits for the courts to exercise their judicial role of verification of judgment

Specific Research Questions

1. What is the correct legal characterisation of personality nonmaterial rights and how can these be differentiated specifically from fundamental rights and property rights?

2. What is the place of personality nonmaterial rights in the scope of the right to self-determination within the field of family cross-border law in particular?

3. What does the link between personality nonmaterial rights and family law?

4. What is the personal, temporal and geographical scope of personality nonmaterial family rights?

5. When they could be protected?

6. What is the sum of the compensation?

Metodology

Private Ordering

Private ordering in its first sense: when it may be situated outside the realm of State law and thus raises questions into the division of power between private and public actors, and into the latter's negative and positive obligations.

Multi-level governance.

We approach our research the influence of public law on private law relationships. The focus is on the direct effect of human rights law, on the "Europeanisation" of private (international) law. Private international law regulates the interplay between the different legal systems. Our focus here is on Italy, Italy and the Russian Federation.

Socio-legal Studies

Our methodological driver is the "law in action"-approach that we use during our research of the phenomenon of Judicial Discretion.

Multidisciplinary research would be the advanced form. Transdisciplinarity is co-creation of scientific knowledge by science and society. In addition, we conduct empirical research. This research is far from relying on the works of learned authors and scholars. We intend to study the actual practice of the compensation for nonmaterial damages in the scape of the cross-border family law Italy and the Russian Federation.

In order to do so, we would rely mainly on a database of the University of Pavia, Italy.

Also we intend to conduct semi-structured interviews with people in the field – mainly judges with a proven track record in cross-border family cases. We would like to have access to a wealth of cases to get a very good grasp of how the rules are applied by courts.

So ourprevious publications also touched upon judicial discretion, European Union Law, and my PhD thesis is devoted to Judicial Discretion, we would like to receive the interesting results.

THE REASONS FOR CHOOSING ITALY AND THE RUSSIAN FEDERATION FOR COMPARISON

Our scrutiny of the COMPENSATION FOR NON-MATERIAL DAMAGES IN ITALY AND IN THE RUSSIAN FEDERATION has made us aware of some interest to present an analysis of the compensation for non-material rights in the framework of cross-border family law in Italy, a former transitional country, where most of the basic features of the

personality rights (material and non-material) were adopted in the period immediately following the downfall of a dictatorial regime, soon after World War II.

The recent dramatic changes in the Italian political scene have been related to the expanding role of the judiciary. The judicialization of politics is a process at work in many other democracies, but in Italy the judicial revolution has been supported by an institutional setting of increasing independence and by the strong powers entrusted to public prosecutors. Judicialization has to be considered a permanent trait of the Italian political system.

Actually, for those interested in the comparative judicial role the Italian case might be of interest.

Russian Federation as a case-study presents great interest, especially in comparison with Italy, which do the part of the Community, also because the provisions of the article 8 of the ECHR are in force in the Russian Federation and the practice which is different from the European practice is the case of interest. The Russian Federation presents the 'traditional' migratory flow towards Western countries by migrants whose values are sometimes at odds with the Western ones.

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Attachment 5, Research Portfolio
Research done at the Faculty of Political Sciences, University of Pavia, Italy

Olga A.Papkova

The Role of the Judge in Semi-authoritarianism: Thought from Russia

with Prof. J.Ziller, the University of Pavia, The Faculty of Social Sciences

Scientific Quality

Research Issue and Questions

This project is devoted to the issue of **the Role of the Judge in semi-authoritarianism**. We aim to find out, explain and compare how "democratic" argumentations on the role of a judge are being designed, manipulated and realized in hybrid or semi-authoritarian regimes,[1] i.e. in political settings which are substantially authoritarian though not without a significant component of pluralism and contestation. We take *Russia*, possibly the most influential and geopolitically grave hybrid or semi-authoritarian state, as a case study, but also aspires to contribute to discussions about *the role of a judge in "undemocratic" (or fresh "democratic") contexts in general.*

The chief question this research purposes to answer is: ***How is the role of the judge seen under such political conditions?*** To answer this question, a differentiation could be made between *institutional* and *ideational* magnitudes of *the role of a judge. The institutional approach* to the role of a judge questions the relevance of the "democratic" provisions of the judicial role in a hybrid or semi-authoritarian settings, while *the ideational* measurement inquires for the thoughts and reasoning which affect, navigate and corroborate the role of a judge in the fresh "democracy".

In this setting the idea of *"sovereign democracy"* in the Russian Federation may be relevant. Sovereign democracy was devised during the last decade as the quintessential Russian alternate to the allegedly general (Western) idea of liberal democracy (Okara, 2008; Polyakov, 2007; Surkov, 2006). While sovereign democracy has not evolved into a fully cherished national *Weltanschauung* (ideology) of Russian Federation, its underlying thoughts and reasoning are of great sense for Russia's self-perception (and the policies arising from it) and for how the country is viewed by others.

Semi-authoritarianism and the Role of a Judge

The end of the Cold War had political repercussions that went far beyond international relations. With the collapse of Russian communism, nations within the former Soviet bloc established new regimes, and Russia itself moved toward democracy. *Democratic structures seemed the only way to mobilize internal support and held out the promise of international recognition*. However modern *Russia is called as the semi-authoritarian state.*[2] The thought of adding qualifying adjectives to "authoritarianism" is to betoken that these trajectories in politics employ political eloquence, establishments, and procedures which are not typically coupled with *authoritarianism,* but with *democracy* in the main. *We hypothesize that these "democratic" features cannot be comprehended as a "façade building" ceremony, simply and solely. They may fit various aims: a guiding function (to rule more efficaciously), a declarative role, and /or a legitimizing one*.

[1] The debate on "hybrid" political regimes is arguably one of the most essential modern events in comparative politics. The phenomenon of hybrid or semi-authoritarian regimes is linked to post-Cold War political development, and connects with regimes that democratized only parcel or that went through processes of regression after incipient democratic change, ultimately uniting aspects of democracy and authoritarianism (Diamond, 2002; Levitsky and Way, 2010).

[2] Authoritarianism with adjectives is as extensively utilized today as democracy with adjectives (Collier and Levitsky, 1997) before. Russia and other countries have been tagged as "electoral" (Schedler 2006), "plebiscitarian" (Rose et al., 2006), and more generally "competitive" authoritarian (Levitsky and Way, 2010).

In large parts of the non-Western world, the amount of semi-authoritarian countries exceeds that of democracies.[3] This is often reviewed as being part of a larger process of *democratic failure*.[4] The authoritarian trajectory in Russian politics from the mid-1990s is assuredly *parallel* with the political directions in other countries that were once part of the *"third wave of democratization"* (Huntington, 1993). However, in Russia and in an incremental number of other countries, *democracy* is not simply being superseded by politically completed authoritarian rule. Traits of *democracy and authoritarianism* are being intermixed. They correspond, even though apprehensively. Scholars struggle with the *conceptualization* of these essentially *novel political trajectories* that have imitated various characteristics of *democracy*, but which act in a definitely *non-democratic way*.

Courts have always played an important role in society. One of the most visible evolutions of the modern *democratic state* is the increasing *political relevance of the judiciary*.[5] Moreover, the era of terror has made the judicial role ever more important for the citizens and the community as a whole. The recent publications of A.Barak (2006) and R. Posner (2006) led to a great deal of public discussion about the Role of the Judge. For Barak, Gibson, Calderia and Baird[6], the judge in a modern democracy undertakes for a role that promotes some of the most contentious political issues of our day (Barak, 2006). Shapiro and Stone state that "a political jurisprudence of rights is today endemic and occasionally epidemic".[7] For Posner, judges are political actors and (sometimes) legislators who are motivated by the dual desires of making the world a better place and of playing the "judicial game".[8] There are, however, a number of checks on limitless *discretion* in the process, including the adversary system and the need to make conscious the methods used to reach a decision. Professor E. Chemerinsky writes that judges make law constantly, and in doing so they draw on their judgment, which is based on their ideology and experiences.[9] Professor W. Farnsworth concludes that once a case is close enough to create dissent, the source of law involved tends to diminish in importance; the decision ends up being made on the basis of policy judgments that cut across the divide between constitutional and non-constitutional sources of law.[10] The next contribution on the question of decision-making methodology comes from Michael Boudin.[11] In his remarks, Boudin agrees that the actual work of judges today is quite different from their historical roles of resolving criminal and civil disputes. Judges are indeed lawmakers, but, Boudin cautions, this role can only remain beneficial and secure if it is employed with due regard for the legislature. When courts act as reformers and effect dramatic innovation, they set themselves up against the democratic process and invite a backlash.[12] There is also the idea that judicial power is undemocratic, which rests on a conception of democracy that means "the rule of majority".[13] Although Barak, Posner, Chemerinsky, Farnsworth, Boudin and others address the age-old dispute over whether judges must interpret and not "make" law, the proposal demonstrates that this question cannot be answered in the abstract.

Indeed, a central premise of this paper is that the twenty-first century presents new challenges to the judiciary – challenges which may sometimes leave existing law and procedure in a kind of limbo. *Human cloning, computer data mining, and computer-generated judicial profiles, on one side, and the era of globalization, terror, post-communism, new political trajectories of many countries on another side, are obvious examples, but so is a low-tech circumstance like exploding caseloads*. Scholars` pragmatism,

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[3] Levitsky and Way, 2010, discuss 35 semi- or competitive authoritarian regimes from Latin America, Europe and Asia.
[4] See Huntington, 1993, for earlier processes of democratic regression; see Diamond, 2008, for the current one.
[5] Tate C. Neal and Vallinder Torbjorn (eds.), The Global Expansion of Judicial power, New York University Press, 1995.
[6] Gibson J, Calderia G, Baird V. On the Legitimacy of High Courts, (1998), American Political Science Review, 92.
[7] Shapiro M, Stone A. The New Constitutional Politics in Europe, (1994), 26, Comparative Political Studies, 409.
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[10] Farnsworth Ward, The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals, 86 B.U. L. REV. 1083 (2006).
[11] Boudin Michael, The Real Roles of Judges, 86 B.U. L. REV. 1097 (2006).
[12] *Id.* at 1098
[13] Russel P. Corry Lecture on Law and Politics. 1987, 12, Queen`s L.J. 421.

with its emphasis on "what works," might fill the legal void when new challenges arise. *But precisely what are the general solutions available to the law and the judiciary? Could we offer the receipt, suitable for any nation, any state?* This paper presents some preliminary answers to the questions. The new Eastern and Central European states can provide important insights in the matter, thanks to their relative common institutional development: a long period of communist rule and a transition to democracy which is still in the process of consolidation. In those countries the usual prescription for democratization has been "to forgive, but not to forget", as long as compromises do not make democratic competition or the agendas of governments irrelevant. Some scholars argued that this prescription is only valid for post-authoritarianism, not for post-communism: as Linz and Stepan (1996:24) put it, "in comparison to post-communist Europe, some of the long-standing authoritarian dictatorships we have considered in Franco's Spain, Salazar's Portugal, and Pinochet's Chile left more to build on in the way of a constitutional culture (...). In all three cases most of the principles of Western democratic law, while abused or put in abeyance in practice, were not fundamentally challenged". According to this argument, because of the confusion between law and politics and the overlapping between state and regime, democracy could *only* be sustained *in post-communist countries* ***with a new judiciary***. An analogy is sometimes established between post-communist lustration and denazification after 1945 (Morawski, 1999). But this analogy we consider as unconvincing. *Let us encourage an approach to studying the judicial role that* ***conceptualizes*** *the role of the judge in another new political trajectory in relation to liberal form of democracy, which is called as semi-authoritarianism. To emphasize the judicial role in semi-authoritarianism as one type of the political regimes among many, we need to analyze how the judicial role is claimed and sustained and how it reinforces, stymies, or mediates the political regime that might be grounded in culture, science, religion, kinship, professions, nationalism or whatever. How do the judicial role and its effects change as the democracy intermingles with authoritarianism? This question begets others: why and when does "nondemocratic" role of the judge triumph? How do different political regimes (democracy and semi-authoritarianism) appropriate the judicial role differently? And what do we mean by the judicial role? Our analysis exemplifies the value of such approach. We will show how collaboration and conflict among different forms (democratic and semi-authoritarian forms of* ***transitional*** *political regimes, modern and the past (in Italy, the Russian Federation) profoundly shape how a state understands what the judicial role is and what judges can do. If we do not investigate the judicial role in relation to different transitional forms of political regimes (liberal democracy and the mixed variant) we will fail to appreciate the full range of the effects of the judicial role, the complexity of the role of the judge, and the extent to which the politicization of judiciary (or judicialization of politics), however naturalized for some European states (e.g Italy), is never permanently secure. Ipso facto, underdevelopment of the relations between law, judiciary and politics requires research into the heart of the legal, philosophical, theoretical thought (Russian and comparative, liberal and another), namely.*

Law and politics: procedures for a New Era, the age of terror

The Judicial Role in democracy concerns chiefly **law and society, the age of terror** (A.Barak, 2006). **Law and society**. Democracy, as well as the rule of law, is a political concept which is highly supportive of a written constitution. Democracy is premised on the idea that the State is the agent of the people. Thus, O'Donnell (1999: 321, 318) writes that "Democracy is not only a (polyarchical) political regime but also a particular mode of relationship between state and citizens, and among citizens themselves, under a kind of rule of law that, in addition to political citizenship, upholds civil citizenship and a full network of accountability (...). All agents, public and private, including the highest placed officials of the regime, are subject to appropriate, legally established controls of the lawfulness of their acts". For Barak[14], the role of the judge in democracy is to understand the purpose of law in society, to protect Constitution and democracy, to help the law achieve its purpose. But the law of a society is a living organism.[15] It is based

[14] Barak, A, The judge in a Democracy, (2006), Princeton, 3.
[15] Dickson Brian, A Life in the Law: The Process of Judging, 63 *Sask. L. Rev.*373, 388 (2000), Cardozo Benjamin N., The Paradoxes of Legal Science 10–11 (GreenwoodPress 1970) (1928).

on a factual and social reality that is constantly changing.[16] According to my conclusion the establishment of the judicial role by the rule of law is not a lawmaker`s whim but it should be a result of socio-cultural and historical development of a society and law.[17] For Franklin and Kosaki courts are originally intended to be "republican schoolmasters," teaching the public to support the rights and liberties of their fellow citizens.[18] Professor J.Resnik uses architecture as a lens through which to inspect the changing nature of courts.[19] She sees courthouses as symbolic of the *democratic* principles embodied in the adjudicatory process. Professors Bone and Green's approach is to step back from the process and consider how procedural rules should be formulated.[20] Professors pursue some of the implications of changes in the way private and public disputes are resolved. Today cases may have hundreds of parties, be tried in multiple jurisdictions, and involve a number of judges seeking to resolve the issues. The scholars have not yet determined how active a judge should be in these practices, how possible and important it is for a judge to remain neutral in conducting them, what procedures a judge should employ, and what societal (or political) values are at stake. Professor D.Faigman calls on judges to learn science.[21] Judges today are required to adjudicate issues turning on complex questions of economics, statistics, science, social science, and mathematics. Professor J. Rachlinski, along with co-authors C. Guthrie, A. J. Wistrich, asks whether we should rely more extensively on specialized courts to meet the demands of heavier caseloads, increased time pressures, and ever more complex cases.[22]To answer this question, he conducted an empirical study assessing whether bankruptcy judges rely on the same cognitive heuristics as other judges and make the same judgment errors. However, Rachlinski did find that bankruptcy judges, perhaps even more so than generalist judges, reached different outcomes depending on their political orientation.
There is the special attention to the judicial role **in the age of terror**. So, Stephen Reinhardt remarks concern the pressures that have been brought to bear on judges, particularly during wartime, which is precisely when the need for judicial independence is greatest.[23] Professor G.Stone puts the tension between civil liberties and national security in historical perspective.[24] He points out that judges usually defer to the government, and that doing so might seem logical.[25]
We admit that the role of the judge in democracy concerns ***the society and law,*** *but we hypothesize that to comprehend the judicial role in the era of new political trajectories of many countries, it`s necessary to close a gap* ***between law and politics****. Firstly,* ***the alternative comprehension of politics and political aims*** *are required. Both* ***idealistic and realistic politics*** *will be under our review. We will demonstrate that judicial power should be linked with politics through the category "****the conscience of law (правосознание)".*** *We will consider* ***the conscience of law (правосознание) as the category which consolidates the classical theoretical legal methods, traditionally referred to the natural and positive legal doctrines****, both.* ***The judicial conscience of law (правосознание)*** *will be considered as the starting point of* ***the judicial power, judicial law-making****, on the one hand, and the category, getting the vital and wholesome normality in the process of demanding political movement to* ***the purpose of law****, on the other hand. We are going to examine the meaning of* ***the integration of the human rights, fundamental principles, and the state interest on the ground of the common aim, rooted in their uniform spiritual life, common culture****.*
We suppose that ***the problems of bankruptcy judges*** *could be resolved by means of* ***the judicial rank`s idea.*** *We are going to show what* ***the judicial rank*** *means concerning the role of the judge. We will prove that only such judges can become more adept in science and the scientific method.*

[16] Rehnquist William H, The Changing Role of the Supreme Court, 14 *Fla.St. U. L. Rev.,* 1.
[17] Papkova O.A. Usmotrenie Suda,(2005), Moscva, 64-199.
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[21] Id. at 1215.
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[25] Id. at 1327.

The Separation of Powers, Judicial Politicization, Independence and the Rule of Law

The *tenets* of the separation of powers, judicial independence, the rule of law are increasingly considered to be the general standards of a constitutional government, a successful democracy (Carothers, 2006; Morlino and Magen, 2008).[26]*However,* ***in many Western European countries*** *contemporary political reality shows that the division of powers, judicial independence became even* ***more liquid*** *and sometimes* ***bewildering*** *especially in what refers to* ***the legislative function*** *firstly shared with some heed and disinclination with the executive branch and now captured by the judiciary[27] including judicial activism phenomenon (in spite of the lack of consensus about its definition[28]). The European scholars write that nowadays* ***in continental Europe the judiciary*** *is faced with opinion as constitutional and supreme courts are acting like* ***legislators, creating the law of judges, sometimes with competition with the rule of law.[29]*** The subject ***of Judicial Independence*** and the related issues of **judicial activism, accountability, the rule of law** major concerns within and beyond the legal community, framed a number of discussions in the scientific literature. Scholars approach the topic of judicial independence and politicization from many perspectives. Does the Constitution provide an adequate framework for ensuring the proper measure of judicial accountability and independence? Are these virtues currently at risk? How should we select judges so as to minimize politicization of the judiciary? Does life tenure adequately protect judges from political pressures and other improper influences? Is it even possible for a judge to leave his\her politics outside the courtroom? Professor M.Gerhardt discusses the sharply divergent views on whether judicial independence is a procedural or substantive value.[30] Professor S.Levinson poses a foundational challenge.[31] He wants to know what we mean by the concept of "judicial independence." Levinson notes that judicial independence is a good thing, worthy of protection, but asks, independence from what? Can there be too much judicial independence? The problem in answering these questions, he opines, is the difficulty of separating the debate from the politics surrounding it. Russell (2001, 12) judges "quite unreal" the attempt at wholly insulating judges from their environment. According to Martin Shapiro, there is no regime with an isolated judicial corps free of political restraints (2008: 34). For my conclusion there are strong pressures on judicial activity which could lead to failures of the role of a court.[32] Feld and Voigt (2003) focus on highest courts and introduce a distinction between *de jure* and *de facto* Judicial Independence. The general proposition is that Judicial Independence helps to enforce the Rule of Law and therefore property rights, furthering economic growth and democracy (Moustafa 2007). We back up the opinion that the combination of democracy and the rule of law could simply be a normative stereotype, not reflecting well the real world of politics. This rhetorical stereotype is routinely reiterated in *the Constitutions of "fresh" democracies*.[33]For instance, the Spanish constitution of 1978 defines the new regime as a "social and democratic state of law" (article 1, paragraph 1). And the Russian constitution of 1993 speaks of a "democratic federative rule-of-law state" (article 1). We also find this normative stereotype in many political analyses.

We intend to direct attention to forms of assessment of the judicial role in democracy and semi-authoritarianism, -- essentially, what we are engaged in here today -- and particularly to ways that the judicial role in democratic and other transitional forms of political regime (the semi-authoritarianism)

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[26] The position is also often labeled as embedded liberalism (World Bank, 2004).

[27] Urbano M.B. The Law of Judges: Attempting Against Montesquieu Legacy or a New Configuration for an Old Principle?\\VIII World Congress of the International Association of Constitutional Law, Mexico, 6-10 December 2010.

[28] Keenan D. Kmiec , The Origin and Current Meanings of "Judicial Activism" in California Law Review, October 2004, 92, 3, 1445-60.

[29] See, example gratia: Interpreting precedents: A comparative study / Ed. by D. Neil MacCormick, R.S. Summers. Aldershot etc., 1997; Vereschagin A.N. Судебное правотворчество в России: сравнительно-правовые аспекты. М., 2004; Marchenko M.N. Судебное правотворчество и судейское право. М., 2007.

[30] Gerhardt Michael J., What's Old Is New Again, 86 B.U. L. REV. 1267 (2006).

[31] Levinson Sanford, Identifying "Independence," 86 B.U. L. REV. 1297 (2006).

[32] Papkova O. Opt.cit, 300.

[33] Examples, among many, can be found in the 1991 constitution of Bulgaria (preamble); the 1991 constitution of Slovakia (chapter 1, article 1); the 1992 constitution of the Czech Republic (chapter 1, article 1); or the 1997 constitution of Poland (article 2).

derive from ***similar*** *(even identical?)* ***understandings of the judicial role****. Note, for example, the degree to which the democratic and any new political regime of a transitional country use the overlapping tools:* ***the Separation of Powers, the Rule of Law, Fundamental Principles, Independence of the Judiciary, Human Rights*** *to list a few significant terms of the judicial role. How are democratic and other claims of the judicial role produced and assessed? What gaps or disjunctures arise in such processes? How do assessments shift over time, such that claims, activities, and persons that are considered illegitimate are sometimes redefined at subsequent moments -- and vice versa?*
In line with this, we advance the theory about ***the alternative meaning of the Judicial independence (Independence from what?) in any form of transitional political regime (democratic or semi-authoritarian) on the ground of the phenomenon "judicial conscience of law"****. With that end of view we are going to examine the* ***lively fundamentals of the judicial role, its tool and organ - the judicial conscience of law (правосознание)****. We hypothesize that the decay of the judicial role consists not only of the abuse, dependence of courts, judicial system crisis. We will consider it as the ripe fruits or displays of* ***inherent decay of the judicial role, which has taken place already****.* ***We will show that the level of the judicial conscience of law (правосознание) ranks with the Judicial Independence.*** *We will answer the question****: Is it even possible for a judge to leave his\her politics outside the courtroom?*** *We are going to examine whether the problems of Judicial Independence could be resolved on the basis of* ***the correspondence of the conscience of law (правосознание) with the state-legal organization of a nation to counterbalance the liberal idea of universalism.***
We hypothesize that in any transitional state democratic foundations, especially, of the role of the judge, established by law, but not followed from a national need, result in ***the dichotomy of the natural judicial conscience of law (правосознание) and the positive conscience of law****. We are going to show that this divarication is the failure of judicial law-making and the result of the conscience of law`s deformation and blemish.*

In relation to the ***conditions for the Judicial Role*** we should have in mind the importance of ***court discretion*** centered on the theory of **the separation of powers.** Judicial discretion appears as something questionable because it can place the judge in the position of a legislator.[34] Posner maintains that the judge may exercise his discretion and may rely on his ideological views. But doing so is not merely political, because ideology is about much more than political affiliation.[35] For Arrunada&Andronova only constraining judicial discretion is instrumental in protecting freedom of contract and developing the market order in civil law (Arrunad&Andronova, 229). *We are going* ***to continue our long-term investigation into the mechanism of court discretion*** *with special attention to its meaning for the application of democratic foundations in novel political trajectory.* ***We will link the judicial discretion to the conscience of law (правосознание).*** *We contribute to discussions about* ***the paradigm of the conscience of law and the court discretion****. We will examine the theory that the court discretion is connected with the* ***idea of a judicial rank****. We are going to consider the idea that* ***judicial discretion is grounded on the role of a judge as the keeper of positive law****. We will rely on the positive law, which is based on natural law; the natural law which is created by the judicial conscience of law (правосознание) by* ***the use of discretion****. We are going to divide* ***the natural and positive judicial conscience of law (правосознание).***

DEMARCATION OF THE STUDY

RESEARCH SCOPE

The question of **how democratic role of a judge is seen under semi-authoritarianism** is of burning theoretical and practical importance. It is a complicated and systematic project, interdisciplinary by

[34] Papkova O. Opt.cit, 152.
[35] Posner Richard A. The Role of the Judge in the Twenty-First Century,(2006), 86 B.U. L. REV. 1063.

nature. Law (Constitutionl, Proceedural), Politics, International Relations, Legal and Political Philosophy are involved in this study.

Our research begins from the hypothesis that the role of a judge may also be thought over a weighty, though under-researched variable of *non-democratic* rule.
The role of a judge may be bound with various forms of political settings—democratic as well as non-democratic. At the heart of this research is the plain straining between "undemocratic" rule and democratic role of a judge. In the instances that the judicial role is being weighed as a relevant variable of new "democratic" regimes, it is most generally espied in instrumental terms.

The research will take over philosophical and theoretical perspectives on the issue of judicial role under mixed political transitional conditions. *Ipso facto,* **our aim will be the appropriate use of the theory.** The project is oriented toward advancing, developing or refining theory in the judicial role`s field. Our study will be shaped by the particular body of theoretical literature (*inter alia,* on my two monographs). The project intends to stand vis-à-vis the particular body of literature. "Theory" will give a chance not only shed light on the nature of the contemporary political order in Russia but also make a useful contribution to the scholarly discussion on the role of a judge within both the conception of liberal democracy and the idea that is explicitly opposed to the liberal variant.

My chief point is that the role of a judge is still to a significant extent determined by the after-effects of the largely non-digested, multi-dimensional category of *the conscience of law (правосознание)*, influencing many aspects of socioeconomic, historical, cultural, political life in any society. This idea runs all through the research. Supporting meta-perspectives on *the conscience of law (правосознание),* we aim also to propose a more integral way of explaining political change in modern Russia. We would like to debate a theory about the role of the judge on the basis of the conscience of law`s concept of Ivan Ilyin.[36] Besides, we intend to test does the theory of Ivan Ilyin show multiple parallels to and compatibilities with well-established legal doctrines and dogmas or not?

RESEARCH OBJECTIVES

This research purposes to further our insight into two issues of increasing academic and political \ societal \ legal interest:

* the workings of semi-authoritarianisms as an increasingly weighty form of government; and, afterwards
* the embodiment of the judicial judge in the novel political settings.

We intend to progress ***the foundations of politics and the judicial role to the axioms of the role of the judge and the conscience of law (правосознание)*** **as the ABC of any transitional nation.** So, the findings of the project will have intellectual, political and social significance.

In **the Part I of our research** we are about to find out, explain and compare how "democratic" argumentations on the role of a judge are being designed, manipulated and realized in hybrid or semi-authoritarian regimes. We intend to apprehend *the theoretical and the ideational* measurements that inquire for the thoughts and reasoning which affect, navigate and corroborate the role of the judge in **Italy** as **the transitional (democratic) country of the past**, **in the Russian Federation** as **the transitional (semi-authoritarian) modern state** in comparison with the theory of liberal democracy.

We are going to see:

[36] Ilyin Ivan, Sobranie sochineniy v 10 tomakh, Moscva, 1993-1996.

What is the role of the judge in the above transitional states? What is its relation ***to law and politics****? Does the role of the judge lead to stability or change?*
The focus of this part is placed in ***the idea of the conscience of law (правосознание) as the tool of the judicial role****. We will suggest the alternative definitions of politics and political aims (regarding the judicial role). The discretion of the judge (on the ground of the theories of judicial syllogism, R. Dworkin and my own), the judicial conscience of law, the relation between the natural law, the positive law and the conscience of law (natural, positive, judicial) with respect to the judicial activity will be under our review. We will concentrate our attention on the integration of the human rights, fundamental principles, and the state interest on the ground of the common aim, rooted in their uniform spiritual life, common culture; changes of legislation, political ideal and state legal ideology as regards the judicial role.*

In ***the Part II*** we will ***conceptualize*** this essentially *novel political trajectory,* will see various characteristics of *democracy* and activity in a definitely *non-democratic way*.
We are above to stimulate an interest in the political eloquence, establishments, and procedures which are not typically coupled with *authoritarianism,* but with *democracy* in the main and **their aims**.

We intend to see what the Sovereign Democracy in Russia and its sources are. We will concern the sovereign democracy in West Europe, Taiwan and others, the doctrine of Carl Schmitt (The Concept of the Political, (1926)).

The comparative analysis of such liberal democratic tools as ***the Separation of Powers, the Rule of Law, Fundamental Principles, Independence of the Judiciary, Human Rights with respect to the judicial role*** *in the transitional country of the past, Italy, and in modern transitional Russia will be under our review. We will suggest* ***the institutional*** *approach to the role of the judge which questions the relevance of the "democratic" provisions of the judicial role in the new political settings. We will pay attention to the* traits of *democracy and authoritarianism in the above tools.*

RELEVANCE FOR OUTLINE FIELD "THE ROLE OF THE JUDGE"

Handed over the growing number of semi-authoritarian regimes in modern world, the issue of **the role of the judge under novel "democratic" conditions** seems increasingly relevant. As yet, however, the judicial role is mainly researched within the situation of democratic society and law, whether at the level of the nation state or beyond. This project affixes shade to this democratic "slope" of much the role of a judge research.

In the fast "swelling" scholarly research on authoritarianism the issue of the role of the judge has remained almost non-existed. Most reviews of semi-authoritarian regimes conduce to be couched in dichotomous terms as conflict or contradiction between power, law and society. We do not *a priori* refuse this elucidation, but we believe that it is a simplification, and we raise it for discussion.

Our fresh analysis of the judicial system of Italy, the transitional country of the past, as well as my experiences in the last decade as consultant for judicial reform in the Russian Federation, has made me aware that scholars and members of the legal professions of different countries who are engaged in devising and revising the features of the transitional judicial systems tend to concentrate their attention on the measures intended to protect judicial independence and disregard those that favor accountability. Such an attitude is fully understandable in view of Russian and Italian experience with their previous undemocratic political regimes, but not necessarily adequate for the future needs of the judicial role in different (democratic and novel "democratic") political settings.

This also relates to the link between the role of a judge and political stability or change.
Semi-authoritarian regimes are weighed to be more elusive than either democracies or full dictatorships (Brownlee, 2007; Huntington, 1993; Levitsky and Way, 2002). Instability normally follows from the

intrinsically conflicting nature of these regimes: the mixture of authoritarian practices with principally democratic institutions and procedures. "Authoritarian regimes may coexist indefinitely with significant democratic institutions", Levitsky and Way (2002, 58) debate, but "the coexistence of democratic rules and autocratic methods (…) creates an inherent source of instability". The tension between institutions and identities may nowhere be more undisguised—the "democratic" features of the role of a judge, designed to strengthen it, may actually weaken and undermine it.

ACADEMIC RELEVANCE

Several bodies of theories will be touched upon:

Theories of Democracy that aims to see judges as a democratic institution (Democracy is not a power of the people but a power exercised in the name of the people; Democracy is not a power of the people but a set of principles, the Rule of Law)
Doctrine of Montesquieu
Idea of judicial activism
Concept of the conscience of law (правосознание) of Ivan Ilyin
Legal Positivism
The concept of Natural Law
Idea of liberal Democracy
Concepts of Sovereign Democracy in West Europe, Taiwan
Doctrine of Carl Schmitt
Theory of judicial syllogism
Dworkinian theories of discretionary power and "one right answer"
My theory of judicial discretion in the Russian Federation
Idea of the Sovereign Democracy in the Russian Federation (The Liberal (Westernized) epicenter; Conservative/revolutionary (Slavophile) epicenter; Conservative/preservationist epicenter).

METHODOLOGY

To achieve the above goals, some methodologies will be applied in the study.

1. Theory

One source is the theoretical framing of the research. Most generally, theory in our research organizes strategies for discovering similarities and differences in the role of the judge`s field in different transitional political conditions (democratic and semi-authoritarian). Theory is used to derive the questions of the judicial role, explain why it is a puzzle, identify gaps in our knowledge concerning the role of the judge, and frame expectations from the *alternative approach* to the judicial role. Theory can also help to explain what this research will contribute to knowledge on the judicial role by suggesting how the political and judicial world has changed in ways that the theories cannot yet account for, by *identifying the judicial role`s ingredients (nature of the judicial role, its idea, the conscience of law), judicial discretion as the condition of the judicial role (on the ground of my monograph on the court discretion)* in the context of mixed political settings and suggesting why these are modified or missing in the liberal democratic context, and by disclosing how this research will help us refine democratic concepts or the scope of theory on the judicial role (*theories of Democracy that aims to see judges as a democratic institution, doctrine of Montesquieu*, *theory of judicial syllogism, Dworkinian theories of discretionary power and "one right answer", my theory of the judicial discretion in the Russian Federation, idea of judicial activism)* more precisely.
Among other things, theory is an orienting device that highlights the Russian sovereign democracy`s idea, its comparison with sovereign democracies in West Europe, Taiwan, the thought of Carl Schmitt. Theory is a means that problematizes the comparison between the judicial role in the transitional (democratic)

countries of the past (Italy) and the modern transitional (semi-authoritarian) state (the Russian Federation). **We will rely on the results of the research in Italy concerning the separation of powers.** The abstract concept of **the judicial conscience of law** might look like on the ground. Russian scholar Ivan Ilyin was studying the phenomenon of the conscience of law. So, the theory describes how the thought of Ivan Ilyin is comparable with the idea of liberal democracy, legal positivism, the tenet of natural law. In doing so, we make explicit how "the judicial role" is enacted or operationalized in our research, as well as making a convincing argument for why we need to reassess the meaning of the concept. In addition to spelling out the connections between key concepts, we should also, if possible, offer examples of evidence that might challenge expectations (**on-line interviews of justices of constitutional or supreme courts in the Russian Federation),** call into question an argument or an interpretation. If a powerful group does not become involved in negotiating important legislation, for example, we may need to spend more time analyzing how the judicial role is defined in relation to this issue or focus more implementation than enactment.

In my account, theory offers a framework for identifying questions concerning the role of the judge, helps suggest locations for investigating those questions, and it offers a means for both specifying the particulars of a nation and for generalizing from particular contexts or cases to others. Theory also provides a framework for helping to elaborate the terms (*inter alia*, the conscience of law, the idea of the judicial role, the ABC of the judicial role, etc) under which explanations are suspect or discredited, by suggesting the conditions or findings concerning the alternative meanings of politics, political aims, relation between natural and positive law through the judicial conscience of law, judicial discretion and the conscience of law, that would cause us to revise our predictions or reject our explanations. We intend to make the link between theory and evidence as explicit as possible.

2. Multiple Methods (triangulation)

We intend to use different strategies to gather evidence. The methods I have used earlier included field work, where my role has ranged from full participant in court procedure as the judge or consultant, in the legislation`s drafting as the participant to solely an observer, interviews with judges, both formal and informal, the analysis of contemporary and historical documents (e.g. newspaper stories, official documents as well as informal, private documents, and archived, historical sources of various kinds--letters, drafts of documents, memos). Each of these methods calls for distinctive forms of expertise and skepticism.

In this research the standard line on "triangulation" is going to be used. We intend to compare the 50-years old thought of Ivan Ilyin with the contemporary idea of Sovereign Democracy in the Russian Federation, the role of the judge in the transitional democratic countries of the past (Italy) and in modern semi-authoritarian transitional state (the Russian Federation) to try to assess changes (or not?) over time, conduct intensive field work in one part of the judicial role and conduct on-line interviews with justices of constitutional, supreme courts of the Russian Federation and Italy or review published reports of cases decided by Supreme and Constitutional courts in Russia to learn about other parts. As the specialist on procedural law in Russian courts, the prolific scholar whose work has appeared in the leading law reviews in the country and been highly influential with commentators, lawyers and courts in the Russian Federation, including the Russian Federation Supreme Court, Supreme Arbirazh Court, the State Duma, the Institute of Comparative Law under the Government of the Russian Federation, the President Administration; as the consultant on the judicial reform in the Russian Federation, participator of the drafting of the new Civil Procedure Code of the RF, I can be sure of the appropriate term of access to the justices and the places.

Triangulation is going to take the form of collecting different kinds of evidence, all of which is directed toward examining the same phenomena of the judicial role. In practice, this form of triangulation intends to be of often organized as a series of comparisons. We compare the evidence collected from different sources **(theoretical, philosophical, legal literature, internet sources, legislature, reports of cases, my monographs on the problem of judicial discretion and European Judicial procedure)** in order to better understand the biases or omissions of each and to produce a more comprehensive view of the phenomena of the role of the judge we investigate. So, we might compare **academic thoughts with**

official accounts, what judges and politicians say --in interviews, surveys, informal conversations, emails or written reports, on the websites of the Institute of Sovereign Democracy of the Russian Federation, constitutional and supreme courts, to the media--with what justices do, what they do in democracy with what they do in semi-authoritarianism, what they do over time, and so on. These sorts of comparisons will almost inevitably lead to a more complex account of what is going with the judicial role.
But it is not always easy to reconcile or even interpret the differences that such comparisons might reveal. Are these differences inconsistencies? Do they represent alternative views that correspond to different political locations? Do they reflect duplicity, politics, or judge's sophisticated understandings of the constraints or the demands of their standing? There is no simply set of principles which allow us to interpret the patterns or gaps that emerge in comparisons of these sorts but an effort to explain them will almost always prove fruitful. Responding to this sort of variation is one way of organizing the iterative relationship of our research as it unfolds. The discrepancy between what has become known as *the judicial role* ***on the books, the formal, textual law of legislation and judicial opinion*** *that is the province of exegesis, and the unruly law as practiced, gave rise to a vibrant, interdisciplinary meaning of the role of the judge.*

We intend to use "contrasts": the point is to point up important differences on the judicial role across the transitional country of the past (Italy) and modern political trajectory of the Russian Federation.

We intend to use "validity": *descriptive validity of the judicial behavior* as the basis for all other forms of validity. Behavior of supreme and constitutional judges must be attended to, and with some exactness, because it is through the flow of behavior – or more precisely, judicial action – the judicial role finds its meaning, also. This "reportage" refers to specific events and situations dealing with the judicial role in or out of the courtroom. Descriptive validity rests entirely on observable data but these are matters on which, in principle, intersubjective agreement could easily be achieved, given appropriate data.
We intend to use "interpretive validity" which refers to representations of what described judicial behaviors, events, and objects mean to the justices observed. Interpretive validity seeks to capture the judicial role's perspective. Interpretive validity has no real counterpart in quantitative-experimental validity typologies of the judicial role. It is inherently a matter of inference from the judicial words and actions in the democratic and another political regime (semi-authoritarianism) studied, grounded in the language of the justices studied, relying as much as possible on their own words and concepts. The goal of interpretation is to describe the judicial role's "lay meaning " and "theories-in-use". The descriptive accounts serve as warrants, and consensus should be achievable about how to apply the concepts and terms of the judicial role. The concepts and terms of both descriptive and interpretive validity are "experience-near,' the local language in use among the justices, although interpretive validity might also involve assessments of the accuracy of informants' report.
We intend to apply theoretical validity which moves to a more abstract account about the judicial role that proposes to explain what has been observed.

THE REASONS FOR CHOOSING ITALY FOR COMPARISON AND THE PLACE FOR RESEARCH

Our scrutiny of the role of the judge in Italy in the framework of the separation of powers doctrine[37] has made me aware of some interest to present a brief analysis of the Separation of Powers, the Rule of Law, Fundamental Principles, Independence of the Judiciary, Human Rights *with respect to the judicial role* in Italy, a former transitional country, where most of the basic features of the judicial role were adopted in the period immediately following the downfall of a dictatorial regime, soon after World War II.
The recent dramatic changes in the Italian political scene have been related to the expanding role of the judiciary. The judicialization of politics is a process at work in many other democracies, but in Italy the judicial revolution has been supported by an institutional setting of increasing independence and by the strong powers entrusted to public prosecutors. However, until 1992 judicial power was somewhat

[37] The research was made at the Faculty of Law of the University of Insubria (Italy) under the Fellowships Programme of the Landau Network-Centro Volta (Italy) (summer-autumn 2011) .

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balanced by the strength of the political class. But the political crisis that came to a head in 1992 has opened a political vacuum that the judiciary has been able to fill.
The 1996 elections have brought to power a new and stronger political alliance, the Ulivo. A new political stability could lead to a containment of judicial power but it is unlikely that the Italian judiciary will be brought back to its traditional passive role. Judicialization has to be considered a permanent trait of the Italian political system.
Actually, for those interested in the comparative judicial role the Italian case might be of interest.

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Attachment 6, Research Portfolio
The evaluation of my research (Russian Part) done by the People's Friendship University of Russia, Moscow (Professor V. Bezbakh)

ФЕДЕРАЛЬНОЕ ГОСУДАРСТВЕННОЕ АВТОНОМНОЕ ОБРАЗОВАТЕЛЬНОЕ УЧРЕЖДЕНИЕ
ВЫСШЕГО ОБРАЗОВАНИЯ

РОССИЙСКИЙ УНИВЕРСИТЕТ ДРУЖБЫ НАРОДОВ

ЮРИДИЧЕСКИЙ ИНСТИТУТ

КАФЕДРА ГРАЖДАНСКОГО И ТРУДОВОГО ПРАВА

Professor Vitaly V.Bezbakh, Dr.Sc. (Laws), Ph.D. (Laws),
Department of Civil and Labour Law

Law Institute
People`s Friendship University of Russia, Moscow, Russian Federation
Review of the scientific research

Author: Olga A. Papkova, PhD.
Title: Non-material damages in the Russian Federation
Reviewer: Professor Vitaly V.Bezbakh, Dr.Sc. (Laws), PhD (Laws)

1. General description
The research is written on 120 pages all together. The structure of the research conforms to principles and requests to the structure of scientific research.
The author has studied and used appropriate number of bibliographic sources (used and quoted in the research). This indicates a deep theoretical knowledge and very good orientation in the publications involving the problem discussed in the study.
The research fulfills the formal requests on excellent level.

2. The topicality of the thesis
The Russian Federation intends to secure the high level of legal protection of rights and freedoms of citizens, the establishment of an effective system of fair and real reimbursement and compensation for damages caused by unlawful acts.
The Russian legislation states non-material damages as one of the types of harm caused to a person, and provides for the possibility of its compensation.
The first study of the monetary compensation for the harm caused to honor and dignity of citizens was made by GF Shershenevich in pre-revolutionary Russia. In the 20 years of XXc the discussion on the compensation for moral damages, thanks to the participation of such Russian legal scholars as I.Braude, K.Varshavsky, A.Zeyts, B.Lapitsky, B.Utevsky and others, had revived. Until the 60s the study of issues related to non-material damages was conducted. Since the 70s, the significant contribution to the development of the principles of non-material damages was made by A.M.Belyakova, S.N.Bratus, N.S.Malein, L.A.Maydanik, N.Yu.Sergeeva, VA Tarhov, M.Ya.Shiminova, K.B.Yaroshenko and others. In recent years, the problem of legal regulation of non-material damages is considered in scientific papers of S.A.Belyatskin, E.A.Mihno, S.V.Narizhny, O.A.Peshkov, I.A.Suharevsky, A.V.Shichanin ,

A.M.Erdelevsky et al. A lot of researchers perceive the non-material damages as the most important problem in the field of the defense of rights and freedom of citizens.
The researcher bases her study also on her own monograph:
Papkova Olga A. Usmotrenie Suda (The Discretion of Court), Moscva, 2005,
which was named as one of the best performances in its field and received the high evaluation not just of the Russian and foreign scholars but also of the State Duma of the RF and of the judges of the Supreme Court of the Russian Federation.

All these studies are taken into account in the research of Dr.Papkova.

The author has performed good orientation and wide knowledge of different parts of legal theory considered in the research: the main provisions of moral damages and conditions of compensation (chapter 1); the concept and the essence of non-material damages; the compensation for moral damages as a way to protect the non-material benefits and the non-property rights.
The author has performed good orientation and wide knowledge of the Russian legislation on the topic: the liability for non-material damages (chapter 2); the terms, forms and methods of the compensation for moral damages; criteria and method of assessing the amount of the compensation for moral injury.
The research is made on the high scientific level.
The topic of the research is current and relevant in the context of up-to-date research in the field of Russian Private Law.

3. Aims and methods of the research
Chapters 1-2 are theoretical background of the research, combined with the relevant judicial practice.
Dr.Papkova has performed the analysis of the theoretical and practical issues of non-material damages, has revealed existing gaps in the relevant Russian legislation and made some concrete proposals to settle them.
The aims, background of the research problem, hypothesis and research methodology are clear, as so the results of research, its` interpretations and offers how to improve the relevant Russian legislation.
The study examines such questions, as:
a) the definition and the nature of non-material damages;
b) the application of the limitation period for claims for the compensation for moral damages;
c) the identification of persons who have reason to demand such compensation and to bear responsibility for this compensation;
d) the determination of the criteria and of the method of assessing the amount of the compensation for non-material damages.

Dr.Papkova points out the following main provisions, which contain elements of novelty:
1. The author offers to state the presumption of the non-patrimonial damages in the Russian legislation. This is especially important in the case of physical and mental sufferings, caused by a committed crime. Referring to the Latin expression *Ei incumbit probatio qui dicit, non qui negat*, I have the opinion, that the commission of any offense is accompanied by non-material damages. If the Russian legislation could be changed, the victims in all criminal cases would have the right to demand the compensation for physical and moral sufferings.
2. The author truly indicates that the presence of a causal link between the non-material damages and offenses, which is one of the conditions of the responsibility for moral harm, is not always obvious. For example, in the case of the non-material damage,

caused to health in the form of disease which was the result of the affect of environmental hazards, first of all the existence of a causal link between the disease and this effect should be established, should be proved.
3. The author proposes that on the claim for the compensation for moral damages should extend the statute of limitations, the use of which should be carried out according to common rules. In my view, this change of the Russian legislation would correspond to and within the meaning of Russian civil law, and human rights.

The chapters 1-2 are nice examples of active research work in theory of Russian Private Law and in the fields of Russian legislation and judicial practice.
The research is inspired from of the theoretical, practical and methodological point of view. Aims and methods are clear; author represents the ideas and knowledge with sufficient theoretical background. The aims were fulfilled, methods of research work are appropriate to the aims and hypothesis formulated in the research.

4. Results of thesis and their benefit
The above said brings to a conclusion that the author is able to undertake and realize profound research works in the field of national and comparative private law, judicial discretion, legal culture.
The theoretical background of the reviewed thesis, as well as the active research work performed by the author is beneficial to existing materials and ideas relating to researches in the field of theory of non-material damage and its compensation.

5. Questions
1. Does it seem appropriate to complement the Protection of business reputation of legal entity, stating it as follows: "A legal person in respect of whom the information discrediting its business reputation was spread, has the right, in addition to the refutation of such information, to claim the reimbursement of damages and the financial compensation for moral damages caused by its spread."?
2. The researcher points out that the determination of the amount of compensation for non-material damages is made by court according to its discretion. However, the problem of the lack of precisely formulated criteria for assessing the amount of compensation for moral damages and of the clear methodology for quantifying the amount of such compensation gives rise to complexity. How could it be settled?

6. Conclusion
In my opinion, the research of **Dr. Olga A. Papkova** meets the high scientific requirements and I recommend it to be presented at the University of Pavia, Law Faculty, Department of Private law.

Professor Vitaly V.Bezbakh,
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Moscow, May 18th, 2015

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Attachment 7, Research Portfolio
The Collaboration Programme

RUSSIAN, ITALIAN COLLABOR ATION IN THE FIELD OF CIVIL PROCEDURAL LAW

13 . 09 . 2010

P.Nappi, O.Papkova

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ABSTRACT

The Russian, Italian collaboration programme in the field of civil procedural law commenced in September 2010 with the following objectives: to improve knowledge in the field of Russian and Italian Civil Procedure, to prepare scientific writings on the subject in English, Italian, Russian and to stimulate information and scientific exchange between Lomonosov Moscow State University (MSU), People Friendship University of Russia, Moscow (PFUR), Russia and the University of Ferrara (UNIFE), Italy. Civil procedure specialists of University of Ferrara, Italy, and of Moscow State University, Russia, participate in this programme, including Professor P.Nappi and Associated Professor O.Papkova. The total duration of the project is 10- 12 months. Methodologies are focused upon the organisation of an effectively functioning collaboration, preparing of joint scientific writings for publishing in Italy (in Italian language), in Europe (in English language) and in Russia (in Russian language). An international quality scientific comparative programme is also developed to allow improvements in the field of quality of teaching Civil Procedural Law. In addition, specific research activities, involving on- line collaboration, the discussion and meeting of partners, are essential for successful cooperation of partners. This project can be considered as an example of successful collaboration between the Universities of two countries. It will not only led to improvements of knowledge in the field of comparative (Russian and Italian) civil procedure, implementation of new teaching or scientific methods, but will also help in establishment of scientific collaboration, information exchange and transfer of knowledge (via visiting scientists programme) between participating Universities of the countries.

INTRODUCTION AND PURPOSE

(A).Courts administer *justice* in all advanced nations of the world. Courts play a central role in both the legal and political processes in many countries. Legal actors have a stake in making sure that legal processes and procedures are perceived as legitimate, both by the general population who might use the legal system, and by the professionals who operate it. A relatively constant series of issues about whether courts provide justice and are fair, efficient, serve to structure alongstanding debate about how courts operate and the best rules of process to determine the best way for resolving of disputes and substantive legal claims.

Our subject will be justice on civil and commercial cases, done by judges, for particular parties. Our concern will be limited to the procedural efficiency and fair trial.

The promise for improving the quality of justice is surely greatest in the areas where injustice is located.

Our emphasis will tend to be much more on injustice than on justice, so the samples of injustice offer the best possibilities for improving quality of justice.

Some typical illustrations will show types of injustice that are now prevalent in Russian discretionary justice.

- B. wrote and published the article in the newspaper that the Judge O. hears cases on behalf 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 rubles. According to the Article 1101 Civil Code of RF (hereinafter – CC RF) in determining of the amount for compensation for moral damage, the court must consider the requirements of reasonableness and justice. In the decision the court did not motivate the reasons justifying the full satisfaction of the claim.
- The Small Enterprise (SE) and The Limited Liability Company (LLC) entered into the contract under which the SE should put a line for the production of casein, the LLC must 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 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 CC RF). The court did not apply the category of equity as a general principle of attribution, set out in the Article 1 CC RF. The result was injustice. 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 bad faith and failed to provide evidence to delay the process. However, there won`t such actions in the conduct of the party. The court found a dishonesty in the conduct of the plaintiff incorrectly. The result was injustice.
- The Bank extended the credit to the Closed Joint Stock Company (CJSC) under the credit agreement. 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 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 bed faith, requiring the simultaneous application of named types of liability. 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 the testimony. By virtue of article 162 CC RF, written evidence is admissible in such case. Court did injustice.
- B. brought a claim for the recognition of privatization of the apartment. The sister of 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, in the court Ruling not justifying why the amount is decreased.

(B). Judicial systems in most developing countries are perceived to be in crisis: cases take too long, cost too much, and are littered with dishonest judges. Litigants are dissatisfied with the process, creditors rare use bankruptcy laws and shareholders feel it would be impossible to win a case against the controlling investor in a local court. Even though there is little

consensus on exactly what judicial efficiency means or how to measure it, people seem to agree that it is low. As a result, several countries have opted to implement judicial reform in the hope of improving the efficiency of civil procedure. Judicial reform efforts, both in developed and in developing countries, have been varied and have met with mixed success.

This symposium of essays will be concerned with improving the quality of justice on civil and commercial cases that is administered by judges. The central question will be: how can the quality of justice on civil and commercial cases administered by courts be improved?

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

Of course, an increase of the role of courts 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 history of Russian civil procedure through to its current form provides good examples of the legislative efforts to converge both classical systems and to create the best system for Russia.

I am sure that a study of legal systems already mixed can provide valuable lessons for these mixing systems, and the study of how they work is fruitful in the field of justice. In fact, mixed legal systems have always been the ―laboratories‖ of comparative lawyers, our ―vantage point‖. As already alluded to, today such systems have gained a special place in the process of European integration. Jan Smits says that mixed legal systems will provide ―inspiration‖. In my opinion, the experience of Russia is consequently of great importance for the future developments of European law.

Our task will not be to examine the structures of the adversarial process and of the non-adversarial process; instead, we assume that each reader knows it`s conception.

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 power to manage the case to increase flexibility: *a*) he exercises power (especially) in the preparatory phase of the proceedings; *b*) generally, he can exercise power to order inquiries *ex officio*.

One of the steps in our inquiry into how to improve the quality of justice on commercial and civil cases will be to locate justice in legal systems, to establish links between procedural models and justice.

Those location will be in the court of first instance in Russia or in Italy.

Italy was chosen for comparative analysis and also as a place of the host organization on the following grounds:

- The Italian reforms of civil procedure have taken the exceptional place among European judicial reforms. At first, they lack a general reform project. Also, they have gone against the prevailing trend in comparison with the reforms that have been recently enacted in other countries. In fact, in Italy there has not been a choice made between the procedural models, as in Russia. Italy is a very good ground for comprehensive comparative study. Italy has the excessive length of civil proceedings and other critical problems which have been the lack of mechanisms to assure that the judge effectively and correctly uses her power in the conduct of the case.
- Italy offers to give new modern meaning to *Corpus Juris Civilis* (inter alia, in the field of civil procedure) to resolve the problem of supranational procedural legislation. It has the importance for my study.
- I would like to learn Italian language to examine Italian jurisprudence literature and literature on Roman law in original in perspective. It is necessary for my teaching and scientific practice to exceed and improve my knowledge in the fields.

The largest clusters of injustice in Russia lie in the exercise of judicial power in the absence of systematic fact-finding, within the reach of previously existing law, beyond the controls of the result. In other words, the most injustice in case involving identified parties probably occurs when judges exercise unrewiered power in conducting the case in the court of first instance and within the kind of procedural protections. This essay will focus on such justice.

In my 2005 book, USMOTRENIE SUDA (COURT DISCRETION), dealing with discretion of Russian judges, I 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"*.

Our research will learn on a review of the major reforms that have affected judicial procedure at first instance in Russian Federation, from the early 90s and questions – in the light of theoretical analysis and international comparison – their consistency with the main goal of improving the quality of justice on civil or commercial case for particular parties that is administered by the judge.

We are going to identify as the achievements of the judicial reforms as their negative tendencies in the field justice in Russian Federation and in Italy.

THE RESULT HOPED FOR, follows below:

- Scientific writing, publications (researcher\international group) on ―Civil Procedure Reform: Russian and Italian Perspectives‖ or\and;
- Special Course of lectures per students in Russia ―Italian Civil Justice‖ or\and;
- Participation in Conferences, *etc,* on the problem of civil justice (national, international);
- Further development of scientific research on the problem;
- Using of new knowledge in my teaching practice;
- Transfer of knowledge on Russian Civil Justice and Civil Procedure
- Longtime International Collaboration with European Professors, Universities, *etc*
- Knowledge of Italian language

(C).We are going to describe our **PREVIOUS SCIENTIFIC AND TEACHING ACHIEVEMENTS IN THE FIELD OF COMPARATIVE CIVIL PROCEDURAL LAW.** On this basis we are going to start our comparative study. Our findings are:

1).The main achievement is the course of lectures ―Civil Procedure in the Member States‖ (published in 2000).

2).We received the less data on the civil procedure reforms abroad.

Our tasks will include:

a) the basic theoretical analysis of major developments in the field of procedure on civil and commercial cases in mentioned countries, *viz:*

- improvement of the legislation of civil procedure;
- improvement of the judicial system;
- changes of the types of civil procedure
- influence of the European Convention on Human Rights and the Rulings of European Court of Human Rights on discretionary justice (in Russia and in Italy).

b) the initiatives of Transnational Civil Procedure;

In today's **Russia**, judicial reform is a key issue for development of justice in the country.

For the past of 17 years, considerable progress has been made in improving quality of justice on civil and commercial cases in Russia.

Improvement of the legislation of civil procedure is one of the main characteristics of the modern stage of development of Russian law. Code of Arbitral Procedure of RF (further – CAP) entered into force on 1 September 2002. Code of Civil Procedure of RF (hereinafter – CCP)

entered into force on 1 February 2003. The novelty of the Codes, their importance for the improvement of justice require careful consideration of the judicial practice in order to identify and address shortcoming of legal regulation, leading to injustice.

We are going to examine what measures must be taken for fundamental improvement of court activities, in particular, improvement of quality of justice by judges capable of proper administration of justice in terms of their professional and moral qualities, etc.

Improvement of the Judicial System. The main changes of the judicial system of RF are the following: the Constitutional Court of RF and arbitratzh courts have been established, the right to establish constitutional (statutory) and magistrate's courts has been granted to the subjects of the Russian Federation. The court-martial legislation has been adopted that has expressly determined their competence and organizational structure.

In the Russian Federation disputes following from civil legal relationships are given consideration by two types of courts: courts of general jurisdiction and commercial courts. Our task will be the examination whether the aforementioned organizational measures taken for improvement of the judicial system in Russia produced a positive effect on justice. In the course of the discussion on the judicial system reform by Russian professionals many suggestions about establishment of a multi branch system of specialized courts in the Russian Federation have been advanced. For example, it was suggested to establish administrative, land, labor, patent, and some other specialized courts (tax, juvenile, etc.). Article 26 of the Federal Constitutional Law of RF dated 23 October 1996 *On the Judicial System of the Russian Federation 18* gives certain grounds for such suggestions. Some of the authors refer to the experience of other states (Germany, France, the USA), which have developed a large-scale system of specialized courts. Without rejecting, in principle, the idea of establishment of specialized courts in the Russian Federation, we would like to learn how the establishment can influence on justice.

Changes of the type of civil procedure. The Russian Constitution of 1993 proclaimed the principle of adversarial character in civil court proceedings (article 123).

In my opinion, in modern Russia according with the new CCP of 2002 there is a peculiar combination of initiative of the parties and court initiative, which have been established in the law. The expression of this principle in concrete articles is a relatively complex problem for justice. The new 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 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.

So, the new Russian CCP of 2002 established a kind of ―golden mean‖ between the initiative of the court and the initiative of the parties. Our task will be to examine could such situation to improve quality of justice.

However, the situation is far from being perfect. Reforming an old system run by old people is a tricky task. In his “SUDEBNAY REFORMA V PROSHLOM I NASTOYASCHEM“ (“JUDICIAL REFORM, PAST AND PRESENT”), 2009, Deputy Chairman of the Supreme Court of RF

V. Zhujkov contemplates advantages and disadvantages of the judicial reform in RF. As of 2009, observers of justice in Russia, including President of RF Dmitry Medvedev, recognized that 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?

Our task will be to examine what amendments and changes of Russian civil procedure deal with improvement the quality of justice.

The European Convention on Human Rights and discretionary justice in Russia. We will explore ***the judicial practice of application of the Convention***. The modern result is that the impact of the Convention on justice in Russia, in terms of its implementation by domestic courts, is unsatisfactory.

Application of the Convention and of the legal positions of European Court of Human Right (hereinafter – ECHR) by Russian courts of first instance is complicated by a number of problems. At the moment 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 positions of ECHR for the Russian implementation practice.

Now the question is whether this situation exists because the judiciary lacks knowledge on the Convention? Or is it because of the quality of justice? During the comparative jurisprudence research we will find the answer.

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

Initiatives of Transnational Civil Procedure. The human community of the world lives in closer quarters today than in earlier times. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation. In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems – so-called ―harmonization‖ – so that the same or similar ―rules of the game‖ apply no matter where the participants may find themselves.

Now Russia gets a unique advantage expressed in the opportunity of generalization and use of the experience of the harmonisation already accumulated by other countries.

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

1. Harmonisation mechanism in Russia.
2. Harmonisation mechanisms inside the European Union, in the Member States Our task will be the examination of their influence on justice.

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.

Our analysis will be highly important to any effective understanding of both Russia's and the EU's future trajectory for improvement quality of 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.

For Russia, the creation of a broad legislative package of cross-border procedural instruments within 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 (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).19

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 justice on civil and commercial cases in Russia and in the EU.

Harmonisation mechanisms in 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.

In my study of civil procedure in the Member States I found that European civil procedural law does not contain counterpart of the Russian procedural law. Russian legislation on civil procedure also contains no substantial counterpart of the European procedural law controlling the discretionary action of judges; yet some such law is the beginning to develop and may soon become important as for Russia so as for Europe. Those beginnings seems to me to deserve encouragement.

As an illustration of my observation that European civil procedure should be effective, let me point to several modern strands and levels of civil procedural convergence in Europe. One significant strand comprises the national level procedural reforms that are across the civil and common law divide striving towards the same goal of efficiency and fair trial. Another important strand comprises the constitutional reforms on both the intergovernmental and national levels, in particular Article 6 of the European Convention on Human Rights and the case-law of the European Court of Justice regarding the right to a fair trial, which have forged a mutual European standard for discretionary activity of a judge in civil proceedings. A further level of convergence developed in the second half of the past century on the supranational level within the European Union. The European Court of Justice has in a wealth of case-law emphasised the right to an effective remedy, which has influenced particular national procedures in relation to for example time-limits, admissibility of certain forms of evidence, neutrality of expert witnesses or the method for apportioning costs of proceedings. In addition the Storme Group's Report on the approximation of the laws of procedure launched a debate regarding civil procedural harmonisation within the European Union.
The balance between the identified themes of convergence is arguably an important issue within the justice.

The present European civil procedure seems to me exceedingly good. But it has not sufficiently penetrated the areas of unreviewed formal justice, where the quality of justice could be not enough high.
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 justice.
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 recent improvement quality of justice movement may be characterized as an amazing effort of the

world legal community to clarify and virtually enforce worldwide through national judiciary the —ideological‖ and almost spiritual legal concept of justice.

(D).Et sic, now we can describe **TIMELINESS AND RELEVANCE** of the project against the state of the art. Thus:

- Judicial systems in most developing countries are perceived to be in crisis. Judicial reform efforts in Russia, Italy have been varied and have met with mixed success.
- The countries make a transition to improvement the quality of civil justice.
- 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 power to manage the case. 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 —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.
- Procedural legislation of Russian Federation was renewed recently. One of the main features of modern Russian legislation is increasing of the role of discretionary justice. My course of lectures —Civil Procedure in the Member States‖ was published in 2000. In my writing I identified narrow subjects as samples of what Europeans do about justice in various contexts.
- My book —Usmotrenie Suda *(Court Discretion),* devoted to discretionary justice in Russia, was published in 2005. In my study I found that discretion is indispensable to modern judiciary and that the cure for injustice can not be the elimination of discretion.
- The course of lectures on Russian Discretionary Justice was given to specialists and students at School For Private Law (under the President of RF), Moscow, Russia.
- The impact of the Convention on Human Right on discretionary justice in Russia, in terms of its implementation by domestic courts, is unsatisfactory.
- Russian judges are convinced that they do not need to possess knowledge on the Convention or with respect to international law in general.
- The Russian Federation undertook positive steps for the impact of the Convention. On 26 February 2010, the Constitutional Court of the Russian Federation delivered the Ruling.

Until today, the opportunity to institute reconsideration of a national case due to a judgment of the European Court of Human Rights has only existed in regard to criminal and commercial cases. The Civil Procedure Code of RF has omitted this issue. Now under the mentioned Ruling the legislator has the obligation to amend the Civil Procedure Code of RF.

- The topic of Russo-European Union (EU) relations is one of the most important security issues in Europe and Russia. The course of the relationship EU - Russia will influence in large measure the extent to which Russia moves toward realizing its historic European vocation and its proclaimed ambition to become a democracy. On the other side, the relationship will influence significantly the capability of the EU to function effectively as a union of European states, possibly including Russia, and other European members of the Commonwealth of Independent States. Admittedly this relationship is in a rather precarious state. But it is essential that scientists, professors understand what the problems are that have impeded Russia's integration with Europe if we and they are to overcome these obstacles.
- Europe witnessed several modern strands and levels of civil procedural convergence in the past century.
- Russia gets a unique advantage expressed in the opportunity of generalization and use of the experience of the harmonisation already accumulated by other countries.
- 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, was signed on June, 24, 1994.
- The concept of creation of four common spaces between Russia and the Union should include real mechanisms of harmonization of the procedural law. Among others, the provisions should concern the quality of justice.
- The process of legislative harmonisation in Europe on the basis of the EU law is bringing the modern understanding of the European law.
- The modern worldwide meaning of EU law as Justinian Code could help to define the door to improve quality of discretionary justice as *Discretio est scire per legem quid sit justum* (Roman legal maxim).

(E).We can outline the **BENEFIT** that will be gained from undertaken the project. Thus:

The researcher can:

- Receive and extend the knowledge in the field of comparative civil procedure
- Start the international collaboration with one of oldest European University, located in Ferrara, Italy

- Use the results of the great experience of UNIFE in international collaboration in the field of scientific (civil procedural law, domestic and international) projects, publications and so on
- Learn the achievements (positive and negative) of Italian Civil Procedure Reform to evaluate the discretionary justice so there are a lot of problems with judiciary in Italy Learn Italian Language
- Examine Italian jurisprudence literature in original, taking into account the new meaning of *Corpus Juris Civilis*
- Get enough materials for scientific and teaching practice at home, for publications, projects, lectures per judges and students,*etc*
- Transfer of her knowledge on Russian justice and civil procedure to Ferrara, Italy, Europe.

UNIFE, Italy, EU can:

- Use the results of the research in international collaboration in the field of scientific (civil procedural law, domestic and international) projects, publications and so on.
- Enhance Italian, EU scientific excellence in the field of Russian, comparative civil procedure, improving quality of civil justice, reform of civil procedure
- Develop the initiative of preparing new legislation: European civil procedural law does not contain counterpart of the Russian procedural law, Russian legislation on civil procedure also contains no substantial counterpart of the European procedural law controlling the discretionary action of judges; yet some such law is the beginning and may soon become important as for Russia so as for Europe.

- Prepare the materials for publication, projects, lectures per students, judges on improvement quality of justice.
- Examine the experience of Russia. Improvement of court activities in civil procedure has already been implemented in Russia. It aims the reducing civil court delay and streamlining the process.
- Discuss the harmonization of civil procedure legislation of EU and Russia. This 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.

(F).Let me present my CV.

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EDUCATION

- Post-graduate study, Law Faculty, Moscow State University, 1993-1997
- Leiden Law Courses, LEIDEN University, the Netherlands, 1996-1997 Law Faculty, Moscow State University, 1985-1990

DEGREES OBTAINED

- Candidate of Legal Science (PhD), *Law Faculty, Moscow State University, 1997;*
- Specialist (analog LLM), *Law faculty, Moscow State University, 1990.*

PRESENT POSITION

Russian, Italian
Cooperation

Associate Professor, Law Faculty, Moscow State University

FORMER POSITION

- Assistant Professor, Law Faculty, Moscow State University, 1997-2001
- Judge, Reutov Court (Moscow) , 1993,
- Notary, Puvlov-Posad`s Notary`s Office (Moscow), 1990-1993

Russian, Italian
Cooperation

VISITING PROFESSORSHIPS AND RESEARCH:

- Peoples` Friendship University of Russia, Moscow;
- International University in Moscow (autumn\spring terms 1999/2000);
- Russian School for Private Law (Institute) under Center of Research for Private Law (under the President of Russian Federation);
- Law faculty, Leiden University, the Netherlands.

SUBJECT TAUGHT

- Civil procedural law of Russia Civil
- procedure of European Union
- Arbitral procedural law of Russia
- Russian Discretionary Justice (comparative course)

PUBLICATIONS

BOOKS AND CHAPTERS IN BOOKS

- Brussels-Lugano Regime: It`s Interpretation, in *Comparative Law and the Problems of Private Law*, Moscow, 2006;
- Judicial Discretion, Moscow, 2005;
- Judicial Discretion`s Legality, in *Materials of 18th International Plehanov`s Recital*, Moscow, 2005;
- Civil Procedure in European Union`s Members, Moscow, 2000;
- Unification of Civil Procedural Legislation in European Union`s Members, in *Materials of International Seminar of EU Law`s Teacning at Russian Universities*, Moscow, 1999.

ARTICLES

Recognition and Enforcement of Judgements on civil and commercial matters in EU, *Zakonodatelstvo, 2001, N 2;*

Judicial proving and Judicial Discretion, *Gosudarstvo i Pravo, 2000, N2;*

- Principles of Civil Procedure in UE members, *Vestnik Moscovskogo Universiteta, seria 11, Pravo, 2000, N3*;

- Judicial Discretion in civil procedural law, *Zakonodatelstvo, 1999,N2*;
- Judicial Discretion`s Kinds in Civil Procedure, *Pravovedenie, 1999, N2;*
- Bounds of Judicial Discretion in civil procedure, *Zhurnal Rossiiskogo Prava, 1998, N2*;
- Judicial Discretion`s problems in civil procedure, *Juridicheskii Mir, 1998, NN 4,5;* Reparation
- of Moral Damages and Judicial Discretion in Russian Civil Legislation, *Review of Central and East European Law, 1998, Vol.24, N 3\ 4.*
- Judicial Discretion in civil procedure and it`s kinds, *Vestnik Moscovskogo Universiteta, seria 11, Pravo, 1997, N3;*
- Definition of judicial Discretion, *Zhurnal Rossiiskogo Prava, 1997, N12*

METHODS

The above programme, which is primarily a joint research programme, started in September 2010, will be functioning via established network of two, three partners (at least) from 2 countries (at least) of Eastern and Western Europe, namely, Russian Federation and Italy.

It is widely held that the Internet is about to undergo a revolution made possible by a new kind of collaboration. I hold this position myself, strongly, but I take an unusual approach to it. The part makes the broad point: On-line collaboration is importantly different from traditional collaboration. We need to think much more creatively, designing collaborative system to solve very particular problems elegantly and efficiently.

I propose a new "Collation Project" which has the lofty aim of enlisting large numbers of scholars (civil proceduralists) to take scholarly public domain texts, analyze them into paragraph-sized chunks, and shuffle the chunks into a single massive outline--to prepare, eventually, joint writing(s) in the field of comparative civil procedure for publishing in Italy, in Europe, in Russia. This will have revolutionary implications by making knowledge more easily accessible and smashing language barrier.

At the same time I propose to start at least three projects: (1) a Civil Procedure Dictionary Project, which sorts lexicographical data by concept, not word, and puts the result into the same outline as the Collation Project; (2) a Debate Guide Project, which summarizes arguments and positions of Russian and Italian civil procedure scholars on all manner of controversy; and (3)

an Event Summary Project, which will locate detailed summaries of current events (discussions, meetings).

These projects will be associated with the Department of Civil Procedure of UNIFE but under the direction of Prof.P.Nappi and Prof.O.Papkova. They will be built from the ground up by a body of the scholars of Civil Procedure Departments of UNIFE&MSU&PFUR led by subject area and other experts (I hope so). It will be open from the beginning--but a meritocracy with enforceable rules.

On- line collaboration is crucially different from old-fashioned collaboration.

Old-fashioned collaboration generally involves two or more scholars working serially on a single work (writing), or each on a different part of a work (writing), and the work is then put together by an editor(s).

On- line collaborative works are not written by precise persons, in this way.

Instead, on- line collaboration can involve a constantly changing roster of interchangeable scholars, and changing mainly at the whim of the participants themselves. For the most part at least, collaborators are not pre-assigned to play special roles in the project. There is just one main role--that of collaborator. And anyone who shows up and fits the requirements can play that role.

In fact, it is best if we will think through together the requirements of a project. There must be leadership(s), granted--that is, some way of actually arriving at a decision when one is needed, that the collaborators can view as legitimate--but a group of scholars thinking creatively about many possibilities can produce more ideas, and more interesting ideas, than just one or a few people working alone.

This brings me to the next major topic: while collaborative systems should be designed with the needs and values of participants in mind, I think that a certain culture, or set of values, is necessary in order to make collaboration work. The principle that collaborators should participate in system design is an example, but only one example.

What makes on-line collaboration work? It's a whole set of things.

- Everyone involved should be the scholar of the named Universities and should understand what the project's aim is and what the rules are for getting there.

-They should also feel empowered to get to work, and (if they're qualified) they should be able to work on any part, or almost any, of the project, whenever the desire arises. Assignments are not made; participants assign themselves, and choosing one assignment does not prevent others from choosing the same assignment.

-So I maintain that, in order to work, any system of on-line collaboration requires something like egalitarianism; but it is necessarily the leadership and authority.

The leaders should be defined. I suppose that Prof. P.Nappi and Prof. O.Papkova will play the role of as much facilitators and organizers as leaders. We will start off discussions as necessary, but we will be highly interested in reading and responding to the best remarks that
appear. Participants should not wait for us to articulate every policy. Here's

the procedure:

- I will be introduced to the colleagues of the Department of civil procedure and will give the lecture on the civil procedure reform in Russia or new Code of Civil Procedure of Russia or impact of European Convention of Human Rights on judicial practice in Russia, etc. The theme depends what you prefer;
- I present a plan, and then invite the scholars to comment on it asap, to present alternative plans, to debate and elaborate all details, and so forth.
- Next, I edit or rewrite the plan, trying my best to take into consideration all reasonable remarks; then, when it seems there is as close to a consensus as the most credible discussants can arrive at, I make an executive decision that such-and-such is the plan we will pursue. Then software requirements will be written and presented to Prof. P.Nappi.

According to the vision I have for the project, it will be possible, in the end, to write the articles on the subject in dozens of languages. That said, I strongly suspect that English will have to be designated the central language of the outline--something I am sorry to have to say, because it is bound to be unpopular--but there must be a common language.

RESULTS

- Joint discussion of the problems of civil procedure;

- Preparation of writings on the matter for publishing in Russia (in Russian language), Europe (in English language), Italy (in Italian language).

Of a particular importance, it could be a successful implementation of visiting scientists program allowing the scientists from Italy and Russia to do research in Ferrara and Moscow.

CONCLUSIONS

This project could be considered as an example of successful collaboration between the countries of Eastern and Western Europe because of the following:

- Discussion of the improvements in civil procedure reform in Italy and Russia. Establishment
- of scientific collaboration.
- Information exchange and transfer of knowledge. Preparation
- of scientific writings in English, Italian, Russian.

ACKNOWELEDGEMENT

We would like to thank all of the Italian and Russian colleagues for the future collaboration.

Attachment 8, Research Portfolio
Final scientific report

Final Scientific Report

Scientific Activity July, 5, 2011 – September, 5, 2011

Judicial Law-Making and the Principle of the Separation of Powers

Scientists:

Prof.Olga Papkova,

Prof. Francesca Ferrari,

Prof.Maria Francesca Ghirga

The *tenet* of the separation of powers is increasingly considered to be the *conditio sine qua non* of a constitutional government, a successful democracy. *Grosso modo*, under the chef d`oeuvre of Montesquieu *The Spirits of the Laws,* popularizing the separation of powers doctrine, both the separation of organs and separation of functions (*divide et impera*) have arisen as the pillars of the concept of the separation of powers.
However, in Italy and many other Western European countries contemporary political reality shows that the division of powers became even more liquid and sometimes bewildering especially in what refers to the legislative function firstly shared with some heed and disinclination with the executive branch and now captured by the judiciary[1] including judicial activism phenomenon (in spite of the lack of consensus about its definition[2]). The European scholars write that nowadays in continental Europe the judiciary is faced with opinion as constitutional and supreme courts are acting like legislators, creating the law of judges, sometimes with competition with the rule of law.[3]
It should be observed that the tenet of the separation of powers is not always well defined, often referring to related but different phenomena. Moreover, to a more careful consideration, the relationship between the state branches seems more complex than expected.
The topic is itself moving target. Over the next decades, judges will be required to apply laws to radically different circumstances as a result of a technological revolution we can only begin to imagine. Global threats, both political and environmental, will put immense stress on the institution of the judiciary and on the democratic process. The unpredictable and unprecedented nature of such developments makes all analyses of judicial activism highly provisional, but also necessary, and as it turned out, highly stimulating. General theory of judicial sources of law, common for civil-law and common-law countries, is needed to be developed. The new Eastern and Central European states can provide important insights in the matter, thanks to their relative common institutional development: a long period of communist rule and a transition to democracy which is still in the process of consolidation.
The analysis carried out in this paper, although still incomplete, suggests not only that the concept of the separation of powers needs a better definition, but that its main dimensions, including the phenomenon of judicial activism, should be taken into account for their different impact. The theoretical interpretation of the judicial law-making and the sources of law, resulted from such activity, are under our review.

Let us start from the definition of the separation of powers. We hypothesize that it does not follow from the verbal design of "the separation of powers" that law can assume just the legal shape and can`t be embodied in judicial decisions.
Before going further, some clarification must be made about the issue at stake. As the concept of the separation of powers is not solid we would like to note that for the purpose of this paper the term of the separation of powers will be used as the *legal principle* of a state machinery`s organization. This principle is looked as an organizational, a legal, an institutional component of the rule of law state. It is implemented in the developed state-legal situation. The difference between the branches according to their competences is peculiar to the undeveloped state-legal situation, also, but there their separation is absent and the state machinery is designed under the principle of organizational unity. Namely under such conditions political- legal consciousness

[1] Urbano M.B. The Law of Judges: Attempting Against Montesquieu Legacy or a New Configuration for an Old Principle?\\VIII World Congress of the International Association of Constitutional Law, Mexico, 6-10 December 2010.
[2] Keenan D. Kmiec , The Origin and Current Meanings of "Judicial Activism" in California Law Review, October 2004, 92, 3, 1445-60.
[3] See, example gratia: Interpreting precedents: A comparative study / Ed. by D. Neil MacCormick, R.S. Summers. Aldershot etc., 1997; Vereschagin A.N. Судебное правотворчество в России: сравнительно-правовые аспекты. M., 2004; Marchenko M.N. Судебное правотворчество и судейское право. M., 2007.

regards the "state will" as the creative force, the material source of law. *A contrario*, both the developed legal situation and the separation of powers mean free political competition. Consequently, the single "state will", shaping law, is entirely absent. *Example gratia,* one of the predominant features of the parliamentary politics can be the tendency to the restraint of legal freedom by the privileges of one or another social group. According to its constitutional competency the judicial power, *ex officio*, can counteract to this tendency and to pronounce the decision of illegality of parliamentary acts, breaching equal rights, formal equality, etc.[4]

First and foremost the separation of powers signifies the spread of the state authority "across" to prevent tyranny and to pave the way for legal freedom, accordingly. And the matter is not only that the executive power (and the judicial power) can`t be realized without regard for any competence, formulated by the legislative power, but also that the legislative power itself is controlled by the judicial power apropos of compliance of the laws with fundamental legal principles. So, long ago famous Edward Coke maintained that neither Parliament, nor a parliamentary act could cancel the legal principles, upon which law was designed. [5]

In this context illustrious Friedrich August von Hayek wrote that the freedom of Britons was not the result of the separation of powers as Montesquieu taught and Brits themselves believed. It was the consequence of the fact that judicial decisions were guided by the common law, which was irrespective of anyone`s will and was formulated by independent judges, at the same time. And on rare occasions the Parliament interfered in that process with the object of law`s clarification. Friedrich August von Hayek asserted that the separation of powers originated in England not only because the legislative power created statutes, and therefore that *it did not do that*: the sources of law were formed by courts, independent from that power, which organized and directed the government and was called "legislative" by mistake.[6]

It is interesting that the classical common law doctrine[7] of XVII–XVIII centuries took notice of the necessity to follow the precedents` rules to avoid free judicial discretion.[8] Courts should be bound by the rules of *res judicata*. The doctrine saw the main difference between the judicial and the legislative powers in that fact, exactly.[9] It was supposed that naturally parliamentary acts could be examined as free decisions, expressing the opinion of one or another majority, while judicial acts should be just legal decisions and its principles could not be cancelled or changed by any majority.

In other words, the tenet of the separation of powers implied that, firstly, law could be only *judicial law* and, secondly, there was a danger that courts would exercise law-making ("law-speaking") arbitrary, but the doctrine opposed namely that fact (*summum jus – summa injuria*). According to the tenet, the law-making was a fate of those who knew and applied law and not

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[4] So, in the USA (in contrast to the European states) during more than 30 years of XX century labor relations were regulating under the principle of formal equality, and the principle of contract freedom in the labor sector was prevailing. The USA Supreme Court (1905) decided that the Constitution did not permit the meddling of a state in the right of a worker to enter into an employment contract freely (*Locher v.New York*). The legislature of a state did not have the right to deprive the worker of a work on the ground of bad terms of the contract. The right of the worker to enter into such labor contract, as he agreed to conclude, was declared as fundamental and constitutional. Only in 1937 (*West Coast Hotel v. Parrich)* the USA Supreme Court cancelled the decision *Locher v. New York* and established that the state had the right to regulate the employment relations between the worker and an employer (see in details: Osakve K. Сравнительное правоведение в схемах. M., 2000. p.51).

[5] *Dr. Bonham case* (1610) 8 Co Rep. 118a (Coke E. Part Nine of the Reports // The selected writings and speeches of Sir Edward Coke. Vol. 1 / Edited by Steve Sheppard. Indianapolis, 2003).

[6] Hayek Friedrich August. Право, законодательство и свобода: Современное понимание либеральных принципов справедливости и политики / Translation from English, ed. Kurjaev. M., 2006. p. 104.

[7] See about the fundamental differences between the common-law and civil-law systems and their distinct approaches to the law in: John H. Merryman & David S. Clark, Comparative Law: Western European and Latin American Legal Systems 213 (1978); Woodfin L. Butte, Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere, *in* The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 315 (Joseph Dainow ed. 1974).

[8] See about judicial discretion in details: Papkova O.A. Усмотрение Суда. M, 2005.

[9] Vereschagin A.N. Opt.cit, p.318–319.

those who had a power to govern (that was a legal paradigm). But in one`s turn the judicial activism should obey the rules of law, without fail. In this sense the common law doctrine is not opposite to the famous warning of Montesquieu that if the judicial power is connected with the legislative power, the judge can become an oppressor. The forensic law-making should not create the situation when the judge conducts and resolves a case according to the rules that he establishes by himself and changes according to his discretion. The classical doctrine insisted on the fact that the common law consisted of not separate components, but of common principles, that were concretized, explained and illustrated by precedents (*res judicata*). This means that the common law judge "should know how to retrieve universal meaningful rules, which can be applied to a new litigation, from suitable precedents."[10]

So, under the mature common law the original separation of powers did not deny the judicial law-making as well as did not suppose that the Parliamentary authority was the law-making power. Identification of the Parliamentary *legislatio* with the law-making is the credit of the continental legal tenant (version of XIX century). Does this position of the continental doctrine correspond to the principle of the separation of powers?

The attempt to disclaim the judicial law-making by reason of the separation of powers is the evidence of some mechanical interpretation of the tenant: the legislator establishes the rule of law, the judge is *"merely mouthpiece of the law";* law is just the statute, the judicial power strictly applies the laws. This interpretation means not the separation of powers, but the separation of work within the model of organizational unity of the state power: there is the supremacy of the legislator *de jure*, but *de facto* there is the absolute position of a political person who directs and controls the nominal legislator. The separation of the legislative and the judicial powers does mean some *judicial independence* in relation to the legislator and the law. Following the classical ethos of liberal constitutionalism, *independent judges* are reckoned to be the indispensable implement in order to enforce the law in a consistent and impartial way. However, there are different approaches to the definition of independent justice and its relation to the doctrine of the separation of powers. *Grosso modo*, definitions suggesting by international organizations heavily lay stress the necessity of the judicial power`s isolation from external – and especially political – influence of other branches. For instance, under the U.N. Basic Principles on the Independence of the Judiciary enacted in 1985, "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without *any* restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from *any* quarter or for *any* reason." (Principle n.2, italics added).

In Europe, the growth of a policy discourse on the rule of law and independent justice has been realized by the Council of Europe, to a large extent. As for judicial independence, in 1994 the Council of Europe issued a Recommendation establishing*, inter alia*, that "in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[11]

However, scholars seem to be less optimistic on the virtues of independent justice. For instance, P.H.Russell contests the attempts to insulate judges from their environment.[12] According to Martin Shapiro, since no regime "is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints",[13] independent justice is always bound. In fact, we "expect courts to be independent at retail, not wholesale… to make their decisions according to the law… to be… the servants of the lawmakers".[14]

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[10] Hayek Friedrich August. Opt.cit, p. 105.

[11] The text is similar to the UN Basic Principles. See Independence, efficiency and role of the judges, Recommendation n. 12 (94), 2d.

[12] Russell P.H. Toward a General Theory of Judicial Independence, in P.H. Russell and D. O'Brien (eds.), Judicial Independence in the Age of Democracy. Charlottesville: University Press of Virginia, 2001, p. 12.

[13] Shapiro M. Courts. A Political and Comparative Analysis, Chicago, The University of Chicago Press, 1981, p.34.

[14] Shapiro M. The European Court of Justice, in Russell and O' Brien, 2001, p. 280.

A modern essential contribution to the definition of the concept of independent justice and to the analysis of its place in the doctrine of the separation of powers has been generated by some scholars of Law and Economics. L. Feld and S.Voigt focus on highest courts and institute a difference between *de jure* and *de facto* independent justice.[15] *De jure* indicator directs only at legal rules, the law, concerning the status of high court judges and their competencies and power. *De facto* indicator endeavours to grasp the empirical dimension of independent justice and deals with judicial power in practice.[16] B.Hayo and S.Voigt maintained later that *de facto* independent justice is hard clarified by freedom of the press and, to a larger extent, by *de jure* independent justice. [17]The significance of the distinction between internal and external independent justice is supported also by Rìos Figueroa.[18]

Virtually, the problem is: how is it possible to ascertain that a judge has "applied the law" or "created the law"? May it be to define the extent of judicial decisions` control which is not in contradiction with the independence of the judge and the judicial power? To what extent does the doctrine imply that the law – i.e. statutes - should be interpreted in the exactly the same way in all circumstances? We can refer here to the need of judges to follow "generally recognized" rules, although we should take into account that there will always be some diversity in the legal community on the meaning of some rules. We can also think that some degree of flexibility in the law`s *interpretation* is not in contradiction with the doctrine of the separation of powers and with the independent justice.

It is common knowledge that the law is a linguistic proposition that has to be *interpreted*. Each judge is always obliged to make a judgment, even in cases of vagueness, ambiguity, imprecision, incompleteness and antinomy of the law.[19] The judge is continually called upon to "translate" the text of the statute in decisions that has to express. Interpretation is a complex and dialectical system. The resolution of a legal dispute is something of procedural, which is based conceptually on three distinct steps: recognition of problem, research of rule to apply, effective application of a norm to issue.[20]

Essentially the legal sciences aspire to establish a true "rational rigour", different from that of mathematics, but no less necessary.[21] In this context, hermeneutics is configured as the "*workshop of living law*".[22] Every interpretative act is always inserted within a specific "living law". The "living law" is a "dialectical synthesis" that incrementally is formed during repeated interpretations of the legal texts. Law, in absolute and general terms, collects the norms of a legal system ("*positive law*") and the concrete application of these same rules in the judicial context ("*living law*"). The "living law" is crystallized in the "precedents", in a whole of acts (sentences, ordinances, decrees, etc.) emanated by jurisdictional organs (judicial power).

Every judge, far from being a "*merely mouthpiece of the law*", through his interpretation of the formal norms, contributes to the continuing realization of the "living law".[23]

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[15] Feld L. and Voigt S, Economic Growth and Judicial Independence, in "European Journal of Political Economy, 19, 2003, p. 497-527.

[16] As it has been pointed out "the more discretion (and independence) judges have, the greater possibility that cases outcomes vary and law is applied inconsistently, counter the traditional conceptions of the rule of law."(Brashear Tiede, L. Positive Political Theory and the Law: Judicial Independence: Often Cited, Rarely Understood, in "The Journal of Contemporary Legal Issues", XV, 2006, p.160).

[17] Hayo B. and Voigt S. Explaining de facto Judicial Independence, in "International Review of Law and Economics",2007, 27, pp. 269-290.

[18] Rìos-Figueroa, J. Judicial Independence: Definition, Measurement and Its Effects on Corruption. An Analysis of Latin America, Ph.D. Thesis, New York University, 2006, p.163-164.

[19] Marinelli V. Studi sul diritto vivente, Jovene, Napoli, 2008.

[20] Pascuzzi G. Giuristi si diventa, Il Mulino, Bologna, 2008, p. 85.

[21] Marinelli V, Opt.cit.p.8.

[22] Ibid.

[23] See in: Bobbio, N, Il positivismo giuridico, Giappichelli, Torino, 1979; Cappelletti M. Giudici legislatori?, Giuffrè, Milano, 1984.

If the court is strictly bound by the law (as the school of legists maintains that rules of law indentify with legislator`s behests, only), there is not the separation of powers: if the court is *"merely mouthpiece of the law"*, he can be just the legislator`s "appendage", the statutes` executor. If the branches are separated, the court can`t be bound by the law, totally.
Let us assume that legal regulation is exercised by the sovereign power, arbitrarily. Then it must be admitted that the statute, issued by the sovereign power, is the sole souse of law, and courts should obey any change of the legislative policy, without demur. Such is the position of the court in the situation when the power is organized in according with the principle of organizational unity.
Further let us concur, referring to the Roman legal maxim *ab abūsu ad usum non valet consequential,* that the legal regulation is not an arbitrary power and the legislation is complied with fundamental legal principles. Then there is no way to asset that only the legislator can utter these principles, properly. According to the doctrine of the separation of powers none of the legislator, the court, the administration possesses the monopoly to define law concerning either of relations, but each of branches should ensure legal freedom within its competency; *inter alia*, the court can`t issue statutes as Parliament, but he can recognize the laws as illegal and give such interpretation of the statute that mostly meets the principles of legal freedom.[24]
Both the court and the legislator participate in the same process of legal regulation, but they use different means and fulfill dissimilar functions.[25] Therefore the power, issuing the statutes, abstractly, and the power, resolving a case, and, in that way, formulating law on a pending suit, must be divided, organizationally and functionally. With that both powers are bound by the same fundamental principles of freedom, equality and equity to an identical extent [26] and neither of them can pretend to the monopoly of its interpretation: so, the legislator "programmes"[27] the judicial system to construe law in definite way, but the competent courts (supreme and constitutional courts) can correct this "programme" if they conclude that the principles of law can be violated, otherwise. The court should not substitute for the legislator, tearing away his "law-speaking" from justice`s tasks (*inter alia*, the court must not act as a super- legislator, an emperor) and the legislator can`t force independent judicial power to take either legal stand.
In the continental European legal tradition the content of law is not confined by the legislator`s opinion. Beyond the *legists` doctrine* it is considered that law in force, *jus scriptum***,** is formulated by both the legislator, introducing the definite socio-political component into the process of law-making, and the judges, rather independent from politics. [28] "Soviet authors, - Rene David wrote, - blame judges of bourgeois countries for their independence in relation to the law. It is possible to doubt their interpretation but not just the fact. Judges of the Romanic-German legal family possess certain independence regarding the law, really, so law and the statute are not identified in these countries….the tradition ranks law higher than politics".[29]

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[24] «The purpose of law (and the rule of law)…is the progress o f freedom, equality and equity in the life of people…Responsiveness this proper legal aim (and legal value) of the rule of law, that have to be interpreted, defines the specific character of the teleological interpretation" (Nersesyanz V.S. Общая теория права и государства. p. 497).
[25] In this context Vereschagin A.N. writes about "the interaction between the legislative and the judicial ways of law-making, which should not contrast to each other, but should mean two different and mutually complementary stages of a single process, namely, the process of the legal regulation" (Vereschagin A.N. Opt.cit, p. 133-134)
[26] This point is reflected in the Constitution of Russian Federation. The article 18 maintains that human rights and freedoms tie together the all branches – "define the meaning, content, application of statutes, the functions of the legislative and executive powers, local government and are supplied with justice".
All Italian judges, as required by article 101 of Italian Constitution, are subject only to the law. Law is by definition unique, reliable and equal for all. The judges decide on the basis of the same normative texts.
[27] Zippelius R. Allgemeine Staatslehre (Politikwissenschaft). – 13., neubearb. Aufl. München, 1999. S. 317–318.
[28] Leoni B. Freedom and the law. Expanded 3d. edn. Indianapolis, 1991.
[29] David R., Jauffret-Spinosi C. Основные правовые системы современности / Translation from French by Tumanov V.A, M., 1997. p.92–93.

To mix law and the statute and to consider the statute as an exclusive source of law means to contradict the Romanic-German tradition. Such is the competent position of Western European tenet. In Russia the doctrine exceeds the bounds of habitual dogmas of Soviet period, with reluctance.[30]

It seems that according to the continental European legal tradition[31] the doctrine of the separation of powers does not allow to maintain that acts of the judicial power can`t and must not be the sources of law.[32]

If it is consistent logically, another opinion has to assert that only acts of the legislative power can be the sources of law pursuant to the separation of powers (*ad deliberandum***)**. Not only judicial decisions but also acts of the executive power can`t be the sources of law. Meanwhile the strictest separation of powers does not exclude the law-making activity of the executive power on the grounds of the law and to carry out the statute, *inter alia*, delegated legislation.

As per a subordinate regulatory act[33], from the perspective of the separation of powers it is acceptable if a bylaw is considered as the authoritative interpretation of the law. The judicial power, applying *jus strictum***,** possesses the competence to evaluate the correspondence of the bylaw to the statute. Any person, who believes that this authoritative interpretation violates his rights or freedoms, can care to go to law. Taking into account that *legem brevem esse oportet,* namely the *interpretative* activity of the independent courts can lead to the correspondence of the "secondary legislation" to the "primary legislation": either the court recognizes the interpretation of the statute as a proper, preferable explanation, confirming the conformity of the subordinate regulatory act to the statute, or the court announces the bylaw as illegal and shows preference to another interpretation of the statute, imparting the official effect to it **(***scire leges non hoc est verba eārum tenēre, sed vim ac potestātem*).

Analogously, the Constitutional court, examining the constitutionality of the statute, either confirms legislative interpretation of the Constitutional provisions, and sometimes defines it more exactly by his regulatory interpretation, or recognizes it as contradictory to the Constitution and gives another interpretation of the Constitutional provisions (*interpretatio abrŏgans***)**.

At the same time there is an allegation that executive bodies (down to "any bodies and officials") possess the right to adopt subordinate regulatory acts, concretizing the provisions of the statute, even the statute does not allow such subordinate concretization. This assertion is of no convincingness. That follows from the doctrine of the separation of powers.[34] *Ope exceptiōnis***,** it

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[30] Vereschagin A.N. Opt.cit, p. 31–32.

[31] It must be noted that the distinctions between the civil-law and common-law systems have blurred. Common-law countries are adopting some of the characteristics of the civil-law system, while civil-law countries are incorporating features of the common-law tradition into their legal systems. But significant differences remain and are likely to remain, as a result of the history and perceptions about the nature and purpose of law underlying each, one originating over 2,000 years ago and the other emerging in the twelfth century.

[32] See another position in: Nersesyanz V.S. Opt.cit, p. 351–353.

[33] Vereschagin A.N. Opt.cit, p.p. 137, 153

[34] So, Savizkiy V.A. and Terjukova E.U. write: «… the laws can be concretized, indeed, not only if it is set down by rules, but in any other case, when a body, possessing the right to accept subsidiary acts, considers such concretizing regulation as the necessity (if, of course, the strict ban to regulate one or another relation by a bylaw is absent). Basic limits of the law`s concretization by a bylaw is not defined (in principle, it can be set down by the law). Its absence allows to concretize the statute by any body or official (not only by President`s and Government`s legal acts, but by acts of other bodies). Accessibility of such concretization without any special legal direction must be defined concerning a concrete case with due regard for the law`s subject and its place among other statutes, and proceeding from the need of law`s application" (Законодательный процесс / Ed. Vasiljev R.F. M., 2000. p 49–50 [the authors are Savizkiy V.A. and Terjukova E.U.]).

It should be emphasized that such opinion not only contradicts the separation of powers, but ignores the famous legal principle: «bodies and officials are prohibited everything what the law does not allow straight". Perhaps, V.A. Savizkiy and E.U. Terjukova don`t admit to this principle, so they maintain that "basic limits of the laws` concretization by subordinate acts of one or another body are not set down" and if the straight prohibition is absent, every body, issuing the bylaw, which "considers such concretization as the necessity" can "concretize" the law. Apparently, Savizkiy V.A. and Terjukova E.U. suppose that state-authoritative players are under the principle "it`s allowed if it is not prohibited".

is obvious if the law does not assume such concretization, not the *subordinate* law-making (i.e. on the grounds of the law and to execute the law) but the *illegal* law-making (substitution for provisions of the law by opinions of "any bodies and officials" concerning what the law says, precisely) is expected. The court can`t take into consideration such "concretizing" acts, so he is under nothing but the Constitution and the law.

Et sic, there is no point in the dispute concerning the law-making power of the executive branch, as such, and the discussion can be devoted namely to limits of this power (*example gratia*, to the autonomous, preliminary or just concretizing rule-making of the executive branch) and to the place of the executive branch`s lawmaking acts in the system of sources of law.

In this case the opinion, not contradicting the law-making activity of the executive power *for the separation of powers` reasons*, but disclaiming the judicial law-making for the same reasons, is illogical.

Moreover, this opinion is denied by the fact that the precedent (*auctorĭtas rei judicātae***)** is the source of law (earlier it was the main source of law) in *the common law countries*, under the separation of powers` conditions.

Essentially, the opinion that *in the civil law countries* the precedent is not considered as the source of law, changes nothing. Even if it were not for the precedent, evaluating as the source of law under the continental legal doctrine, and if it had not been the same, the essence of the separation of powers would not be changed depending on the "legal geography". If in the common law countries the separation of powers does not impede the law-making activity of the supreme courts, in the civil law countries the separation of powers does not hinder from the judicial law-making, also.

Et sic, namely the separation of powers, understanding as the organizational and functional distribution of the state power, supposes that the judicial acts could be the sources of law.[35]For, the separation of powers means, in particular*, independent* justice – independence of the judicial power in the course of "law-speaking" (competence) – in resolving cases` time, i.e. in ascertainment of law concerning a pending suit, interpretation of Constitution, statutes and other sources of law in the process of jurisdiction`s implementation.[36]

Hence it appears that the judicial law-making is feasible. It seems as an *elegantia juris***.** The primary sources of law *(creative precedents)* and the secondary sources of law *(precedents of interpretation, habits of judicial practice and even "quasi-normative" judicial acts – acts of normative interpretation)* have resulted from that appearance.

From the perspective of the separation of powers, the judicial law-making is permissible just in the framework of forensic functions to resolve the case. The judicial power as represented by the supreme courts can give the law-making decisions, not substituting for the legislator and remaining within the judicial tasks.[37] Consequently, not the forensic law-making, as such, contradicts the tenet of the separation of powers, but just the law-making activity of the supreme courts ("quasi-normative" acts of the judicial power) by the use of *abstract* normative interpretation of the Constitution or the statute, is at variance with the doctrine. The nature of the judicial power supposes namely *specific* normative interpretation of the Constitution or the law concerning *the pending suite (adhuc sub judĭce lis est***)**. So, everything points to the opinion that just *specific (incidental)* normative interpretation of the Constitution or the law, resulted in the interpretative precedent, is acceptable. Let even the "quasi-normative" act (example gratia, regulations of the Supreme court) is issued, but *this act must not precede judicial practice, but generalize legal stands, that have already put into specific normative interpretation*. So, *expressum facit cessāre tacĭtum***.**

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[35] Livshitz R.Z. Теория права. M., 1994. p. 109.

[36] Zor`kin V.D. Социалистическое правовое государство: основные черты концепции // Право и власть / Ed. Vishinskyi M.P. M., 1990. p. 83.

[37] Zor`kin V.D. Opt.cit., p.83.

Concluding remarks

In light of these reflections, for to study the real relation between the doctrine of the separation of powers and the judicial law-making, it is indispensable to go beyond the dimension of the separation of powers and to analyze the law-making activity of supreme and constitutional courts.

Since the judicial law-making is not a cognitive activity, but something eminently practical and material, it is necessary to overcome the distinctions among the dimensions of doing, thinking, deciding, knowing, organizing, resolving, interpretation and investigate in overall sense the situated practices of the supreme and constitutional courts within an organizational context of the separation of powers doctrine.

In conclusion, this paper intends to represent the general theory for to discuss on the dialectics between the judicial law-making and the tenet of the separation of powers.

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