IV. CRIMINAL LAW AND PROCEDURE

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ON DRAWBACKS IN REGULATING THE FIRST PHASE OF CASSATIONAL PROCEEDINGS IN PROCEDURAL LAW OF RUSSIA

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Introduction: *in the article, disputable questions of regulating the first phase of cassational proceedings according to the Russian procedural law are considered.* ***Purpose:*** *to conduct a comparative analysis of the Civil Procedural Code, Administrative Procedural Code, Administrative Court Proceedings Code and Criminal Procedure Code rules that regulate cassational procedures; to find drawbacks in the process of regulating the first phase of cassational procedures in criminal procedural law and procedural law of Russia on the whole.* ***Methods:*** *the research is based on a complex of methods of scientific cognition, with the dialectical method being the major one. In the article, general scientific methods (dialectics, analysis and synthesis, abstracting and concretizing) and specific scientific methods (comparative law research and technical legal method) were used.* ***Results:*** *the imperfection in regulating the first phase of cassational procedures has been revealed in the fact that preliminary study of a complaint or a proposal is only conducted by a judge of the corresponding cassational court, who solely takes a decision on whether to transfer those complaints and proposals to the court hearing or to dismiss (articles 401.7–401.11 of the Criminal Procedure Code; 380.1–384 of the Civil Procedural Code; 323–325 of the Administrative Court Proceedings Code; 291.6–291.9 of the Administrative Procedural Code). The legislator does not properly provide a unified approach to the regulation of the inter-branch institution of cassational proceedings in procedural law of Russia. This leads to the lack of consistency in the court practice, resulting in the unjustified infringement of rights and legitimate interests of a person, and groundlessly limits the access to cassation in different spheres of court proceedings. In general, there is no equal level of protection of the rights of citizens in the country, their equality before the court and the law is not observed.* ***Conclusions:*** *in procedural law of Russia and in practice of its application as referred to inter-branch institutions (including cassational proceedings as its part), it is necessary to develop a unified approach, to the first phase of cassational proceedings in particular. The access to cassation should be stricter than that to appeal, but it should not be extremely complicated. The rules of a "strict" access should be justified and should not be significantly different for all the forms of court proceedings. At present, according to the current legislation, access for citizens to cassation is most difficult in criminal courts (as compared to civil, arbitration, administrative legal proceedings). The criterion of the considerable violation of substantive law and (or) procedural law rule that influenced the result of the court procedures and led to the in-*

fringement of the person's rights and legitimate interests, should be defined collectively but not solely by a judge outside the court hearing, as it takes place now in accordance with the Criminal Procedural Code, Civil Procedural Code and Administrative Court Proceedings Code of the Russian Federation.

Keywords: the first phase of cassational proceedings; access to cassation;
criterion of the considerable violation of substantive law and (or) procedural law rules

Information on Russian

О НЕСОВЕРШЕНСТВЕ РЕГУЛИРОВАНИЯ ПЕРВОГО ЭТАПА КАССАЦИОННОГО ПРОИЗВОДСТВА В ПРОЦЕССУАЛЬНОМ ПРАВЕ РОССИИ

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Введение: *в статье рассматриваются дискуссионные вопросы регулирования первого этапа кассационного производства в процессуальном праве России.* ***Цель:*** *провести сравнительный анализ норм ГПК, АПК, КАС, УПК, регулирующих кассационное производство. Выявить несовершенство регулирования первого этапа кассационного производства в уголовно-процессуальном, а также в процессуальном праве России в целом.* ***Методы:*** *методологическую основу исследования составляет совокупность методов научного познания, среди которых ведущее место занимает диалектический метод. В статье использованы общенаучные (диалектика, анализ и синтез, абстрагирование и конкретизация) и частнонаучные методы (сравнительно-правовой, технико-юридический).* ***Результат:*** *выявлено несовершенство регулирования первого этапа кассационного производства – предварительное рассмотрение жалобы, представление единолично судьей соответствующего суда кассационной инстанции для принятия решения об их передаче для рассмотрения в судебном заседании или об отказе в передаче (ст. 401.7–401.11 УПК; 380.1–384 ГПК; 323–325 КАС; 291.6–291.9 АПК). Законодатель должным образом не обеспечивает единого подхода к регулированию межотраслевого института кассационного производства в процессуальном праве России, что лишает единства судебную практику, приводит к неоправданным нарушениям прав, законных интересов личности, необоснованно ограничивает доступ в кассацию в разных формах судопроизводства. В целом же, в стране отсутствует одинаковый уровень защиты прав граждан, равенство их перед судом и законом.* ***Выводы:*** *в процессуальном праве России и практике его применения относительно межотраслевых институтов (коим в том числе является кассационное производство) необходимо вырабатывать одинаковый подход, и в частности к 1-му этапу кассационного производства. Доступ в кассацию должен быть более строг, чем доступ в апелляцию, но не быть чрезвычайно затрудненным. Правила «строгого» доступа должны быть обоснованными и не могут существенно расходиться (различаться) во всех формах судопроизводства. В настоящее время, согласно действующему законодательству, доступ в кассацию в большей степени затруднен для граждан в уголовном судопроизводстве (по сравнению с гражданским, арбитражным, административным судопроизводством). Критерий существенного характера нарушения норм материального права и (или) норм процессуального права, повлиявшего на исход судебного разбирательства и приведшего к наруше-*

нию прав, законных интересов личности, должен определяться коллегиально, а не единолично судьей вне судебного заседания, как это происходит в настоящее время в соответствии с УПК, ГПК и КАС РФ.

Ключевые слова: первый этап кассационного производства; доступ в кассацию;
критерий существенного характера нарушения норм материального права и (или) норм процессуального права

Introduction

According to the procedural law of Russia, the current order of proceedings in a court of cassation includes two relatively isolated phases: one is preliminary consideration of a complaint or submission solely by a judge of the appropriate cassation court to decide whether to transfer it for court consideration or dismiss (articles 401.7 – 401.11 of the Criminal Procedural Code; 380.1 – 384 of the Civil Procedural Code; 323 – 325 of the Administrative Court Proceedings Code; 291.6 – 291.9 of the Administrative Procedural Code), and the other is a cassation court hearing followed by the appropriate court decision (articles 401.12– 401.16 of the Criminal Procedural Code; 385 – 390 of the Civil Procedural Code; 326 – 330 of the Administrative Court Proceedings Code; 291.10– 291.14 of the Administrative Procedural Code). The first phase mentioned only appeared in cassational proceedings after amendments to the Russian Federation Criminal Procedural Code by Federal Law of December 29, 2010, No. 433-FZ and, correspondingly, after amendments made to the Russian Federation Civil Procedural Code by Federal Law of December 9, 2010, No. 353-FZ; however, this phase had been enshrined before and now is provided for in the review proceedings. The Russian Federation Administrative Court Proceedings Code, having been in force since September 15, 2015, introduced the order of cassational proceedings similar to that provided for by the Russian Federation Civil Procedural Code. As for the Russian Federation Administrative Court Proceedings Code, in the system of the Arbitration Court **originally** there was **no first phase** (preliminary consideration of a complaint performed solely by a judge followed by the decision either to transfer it for court consideration or dismiss), the same as **it does not exist now at the level of** Federal District Arbitration Court (Articles 278-291). This phase was first introduced only at the level of the Collegium on Economic Disputes in the RF Supreme Court.

This significant difference between courts of general jurisdiction and courts of arbitration in organizing cassational proceedings as an inter-branch institution in the Russian procedural law cannot but causes a number of questions. It is difficult to explain the existing differences in organizing and implementing Justice in the conditions of the unified national court system of the Russian Federation, when the task of providing an equal level of protection for the rights and legitimate interests of the citizens and the task of implementing the constitutional principle of equality before the court and the law need to be managed. The legislator, the Russian Federation Constitutional Court, scientists and experts give different assessments to introduction of the phase of preliminary consideration of a complaint solely by a judge, followed by a decision to transfer the case to the court consideration or dismiss, in criminal, civil, administrative, and since recent time, partially, in the arbitration proceedings.

Main Content

As the Russian Federation Constitutional Court pointed out in its Regulation of March 25, 2014, "8-P", "On Case Concerning the Review of Constitutionality of a Number of Provisions of Articles 401.3, 401.5, 401.8 and 401.17 of the Criminal Procedural Code in Connection with Complaints of S. S. Agaev, A. S. Bakayan and others", the order of criminal proceedings in the cassation court containing the requirement of preliminary consideration of cassation complaints by judges of the appropriate courts is intended to prevent the transfer of evidently groundless applications and to discover the presence of the fundamental law violations that can lead to the revision of judicial decisions in force. Such a proceeding on a cassation complaint corresponds to the legal nature and the purpose of the cassational procedure and cannot be treated as incompatible with everyone's right to the protection in court and fair trial. When considering a criminal case on its merits in the cassation court, basic procedural principles and guarantees are respected for all the parties and other participants. The interpretation of part four of Article 7 of the RF Criminal Procedure Code in its interrelation with Articles 401.7 – 401.11 is that when taking the decision on the grounds for the criminal case to be transferred to the cassation court,

the judge is obliged to take a justifiable and reasoned decision.

The introduction of this phase into the Russian procedural law could be treated as the reflection of the essence of the implemented reform of the court procedure monitoring and review: the new cassation got the features of an extraordinary procedure. In its decisions, the European Court of Human Rights clarified that the access to the cassation should be stricter than to the appeal [1, p. 190].

It is difficult to object to this statement. Along with this, the access to the cassation for citizens should not be extremely complicated, i. e. "strict rules" should be justified.

However, the analysis of some norms of the RF Criminal Procedure Code testifies to the contrary.

For example, in accordance with part two of Article 401.3, as in force before Federal Law of December 29, 2013, No. 3 82-FZ "On Amendments to Article 401.3 of the RF Criminal Procedural Code" came into its force, the Judicial Chamber of the RF Supreme Court receives cassation complaints, sentencing submissions and a decision of Justice of the Peace; a verdict, judgements or decisions by the regional court; appeal judgements and decisions, interim judicial decisions by the Supreme Court of the Republic, by the regional or territorial court, by the court of a city with the federal status, by the autonomous region court, by the autonomous area court - all taken during criminal proceedings in the court of first instance, in case they were a **subject of examination by the Presidium** of the Supreme Court of the Republic, regional or territorial court of the city with the federal status, autonomous region court, autonomous area court. Cassation complaints, sentencing submissions, appeal decisions and judgement of the regional (naval) court are submitted to the Military Collegium of the RF Supreme Court in case they were **not a subject** of examination of the regional (naval) military court. In accordance with Item 5 of Part 1 of Article 401.5, cassation complaints and submissions made with violation of jurisdiction rules set by Article 401.3 were returned with no review. Besides, according to Article 401.8, after the study of a cassation complaint or submission, the judge of the cassation court makes a decision on transfer denial for the cassation complaint or submission for their further study in the cassation court in case there is no ground for that. The Chairman of the RF Supreme Court and his deputy have the right to disagree with the decision of the Supreme Court judge on the refusal to transfer cassation complaint or submission to the cassation court, and can annul the order and transfer the complaint or submission for consideration to the appropriate cassation court. Moreover, according to Article 401.17, the repeated or new complaints or submissions on the same or different legal grounds made by the same persons and submitted to the same cassation court are not allowed in case this complaint or submission was studied earlier with regard to this person by this court in the court hearing or were rejected by the judge's order. The previous legal provisions groundlessly made the citizens' access to the criminal procedure cassation more complicated.

One can suppose that the legislator agreed with the vulnerability of the listed norms by adopting Federal Law of December 28, 2013 No. 382-FZ. The amendments were introduced to Items 2, 5 of Part 2 of Article 401.3 of the Russian Federation Criminal Procedure Code. We reiterate that the previous version of the article provided for the possibility to make the complaint or submission against the court decisions listed in Item 1 of the mentioned article to the Judicial Chamber on Criminal Cases of the RF Supreme Court only in case they were the **subject of examination** by the Presidium of the regional and equated courts, whereas the current version states that these court decisions must be **appealed under the cassation procedure** but need **not be a subject of examination of the cassation court**. In this regard, it is necessary to mention that there were no such mistakes made in the Russian Federation Civil Procedural Code. **Originally, the Civil Procedural Code included this norm in the form that still regulates homogeneous legal relations in the sphere of criminal proceedings** (Items 3, 4 of Part 1 of Article 377 of the RF Civil Procedural Code).

It should also be noted that before Federal Law of December 28, 2013, No. 382-FZ introduced amendments into the Criminal Procedure Code, the decision of the regional court judge on transfer denial for the cassation complaint or sub-

mission for consideration under the cassation procedure **had limited the opportunity for further judicial protection**.

There was no similar opportunity with respect to transfer dismissal by a judge of the regional court and the equal status court (as it exists for the Chairman of the RF Supreme Court and his deputy who have the right to disagree with the Russian Federation Supreme Court judge's decision to refuse to transfer a cassation complaint or a criminal case submission for their consideration at the court hearing in the appropriate cassation court).

The Russian Federation Constitutional Court found such a situation to *contradict* the Constitution. As the Russian Federation Constitutional Court explained, relations that are homogeneous in juridical nature should be regulated in the same way. The inter-related regulations of Items 2 and 5 of Part 2 of Article 401.3, Item 5 of Part 1 of Article 401, Item 1 of Part 2 and Part 3 of Article 401.8 and Article 401.17 of the RF Criminal Procedural Code as in force before Federal Law of December 28, 2013, No. 382-FZ, contradict the Russian Federation Constitution, its Articles 19, 46 and 55 [8]. Thus, in accordance with the procedure currently in force, the judge's decision on the transfer denial for a complaint or submission to the court session does not prevent from the further cassation complaint transfer to the RF Supreme Court for its consideration.

However, the explanations of the RF Constitutional Court have not fully solved the problem of the appeal against the decision of the regional and equal status court judge on the transfer denial for the complaint or submission to the cassation court. Homogeneous relations having respect to the opportunity of appealing against the decision to refuse to transfer a cassation complaint or submission made by the regional/ equal status court and the RF Supreme Court judge are still being regulated differently. A bill on proposing amendment to Chapter 47.1 of the Russian Federation Criminal Procedure Code has been submitted to the State Duma of the Federal Assembly of the Russian Federation. The bill gives the right to the judge of the RF Supreme Court, to the Chairman of the RF Supreme Court and his deputy, to cancel the decision of the regional/ equal status court judge on transfer denial for the complaint/submission and transfer them for consideration in the appropriate cassation instance in case they disagree with it. Thus, if the bill passes, the problem of appealing against the decision of the regional and other court will be legislatively solved (at present, the bill is being studied in the State Duma of the Russian Federation) [5].

The same problem is relevant for the civil court procedures (Part 3 of Article 381) and administrative court procedures (Part 4 of Article 323 of the Administrative Court Proceedings Code). It should be assumed that the solution should be similar to the one provided in the criminal court proceedings.

It is obvious that as compared to civil, arbitration and administrative court procedures, the access to the cassation in criminal court proceedings is the most complicated. The situation is getting worse because of the fact that **the "exhaustion of remedies" rule set for the decisions that have not yet come into force** are in some form enshrined in all the procedural codes except for the Criminal Procedural Code (Part 2 of Article 376 of the Civil Procedural Code; Part 2 of Article 318 of the Administrative Court Proceedings Code; Part 1 of Article 273 of the Administrative Procedural Code). It seems that there are no serious grounds for such an exception for the criminal proceedings. The rules of the citizens' access to the cassation in all the forms of court procedures should not be notably different.

We should also keep in mind that the "exhaustion of remedies" rule has also an international importance. The condition for applying to the European Court of Human Rights by the interested person is the exhaustion of all the national means of legal protection, as it is defined by the generally acknowledged international law norms, and the term is 6 months after the national bodies took the final decision on the case (Part 1 of Article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms). In this regard, the final decision is the court order of a particular authority which the European Court of Human Rights considers to be an effective national mean of protection.

Emphasizing excessive difficulties that citizens experience when trying to get access to the cassation, let us return to the first phase of the cassation procedures. In the mechanism of overcoming the

transfer denial for the cassation complaint/submission to be reviewed in a cassation instance, there are problems and the necessity to fill in the gaps in the legislative regulation. They refer not only to criminal but also civil and administrative court procedures. Indeed, in his complaint to the Constitutional Court of the Russian Federation, D. I. Abramovskikh, who had received a refusal to transfer his cassation complaints for the cassation consideration, requested to declare Item 1 of Part 2 of Article 401.8 to be inconsistent with Articles 19 (Part 2), 21, 24 (Part 2), 29 (Parts 4 and 5), 33, 45 and 46 of the Russian Federation Constitution, because according to this provision, not only the cassation complaint/ submission but also the copies of the contested court decisions are withheld in the cassation court [11]. Similar norms are contained in the Civil Procedural Code (Item 1 of Part 2 of Article 381) and Administrative Court Proceedings Code (Item 1 of Part 3 of Article 323). Based on similar complaints, a draft federal law was introduced to the State Duma [9]. There is still no answer to the question – how can a complainant challenge a single judge examining the complaint?

Besides, the vulnerability of the mechanism of overcoming the transfer denial for a cassation complaint/submission to court hearing is intensified by groundless differences in regulating the analyzed phase of proceedings in Russian procedural law.

In particular, we mean the prohibition provided for by Part 3 of Article 401.13 of the Russian Federation Criminal Procedure Code, in accordance with which a judge having made a decision to transfer a cassation complaint/submission to the cassation court, **has no right to participate in that criminal case consideration**. Such a prohibition is not provided for by Articles 61-62 of the Russian Federation Criminal Procedure Code, and in general, the existence of this norm cannot be accepted as convincing. Besides, this prohibition is not provided by the Civil Procedural Code, the Administrative Court Proceedings Court, and Administrative Procedural Code (at the level of the Russian Federation Supreme Court Judicial Chamber). Finally, the absence of this prohibition in the Civil Procedural Code was the subject of examination of the RF Constitutional Court, which pointed out that at the phase of preliminary consideration of a complaint, the only question solved is the question of transferring the cassation complaint/ prosecutor's submission for further study in the cassation court. The participation of the judge who reviewed this complaint or submission cannot be declared to break the principles of independence and impartiality of the judges when executing justice [7].

There are some other poorly explainable contradictions that do not provide an equal approach in regulating cassational proceedings in procedural law of Russia.

Unlike the Criminal Procedure Code (Article 401.5), in accordance with the Civil Procedural Code (Item 1 of Part 1 of Article 379.1), Administrative Court Proceedings Code (Item 1 of Part 1 of Article 321), Administrative Procedural Code (Article 281, Item 1 of Part 1 of Article 291.5), a cassation complaint or submission **cannot be returned to the complainant** with no consideration on the merits, in case there are **no fundamental violations of substantive law norms or procedural law norms committed by the court that influenced the outcome of the case**, with the reasons proving such violations. These norms give another confirmation that the citizens' access to the cassation in criminal proceedings is groundlessly stricter.

Thus, a number of problems of legal regulation of the first phase of the cassational proceedings of Russia are still unresolved.

It appears that the imperfection of the legislative regulation of the first phase of cassational proceedings performed in accordance with the Criminal Procedure Code, Civil Procedural Code and Administrative Court Proceedings Court is that a judge **solely** makes a decision on the fundamentality of violation of the substantive law norms and (or) procedural law norms that influenced the outcome of the case outside court proceedings.

As for "filters" for accepting cassation complaints/ submissions, their necessity is acknowledged by the majority of scientists and practitioners. We share the opinion of Y. A. Kostanov that the only filter acceptable is the one that filters out formally unacceptable complaints and submissions but not the one that decides if the complaint is reasonable in terms of the tasks set in it [4, p. 17].

The first phase of cassational proceedings regulated now by the Criminal Procedure Code, Civil Procedural Code, Administrative Court Proceedings Court, in our opinion, is a vivid deviation from the strict observance of the procedural form. This happens for a number of reasons. The judge outside the procedural form examines, in fact, the subject of the cassation proceedings. The principles of the justice cannot be followed outside the procedural form, and the person does not get the right to protect his legitimate interests. **There is a big risk of the arbitrary discretion by the judge, which can lead to making an illegal and groundless decision**. In connection with that, it is enough to say that the number of civil complaints for whose transfer a dismissal decision was taken in 2014 is 113.5 thousand or 95,5% (in 2013 – 110.9 thousand or 94,5 %). Thus, the cassation court received 5,3 thousand or 4.5 % of the complaints and submissions made by the regional courts and justice of the peace, in 2013 – 6.1 thousand, or 5.2 % [6, pp. 63–64].

The chart given below shows a large number of complaints with a dismissal decision concerning their transfer to the cassation court [12].

Data on quantity and results of the complaints and submissions made by complainants under the civil and criminal cassation procedure and considered by the Perm Regional Court in 2013–2015

		2013	2014	2015
Complaints and submissions received for **criminal** cases		6414	5843	5382
Of which	Transfer for consideration in the cassation court **rejected**	4160	2844	2661
	Transfer for consideration in the cassation court **approved**	262	151	189
Complaints and submissions received for **civil** cases		2797	2682	2590
Of which	Transfer for consideration in the cassation court **rejected**	2108	2003	1914
	Transfer for consideration in the cassation court **approved**	18	31	38

It is obvious that the other side of the legislator's will to provide a filter for groundless complaints/submissions, to save judges' time and efforts and to distinguish cassation procedures from appeal procedures is lowering level of protection for the citizens' rights and inaccessibility of the cassation proceedings for them.

Following the example of arbitration proceeding (at the level of the cassation courts of the territories), after filtering complaints/submissions that do not comply with the general (formal) requirements of law, it is necessary to hold a trial session where all the principles of justice are realized.

Conclusion

We believe that there is a necessity for a collegial decision when defining the criteria of fundamentality of violation of the substantive law norms and (or) procedural law norms that influenced the outcome of a case. This is a guarantee for taking legitimate and reasoned decisions by the cassation court.

In literature dedicated to problems of the civil process, there is a well-reasoned opinion that empowering a judge to make a decision on transfer or refusal to transfer a cassation complaint/ submission for consideration in the cassation court on the grounds that contested legal acts either have or do not have significant violations of the substantive law norms and procedural law norms is illegal and does not comply both with the norms of Civil Procedural Code and the essence of the cassation proceedings [2, p. 62].

As it is mentioned in the Concept of the unified Civil Procedural Code of the Russian Federation [3, p. 187], a new Procedural Code should provide for the eligibility criteria for the cassation complaint in order to minimize the importance of the judge's discretion. The formal criteria of the eligibility set solely by a judge are the requirements for the contents and the form of the complaint, subject composition, observance of dates and arbitrability. The criterion of the fundamentality of violation of the substantive law norms and (or) procedural law norms that influenced the outcome of the case and led to infringement of rights and legitimate interests should be determined as a

collegial decision. It appears that such an approach to understanding the process should be implemented not only in the unified Civil Procedural Code, but also in the Criminal Procedure Code, Administrative Court Proceedings Code, i. e. in the procedural law of Russia.

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