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The improvement of legal regulation of appeal and cassational proceeding in civil procedural legislation of the Republic of Kazakhstan

The theoretical concept and essence of legal institutes of readjudication of judicial acts in civil process are considered in the article: appeal and cassational proceeding. The author, analyzing legal regulation of these legal institutes in the draft of the new Civil procedural code of the Republic of Kazakhstan, comes to a conclusion that it is necessary to leave the full appeal in edition of the current legislation. The new approaches to research of this problem are expressed in the provisions formulated by the author, and also in system of suggestions for improvement of the legislation.

Key words: appeal, cassation, appeal proceeding, cassational proceeding, civil process, Civil procedural code, judicial division.

The constitution of the Republic of Kazakhstan guarantees to each citizen the right for judicial protection of his rights and freedoms. The production before the court for protection of the violated subjective right and legitimate interest — wide, originally democratic, constitutional right in which availability of justice is embodied. The equality of all before the law and court (Art. 14), and also the right to the qualified legal aid (Art. 13) is fixed in the Constitution of the Republic of Kazakhstan [1]. Protection of the rights of citizens is realized in civil and criminal legal proceedings.

Justice implementation was necessary attribute of the state sovereignty at all times. Therefore it isn't casual that judgments, in particular on civil cases, are taken out by «a name of the Republic of Kazakhstan» as only the state has absolute monopoly for justice implementation. The Ancient Greek philosopher Platon noted that «laws are guarded by justice. Any state stops being the state if courts in it aren't arranged properly». It follows from this that no other establishment, except the judicial authorities which are legislatively established by the state, has no powers on enactment of the judicial resolutions and coming under to obligatory execution.

In the Republic of Kazakhstan justice functions irrespective of the legislative and executive authorities and has the competence which is strictly defined in the Constitution of the Republic of Kazakhstan and laws. The special role in modern conditions belongs to justice on civil cases. From total quantity of the cases considered by courts, the prevailing number is made by civil cases. Therefore implementation of justice on civil cases as specific state function consists in providing appropriate application of the laws by restoration of both the violated right, and the broken balance in civil legal relationship. That is justice is called as the famous French jurist of the XIX century Alexis de Tocivil noted in due time, «to replace idea of violence with idea of the law» [2; 6].

Consideration and settlement of civil cases affects the subjective rights and legitimate interests of considerable part of citizens and legal entities. Therefore, it is difficult to overestimate justice role in protection of the rights and freedoms of citizens, the organizations, the statement of the principle of social justice, the prevention of offenses, and development of respect for the law, the rights, honor and dignity of citizens.

The specified problems of civil legal proceedings can be successfully realized only at the most strict respecting of the legitimacy as one of the most important conditions of strengthening of the legal basis of the state and public life, functioning of the constitutional state which is under construction in Kazakhstan.

According to the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 the civil procedural law is urged to provide availability of justice, the maximum realization of the rights of participants of civil legal proceedings, timely protection and restoration of the violated rights and personal freedoms, interests of society and state. Standards of the existing civil procedural legislation, pursuing these aims, have to consider to the full extent to take into account the happening changes caused by fast development of economy and necessity of settlement of legal disputes, increase of legal literacy of citizens [3].

One of the factors defining development of process of democratization in the country is providing to everyone availability of justice, and also fair and rather fast settlement of the legal conflicts. Ways of achievement of such security are various, in particular, in the Message of the President of the Republic

of Kazakhstan — the Leader of the nation Nursultan Nazarbayev to the people of Kazakhstan «Strategy «Kazakhstan – 2050»: the new political policy of established state» is specified by one of the main directions of Strategy realization by citizens of the right for judicial protection which is guaranteed by the Constitution. For this purpose it is necessary to simplify process of administration of justice, having relieved it of excessive bureaucratic procedures. At the same time for unloading of courts it is necessary to continue development of institutes of extrajudicial settlement of disputes [4]. It obliges the scientists-jurists to revise the existing civil procedural legislation, the separate institutes of the civil procedural law.

The judicial reform which is carried out in the Republic of Kazakhstan is aimed at the statement of the self consistent and independent judicial authority capable to protect the rights, freedoms and legitimate interests of citizens and other legal entities. Achievement of this result isn't possible without studying of practice of realization of problems of civil legal proceedings as effective justice assumes achievement by court of the purposes and tasks fixed by the existing civil procedural legislation (Art. 5 of Civil procedural code of the Republic of Kazakhstan).

The existing Civil procedural code of the Republic of Kazakhstan is the code, one of the first in the former Soviet Union unifying civil legal proceedings. With enactment of the Civil procedural code of the Republic of Kazakhstan certain steps towards simplification of civil legal proceedings are taken: writ proceedings and trial of claim cases in the trial in absentia (chapters 13 and 24 of CPC) are entered. However cardinal change of the civil procedural form which is bulky and demanding considerable expenses by overwhelming quantity of the civil cases considered in court didn't happen. In this plan it would be desirable to stop on some questions of improvement of the Civil procedural code of the Republic of Kazakhstan regulating an order of administration of justice on civil cases.

Now in Kazakhstan the draft of the new Civil procedural code which provides the order of consideration of civil cases, convenient and fast for the parties focused on their reconciliation and wide using of modern technologies is discussed. According to the Concept of the draft of the Civil procedural code the trial stages at which provision of new proofs by the parties and the persons participating in case, with an exception of possibility of their provision to the court of cassational and supervising instances will be defined.

The appeal of judicial acts is a real guarantee of protection of the rights of the persons participating in civil legal proceedings which provides opportunity by the simple and available way to achieve cancellation or change of illegal and unreasonable judicial acts. The justice focused on necessity of the solution of concrete cases represents very difficult activity. Today in the republic becomes much to provide rather high level of implementation of such activity in consequence of which acts of courts of the first instance are reasonable and in the terms established by the law come into force. However completely it is almost impossible to exclude more or less essential errors in work of court of the first instance therefore the operating order of legal proceedings can't do without elimination of miscarriages of justice. One of such ways is proceeding on readjudication of judicial acts as the appeal and the cassation.

Appeal proceeding in civil process arose in the Roman Empire. The word «appellation» of a Latin origin is also meant by «the address, the complaint», that is it is about the appeal of the judgment in higher judicial instance for the purpose of re-examination of the case [5; 69].

The Kazakhstan scientist-processualist Z.H. Baymoldina gives the following definition: «The institute of the appeal represents the set of the civil procedural rules regulating activities of appellate court for check of legality and validity of the judgments which didn't enter into force and rulings of court of the first instance and also on secondary consideration and settlement of case on merits» [6; 245].

In juridical literature there are opinions which consider the appeal proceeding as reconsideration of a civil case in essence: «The right of appellate court to check correctness of settlement of case by court of the first instance, both with legal, and from the actual side, and also to establish the new facts by research and an assessment of new proofs allows to claim that the appeal instance anew considers and allows the merits of the case. Thus, the institute of the appeal represents the resolution of case on merits» [7; 58].

However, features of the appeal proceeding are that first, usually appeal instance doesn't reconsider all case entirely, and investigates the separate facts, circumstances and proofs (first of all, on what the party specifies in the appeal complaint), leaving other moments beyond the frames of consideration. Secondly, in appeal instance such principles of process as an oral nature of judicial proceedings, directness, competitiveness and some other principles often work in smaller volume, than in courts of the first instance. All this doesn't allow considering the appeal simply as reconsideration of a civil case.

It should be noted that proceeding of readjudication of judgments in the different countries and during the different historical periods had very essential differences, though similar names. The legal systems

of various countries know both full and incomplete appeal [8; 169]. The full appeal is fixed in the legislation of France and Italy, and incomplete is fixed in the legislation of Germany and Austria. At the full appeal the parties are rather free in presentation of proofs (as considered in court of the first instance, and new also), and the appeal instance has all necessary powers for pronouncement of the new judgment on the case. At the incomplete appeal the parties have no right to produce to the court the new evidences; the appeal instance has some restrictions of the powers and under certain conditions can return the case for new consideration to court of the first instance.

It should be noted that limits of studying of the case by higher instances are various. If the Appellate court of France investigates the case in full, finding out the actual and legal side, the Court of cassation considers only matters of law, i.e. correctness of application of law. A subject of consideration is violation of the law, excess of the power, the contradictory judgment. In the case of satisfaction of the appeal the case comes back in that court which judgment was cancelled, for consideration of the case in other structure. The case can be returned and in appeal instance, which judgment cancelled superior court.

Now the Kazakhstan model of appeal proceeding has similarity with French, that is the appellate court not only checks the correctness of judgments of the first instance, but also can allow the case on merits again on the same beginnings, as well as the first instance. According to the existing civil procedural legislation consideration of appeal complaints and protests is made by the judge of appeal board individually: «Appeal complaints and protests to the judgments passed by the regional and equated to them courts are considered individually by the judge of the regional and equated to it court» (Art. 333 of CPC of the Republic of Kazakhstan).

Consideration of the appeal complaint and protest individually by the judge or in joint structure of three judges of court is provided in article 397 of the CPC of the RK draft. «Individually private complaint and a protest, and also the appeal complaint and a protest on the cases connected with collecting the alimony, a salary, divorce, and cases of special proceeding except for categories of the cases provided by chapters 42, 43, 49, 50 of the present Code are considered by the judge». Though it is conventional that appeal or cassation readjudication of judgments on cases are carried out by more qualified judges jointly.

Individual readjudication of judicial acts as the appeal shows misunderstanding of essence of the appeal and institute of readjudication of judgments in general. The sense of this procedure consists in increase of level of consideration of the case, readjudication of it by more qualified judges in joint structure as it is considered that the board of judges is a sufficient guarantee of necessary level of pronouncement of the fair resolution on the case. For ensuring high-quality consideration of the case in courts of appeal instance, we consider necessary, to specialize judicial divisions on categories of civil cases.

In Strategy «Kazakhstan – 2050» the President of the Republic of Kazakhstan N. A. Nazarbayev designated major problems on strengthening of statehood and development of democracy. He paid special attention to questions of realization of the rights of citizens for the judicial protection guaranteed by the Constitution of the Republic of Kazakhstan. Effective and fair application of law, including strengthening of judicial authority are called by him among seven state-building directions [4]. It should be noted that in the Republic measures for development of judicial system, improvement of the national legislation are consistently carried out. The question of necessity of complex audit and readjudication of the civil procedural legislation which is urged to provide «the order of consideration of civil cases, convenient and fast for the parties focused on their reconciliation and wide use of modern technologies» was among the priority directions.

Today we have no necessity to speak about efficiency of the current version of the Civil procedural code as only for the last three years over twenty laws by which various changes and additions were made to it were adopted, and all since 1999 those were brought more than fifty times. It is necessary to consider standards of the new Criminal procedural code of the Republic of Kazakhstan accepted on July 4, 2014. From these positions, development and removal at discussion of the draft of new Civil procedural code of the Republic of Kazakhstan it is demanded by time and circumstances. It would be desirable to give the analysis to such major institute of civil procedural law as readjudication of the judicial acts both which haven't entered, and entered into the legal force. Exactly this institute and its norms since 1999 in Civil procedural code of the Republic of Kazakhstan systematically were exposed to continuous audit and were modernized, and several times cardinally. In the presented edition of the Civil procedural code of the Republic of Kazakhstan draft we see again the next attempt of search of optimum model of readjudication of judicial acts with which in something it is possible to agree, and to argue with something, taking into account, first of all, the experience which is saved up by jurisprudence, without forgetting thus the main principle, the purpose

by which we have to be guided, choosing an order of the appeal of judicial acts, convenient, available to the parties, but not for court.

We don't consider from these positions reasonable the changes which are assumed by the draft to bring in an order and terms of appeal complaints and protests: «article 398 item 3. The appeal complaint, protest can be submitted within fifteen working days from the date of pronouncement of the judgment in the final form». The current edition of article 334 of the Civil procedural code of the Republic of Kazakhstan «the appeal complaint, protest can be submitted (are brought) within fifteen days from the date of delivery of the copy of the judgment passed by court» underwent testing by time and practice. This norm stimulates the court, first of all, secretaries of judicial session to take measures to that the judgment in point of fact was handed to the parties, and they had opportunity, proceeding from its contents, to realize their right for justice.

The offered edition of the Draft that «the complaint, the protest can be submitted within fifteen working days from the date of pronouncement of the judgment in the final form» creates for the parties and for court a set of problems. If to consider that according to the article 229 of the Civil procedural code of the Republic of Kazakhstan «drawing up the motivated judgment can be postponed for term no more than five days», the party can come behind a judgment in five days, unfortunately, such practice exists, as the result of huge load of courts.

The current version of the article 334 of the Civil procedural code of the Republic of Kazakhstan in this plan is positively perceived not only by the parties, but also by the lawyers practicing in courts, lawyers-authorized agents. We consider that the parties, other persons participating in case need to give sufficient term for preparation of the appeal complaint or protest. Therefore it is offered to leave former edition of part 3 of the article 334 of the Civil procedural code of the Republic of Kazakhstan: «The complaint, the protest can be submitted (are brought) within fifteen days from the date of delivery of the copy of the judgment passed by court».

In a part of the appeal of rulings of court of the first of instances we consider, also necessary to leave the operating term in fifteen days as the rulings are most often taken out by court before the judicial proceedings, or during it when the parties have straight line and operational interest in their appeal.

The individual readjudication of judicial acts as the appeal shows misunderstanding by the Civil procedural code of the Republic of Kazakhstan developers of essence of the appeal and institute of readjudication of judgments in general. The sense of this procedure not in simply to give to the parties the chance «to change» all process anew. The main thing thus — increase of level of consideration of the case, the qualified consideration of the case. The institute of readjudication of the judgment is one of manifestations of compromise between legal protection of interests of participants of the case and effectiveness of process as readjudication of the case at higher level happen only when the judgment of the first instance doesn't satisfy one or both parties.

In the current Civil procedural code of the Republic of Kazakhstan the institute of the full appeal is regulated. At incompleteness of research in the first instance court appellate court has to cancel the passed judgment, to accept the case to the proceeding and finish its settlement in essence. Respectively the increase in term of hearing of cases by courts of appeal instance about two months is required. Therefore, we consider necessary the implementation of readjudication of judicial acts as the appeal only in joint structure.

The essence of the cassation founded at the time of Napoleonic France consists only in check of legality of the appealed judgment. The court of cassation instance in the XIX century possessed two powers: to leave the judgment without change or to cancel it (to file an appeal to a court of cassation) with the direction of the case for new consideration in the first instance.

According to the cassation appeal in the article 433 of the Civil procedural code of the Republic of Kazakhstan draft where it is established that «Cassation complaint or a protest are considered by cassation judicial board of the regional and equated to it court as a part of not less than three judges of this board». We find it possible to offer option of implementation of cassation readjudication individually by the judge. The following version of article 433 of the Civil procedural code of the Republic of Kazakhstan draft is offered: «The cassation appeal or protest on the judgments which entered into force, resolutions and rulings of courts of the first and appeal instances is considered individually by the judge of the regional and equated to it court». The right to carry out such readjudication can be granted only to the judges having length of service by the judge not less than 10 years, and 5 years length of service by the judge in courts of the first of instances.

The term of reconsideration of the case in the cassation in Art. 446 of the Civil procedural code of the Republic of Kazakhstan draft where it is provided: «In the court of cassation instance case is subject to con-

sideration no later than monthly term from the date of its receipt», it is necessary to establish in two months that will give the chance to the judge thoroughly to study case materials, the appealed judicial act. Two joint instances on readjudication of judicial acts is thing too expensive and not acquitting itself, individual cassation will demand serious personnel selection of judges, but we are sure that this model will be more effective.

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Қазақстан Республикасының азаматтық іс жүргізу заңнамасында апелляциялық және кассациялық өндірістерді құқықтық реттеуді жетілдіру

Мақалада азаматтық іс жүргізуде сот актілерін қайта қарау бойынша құқықтық институттардың: апелляциялық және кассациялық өндірістердің теориялық ұғымы мен мәнісі қарастырылды. Автор аталмыш құқықтық институттардың жаңа Қазақстан Республикасы Азаматтық іс жүргізу кодексінің жобасында құқықтық реттелуіне талдау жүргізе отырып, қолданыстағы заңнаманың редакциясындағы толық апелляцияны қалдырған жөн деген қорытындыға келді. Осы проблеманы жаңа тұрғыдан зерттеу автордың ұсынған тұжырымдарында, заңнаманы жетілдіру бойынша ұсыныстарында көрініс табады.

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Совершенствование правового регулирования апелляционного и кассационного производства в гражданском процессуальном законодательстве Республики Казахстан

В статье рассматриваются теоретическое понятие и сущность правовых институтов по пересмотру судебных актов в гражданском процессе: апелляционного и кассационного производства. Автор, анализируя правовое регулирование данных правовых институтов в проекте нового Гражданского процессуального кодекса Республики Казахстан, приходит к выводу, что следует оставить полную апелляцию в редакции действующего законодательства. Новые подходы к исследованию данной проблемы выражаются в сформулированных автором положениях, а также в системе предложений по совершенствованию законодательства.

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