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Objectives and Scopes of Cassation in the Administration Process

In an administrative process it is very important an institute of cassation appeal, stating its admissibility grounds, a purpose, tasks and scopes of appeal.

To provide protection of individual and public interests within the scopes of the cassation appeal the following issues are very important, such as functional competence of cassation, review of legal elements of a disputed decision, checking the legal grounds of the disputed decision, restriction of power of review, confining to the cassation decision, constraining the admissibility of a cassation appeal and obligation of the cassation court to consider in essence all cassation appeals of special importance.

A procedural institute of lodging a complaint in the appeals instance has several purposes: protection of interests of a party and provision of unified justice; consideration of a case in the appeals instance and establish homogeneous court practice on analogous cases.

Key words: *the essence, purpose, tasks, scopes of cassation, constraining of cassation, individual and public interests, unified justice, law development, homogeneous court practice.*

1. Introduction

The essence and objective of cassation in professional literature is discussed as an obligatory and partly as an inevitable issue. A particular dispute concerns whether cassation must serve only or mostly general interests of developing of universal court practice or in a concrete case individual interest of taking right decisions. This issue is really important for a legislator, but less important (though not insignificant) for a user of Law.¹

The precondition for making a cassation decision is a procedural action being always carried out by an appropriately authorized person. In spite of the fact that cassation from the pure language viewpoint is revision, review, or a decision to be taken on the subject of revision, here a talk is about a final means of making appeal by a party of the process, which cannot be made by the third person even if the latter has legal, economic (financial) or the other kind of interest to revise this decision. The party of the process in relation to which the court judgment of the previous instance is not appealed, is forbidden to participate in the proceedings of cassation court.

The other opportunity, for example, a constitutional complain, which allows to revise the conformity of the cassation decision to the constitution, is not an appealing, but a mechanism of constitutional control, which is granted, for example to the Federal Constitutional Court of Germany in relation to all the democratic agencies of the state government.²

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¹ May A., Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 16.

² Ibid, 16.

2. Restriction, Main Point and Tasks of Cassation Court

Cassation appeal is restricted as by admissibility, as well as by size and scope of revision. This restriction and the difference coming from it in relation to the other possibilities of appealing is a main essence and objective of the cassation appeal. The objective of any judicial procedure is to accept the equitable decision on the concrete subject of litigation, which is corresponding to current Law and which must accomplish and exhaust the dispute between the participants of the process. To it belong investigation and stating considerable factual circumstances, choosing legal regulations and defining the contents (explanation) and also ascertainment of legal results expected from the factual circumstances of the case (subsumption qualification).³

For accepting the decision all these individual aspects are important. At the same time legislation is confined by legal review of the decision appealed by the cassation rule, using norms of current Law properly. From this it is clear that the talk is about the fair decision for a concrete case, otherwise the cassation court must be given the authority to reconsider and investigate factual circumstances without restriction. In such a case the cassation review would have been like the cassation consideration.

Checking up legality of the appeal court decision (judgment) means checking up the infraction of substantive-legal and procedural-legal norms. But by the Georgian model of the appeal court checking up the legality of the judgment has its scope, beyond which a judge cannot act, namely according to the first part of Article 404 of the Criminal Code of Georgia⁴ an appeal court is checking up the judgment within the scopes of the appeal appeal. An appeal court cannot check up procedural infractions voluntarily with the exception of facts given in paragraph “f”⁵ of part one of Article 396, which indicate procedural infractions.⁶

The above mentioned shows that the appeal court of the Georgian model is not a court stating facts and is checking up only the legality of the appealed judgment. The existence of such a model of cassation is conditioned by many factors, but the main characteristic of it is those objectives and tasks which are put before the appeal court.

Raising an issue on legality of the cassation court decision is the right of the party of court proceedings, but the judgment connected with the accepted decision is the prerogative of the Supreme Court.⁷ The main task (objective) of cassation procedure is not the solution (discussion) of case in essence, but review of legality of the decision accepted by an inferior court.⁸

The legal function of review is one of the elements defining tasks and objectives of court of cassation.⁹

³ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17.

⁴ Civil Procedural Code of Georgia, Article 404, The Parliament of Georgia, № 1106, 14.11.1997, <<https://matsne.gov.ge/ka/document/view/29962>>.

⁵ Civil Procedural Code of Georgia, Article 396, The Parliament of Georgia, №1106, 14.11.1997, <<https://matsne.gov.ge/ka/document/view/29962>>.

⁶ *Todria, T.*, Importance of Factual Circumstances in Cassation Court, Tbilisi, 2011, 25-26 (in Georgian).

⁷ *Mamaishvili T.*, Conference Devoted to Homogenous Court Practice, Decision of Cassation Court, Journal Justice, 2008, № 1, 104 (in Georgian).

⁸ *Qurdadze Sh.*, Proceedings in the Highest Court of Appeal, Tbilisi, 2006, 94 (in Georgian).

⁹ *Mamaishvili T.*, Conference devoted to homogenous court practice, Decision of Cassation Court, Journal Justice, 2008, № 1, 105 (in Georgian).

Cassation is basically protecting the united system of justice, which on its own supports strengthening of legal safety, as well as development of individual issues of justice in restrained quantity.¹⁰

It should be noted that according to French legislation the objective of the cassation appeal is review of the conformity of the decision to the law, carried out by the court of cassation. Hence it only discusses the legal side of the decision. It does not review factual circumstances of case and cannot carry out investigative activities. It does not either discuss new evidence or check up repeatedly evidence, which were represented to the court issuing the appealed decision.¹¹

Restriction of using of law enforcement of certain legal regulations and not revising and preconditions for very strict admissibility of court of cassation shows that accepting of a fair decision in a concrete case is not the only objective of cassation review. The united court practice (legal safety) and public interest of law development precondition the objective of cassation. At the same time factual circumstances stated by inferior court are not often excluded in reconsidering by cassational rule, which are not often foreseen sufficiently. Revision of factual circumstances is necessary for the conformity with current law, though it requires a special protest, the argumentation of which exempts the court of cassation from restrictions. The main essence of cassation is influenced not by conditional restriction of court of cassation by factual circumstances stated by inferior court, but prohibition, it must investigate and state itself circumstances important for taking decision, which in case of the grounded protest is generally causing disaffirm the appealed decision and sending it for reconsideration to the inferior court, which will state factual circumstances of case.¹²

The most important task before the cassation court is to check up the juridical side of case, to what extent it is conformed to the legal norm and whether the main point and content of the norm used by court is understood properly in deciding the matter.¹³ The above mentioned is the peculiarity of cassation. The system of legal means defining peculiarities of cassation is a legal regulative mechanism.¹⁴

According to the French legislation court of cassation does not consider for the second time the case, in relation to which the cassation appeal was lodged. To it only legal issues, connected with the case, might be submitted. It is impermissible to submit new evidence to court of cassation.¹⁵

According to the legislation of Austria the objective of legal proceeding of cassation is provision of united justice, to comprehend similarly the contents of material, as well as procedural norms, legal safety, development of law. Court of cassation must not admit evasion of the united system of justice provided by the Supreme Court when such united justice has not existed or exists but not in kind of the united justice.¹⁶

¹⁰ Zivilprozessordnung, Kommentar von Prof. Dr. Heinz Thomas, Dr. Klaus Reichold, Prof. Dr. Hans Putzo, Dr. Rainer Hüsstege, 24., neubearbeitete Auflage, Verlag C.H. Beck, München, 2002, 895-896.

¹¹ Ginchard S., Raynaud P., Nouveau Code de Procedure civile, Dalloz, ed., 2002, 334-339.

¹² May A., Die Revision in den zivil- und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGO, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2., überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17.

¹³ Lituashvili T., Civil Procedural Issues in Court Practice of Georgia, Part 1, Tbilisi, 2002, 165 (in Georgian).

¹⁴ Алеев С.С., Общая теория права. Т. 2, М., 1982, 9.

¹⁵ Couchez G., Procedure Civile, Dalloz, 9^e ed., 1996, 387-389.

¹⁶ Jurisdiktionsnorm und Zivilprozessordnung, Herausgegeben von Dr. Rudolf Stohanzl. 15., Auflage. Wien 2002, 1399-1416.

All the decisions of the court of appeal are not appealable by the rule of cassation, because according to legislation the admissibility of the cassation appeal depends on certain preconditions. The objective is to discharge of courts of cassation from insignificant legal controversies and maintain their vitality, choosing these preconditions of admissibility by a legislator. For deciding the priority issue of the cassation objective very important is individual, as well as general interest.

So the admissibility principle is more and more established (beside the dependence of the cassation appeal on property-legal value), especially when the matter is concerned with special importance and divergence. By this approach the cassation appeal is admissible only when a legal controversy is of high financial interest and legal importance. Though accessibility restrictions, especially the necessity of admissibility because of special importance and divergence, considers public interests avoiding cases of court of cassation, which are not to be reconsidered, maintaining its high functional capacity, an individual interest of accepting a proper and fair decision does not go to the background and in cassation legal proceeding it remains as a cassation objective.¹⁷

It should be noted that the aim of creating a court of cassation is provision of homogeneousness of court practice, comprehension of laws similarly. The main purpose of cassation is protection of the rights of parties according to legislation of Georgia, correction of court mistakes, which might be made by them while using this legislation.¹⁸

When provision of creation of the united court practice has significant influence on cassation, at the same time it is not either the only or the preferential objective of the cassation. A legislator would have reached this objective, if he beyond the legal issues within the scope of concrete case had made possible to give restrained answer to legal questions that are to be stated and cleared up. Except legal homogeneousness and law development in spite of its constraints cassation must provide an equitable decision on a concrete case. It makes us think that decision of inferior court is reviewable not by own initiative, but only basing on petition of one of the participants of the process. A legislator has granted the participants of the process the final (though restrained) authority of appeal, to protect individual rights, not turning them into protectors of legal homogeneousness.¹⁹

So its objective does not differ greatly from the others' objective, to provide proper decision on legal controversy and favor accomplishing finally the controversy between the parties of the process.

Te existed restrictions of admissibility preconditions on the one hand must provide averting matters less significant for court of cassation and on the other hand must restrict the volume of the decision under review. A legislator tried to accomplish this objective in civil proceeding first of all by restricting the value of the subject of controversy and later partly in parallel by setting the admissibility preconditions. In administrative proceeding opposite to civil process a cassation appeal is

¹⁷ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 17-18.

¹⁸ *Khrustali V.*, Objectives of Cassation and Preconditions for Accepting (admissibility) Cassation Appeal for Consideration, Collected Works: *Liluashvili T.*, Festschrift of 75, Tbilisi, 2003, 188 (in Georgian).

¹⁹ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 18.

admitted regardless of the appeal value. In this case there are not used requirements of II part of Article 365 and Article 391 of Criminal Code of Georgia²⁰ (Code of Administrative Offences, Article 34²¹). In discussing the objective of cassation is not always sufficiently envisaged the difference between the admissibility of cassation and the volume of review.

The tendency is obviously to setting the narrower preconditions of admissibility, maintaining functional capability of the court of cassation for the purpose of discharging the court, and to highlight general interest for development of legal homogeneousness..²²

3. Provision of Protection of Individual and Public Interests within the Scope of Cassational Appeal

Within the scope of admissibility preconditions of the cassation appeal a legislator gives the priority to protection public interests of legal homogeneousness and puts it before an individual interest of settling a concrete matter fairly. In spite of it the cassation appeal remains as a means of protection and carrying out individual rights of each participant of the process. After overcoming the admissibility raised for protecting public interests, the court of appeal must accept a legally right decision on a concrete matter, which will not have any straight or direct legal influence on other persons not participating in the process or other subjects of controversy, even if there is any similar subject of controversy and legal issues. At the same time it is obvious that legal issues solved by court of appeal, as weighted ones of the highest court instance, have influence on using of enforcement of laws of inferior court instance and legal behavior of population.²³

First of all the court of Appeal must foresee any offence and use all legal norms, which are not defined by this or that procedural code, as a statute not under review. An appellant is obliged to point to a concrete offence, which at the same time is not excluding the disaffirmance of the inferior court decision by court of appeal in spite of not pointing to the offence by the appellant. The other regulation is extended only on procedural issues, especially on the procedure of stating factual circumstances, which is really reviewable in the cassation instance only within the scopes of procedural protest of (pointing) violation of laws, though there are exceptions especially on hard procedural deficiencies, which should be considered by own initiative.²⁴

Legislation puts in foreground the violation of reviewable legal norms as a precondition of revision of the inferior court decision. In fact the matter is less concerned with displaying law violation; it is mostly concerned with accepting the final right decision on the matter of cassation constraining

²⁰ Civil Procedural Code of Georgia, Part 2 of Articles 365 and 391, The Parliament of Georgia, №1106, 14.11.1997, <<https://matsne.gov.ge/ka/document/view/29962>>.

²¹ Administrative Procedural Code of Georgia, Part 1 of Article 34, the Parliament of Georgia, №2352, 23.07.1999, <<https://matsne.gov.ge/ka/dokument/view/16492>>.

²² *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 18.

²³ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 19.

²⁴ *Ibid*, 20.

the use of using reviewable legal norms. Hence cassation can be grounded without violation of law, for example, in case when after having been accepted the appealed decision a legal norm to be used in this concrete matter came into force, which would not have been used and violated by inferior court.²⁵

It should be noted that according to German legislation the existence of law violation is not justification of a cassation appeal and does not cause reversing of the appealed decision, if violation is not causal-investigatory or is annulled by the other law violation and compensated in such a way, that ultimately the decision is sound. According to the Federal Constitutional Court of Germany the first-rate task of the court of cassation is legal homogeneousness. In other decisions court somehow mitigated this phrase and raised on the one hand arguments of legal safety and legal development, on the other hand interest of the party in getting fair decision.²⁶

Arguments of protection party's interests are: formation of cassation appeal, as a real means of appealing, which is possible only by the party's solicitation and expenses, also only when the decision is taken not on legal, abstract issue, but on concrete legal controversy, Also prohibition of reformatio in pejus (change for worse) and a legal force acting between the participants of the process. So changing of the decision for worse, changing it against the appellant, the force of decision of court of cassation is spread only on participants of the process.

In favor of the united court practice and general interest in law development talks functional competence of cassation, review of legal elements of the appealed decision, checking up the legal ground of the appealed decision, restriction of reviewable right, confining with the decision appealed by cassation rule, restriction of admissibility of a cassation appeal and obligation of the court of cassation to investigate all the cassation appeal of special importance.²⁷

Federal Constitutional Court of Germany thinks that cassation is "a procedural formation developed in regard to legislative advisability. Its functional define comes from current law". By this constellation cassation is "means of appealing, which must serve general interest, as well as party's interests".²⁸ It is true that the authority of revising a case by a court of appeal is confined, but when it appears, its objective is to take legally right decision. This objective comes directly from legal regulations, namely from the above described form of cassation, as a form for taking the right decision on case from the party's appeal.

From the point of accessibility to the court of appeal objectives don't exclude each others; on the contrary, they support and expand each other. From the viewpoint of an individual case the objective is establishment of the united court practice, development of law and existence of controlling function over the inferior court. The way to this objective is taking legal and right decision on individual case by lawful regulation.²⁹ In fact the Federal Constitutional Court of Germany denied the opinion about

²⁵ Ibid, 20.

²⁶ Ibid, 20-21.

²⁷ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 21.

²⁸ Decision of Federal Constitutional Court of Germany, dated 09 September, 1978, 2, 831/76. BVerfGE, Beshchl. V. 9.9. 1978 – 2 BvR 831/76 – BVerfGE 49, 148 ff.

²⁹ Decision of the plenary session of Federal Constitutional Court of Germany dated on June 11, 1980, 1/79; Decisions of Federal Constitutional Court of Germany, 54, 277, 289. BVerfGE, Beschl.des Plenums v. 11.6.1980 – IP-BvU 1/79 – BVerfGE 54, 277, 289.

the priority of common interest expressed in professional literature and explained that cassation compared with its other objectives, not only in the second place, serves the interest of protection of deciding an individual case.³⁰ There are emphasized two tasks of the court of cassation: on the one hand protection of the united system of justice and public interest in development of law and on the other hand protection of parties' interest on individual fair decisions.

Tasks and objectives are inseparable and it can be said that each concrete task is an objective itself.³¹

Court of appeal is obliged, if there are all the preconditions of accepting and admissibility of a cassation appeal, to investigate the cassation appeal in essence and take a proper decision in relation to the appeal, namely regardless of the investigation results to satisfy the appellant or reject a cassation; at the same time the opportunity of appealing of the decision by cassation rule and the existence of a court of appeal itself is a real legal means for checking up the rightness of the decision once again from the point of view of legal validity, which gives hope that if a mistake is really made in legal validity, it can be corrected, so the decision can be corrected. Based on the above one objective of cassation is cleared up: protection of parties' rights and interests, which in other words is called protection of individual interests.³²

Differences of admissibility preconditions and unreviewable legal norms are only qualitative and not general. Thus they don't concern the objective of cassation. It really spreads, for example, over the difference, which characterizes the principle of compatibility in civil legal proceedings and the inquisition principle in administrative legal proceedings, which in the cassation instance is expressed only in the issue whether the lack of evidence is a procedural defect.

Interest of accepting a decision and development of Law in view of preconditions of admissibility by a legislator and also before the judge of court of cassation, which by virtue of law is obliged to protect, satisfy and bring in balance the two interests according to the concrete procedural legislation.

The objective of cassation cannot be other than protection of rights of parties' according to the legislation of Georgia, correcting court mistakes, which can be made by them in using this legislation.³³ The function of the court of cassation must be provision of using laws homogeneously on the whole territory of Georgia.³⁴

The court of cassation must check up and consider requirements of protection rights necessary for the admissibility of the appeal, though only within the scope of admissible cassation.³⁵

³⁰ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 21-22.

³¹ *Алиескеров М.А.*, Кассационное производство по гражданским делам: вопросы теории и практики. Изд. „норма“, 2005, 42.

³² *Liluashvili T.*, Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2005, 494 (in Georgian).

³³ *Liluashvili T.*, Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2003, 303 (in Georgian).

³⁴ *Kiria G.*, Peculiarities of Appealing of Court Decisions on Civil Matters, Journal “Justice”, 1997, № 9-10, 76-78 (in Georgian).

³⁵ *May A.*, Die Revision in den zivil-und verwaltungsgerichtlichen Verfahren (ZPO, ArbGG, VwGo, SGG, FGO) Eine systematische Darstellung unter besonderer Berücksichtigung der höchstrichterlichen Rechtsprechung, von Artur May 2, überarbeitete und erweiterte Auflage – Köln; Berlin; Bonn; München: Heymanns, 1997, 13.

The proper usage of procedural means is of crucial importance for accomplishing the definite objectives before the court of cassation. It can be said that by means of the whole system of legal means is regulated those procedural-legal relations which are created by lodging a cassation appeal.³⁶

Besides it is doubtless that one of the objectives of creating cassation in Georgia was the understanding of laws homogeneously and provision of the united justice. Such an objective is before courts of cassation of almost all countries, which in other words is called protection of public interests.³⁷

In the activities of cassation the protection of individual and public interests is equally important.³⁸

4. Conclusion

Just court of cassation must be a guarantee of fair court in a state. In discussing measures connected with a court of cassation there should be taken into account a fact that the matter has been already investigated in two court instances.³⁹

The Supreme Court, the concrete objective of which is provision of dynamical, progressive and unifying definition of law, plays an important role in strengthening legal safety. In general supreme courts are providing that citizens' legal status must be guaranteed in relation to other citizens or governing agencies. The supreme courts must provide direct usage of constitutional norms and definition of laws by using these norms.⁴⁰ In spite of the fact that supreme courts don't have legislative authority, they must play a dynamical role of law definition and supervise using laws by courts and in this way provide homogeneousness of court practice. As defenders of law, they favor maintenance and protection of juridical safety of freedoms and fundamental rights.⁴¹

The Supreme Court has the most significant legal mission.⁴²

All this finally will support not only effective protection of freedoms and fundamental rights of citizens, but will also provide brushing up of Georgian administrative law and for the future its development from the scientific, as well as practical point of view.

³⁶ *Todria T.*, Importance of Factual Circumstances in Court of Cassation, Tbilisi, 2011, 28-29 (in Georgian).

³⁷ *Liluashvili T.*, Civil Matters Proceeding in Court, Practical Guide, 2nd ed., 2005, 494 (in Georgian).

³⁸ *Khrustali V.*, Cassation in Civil Proceedings, see Abstract of Thesis, 2004, 9-10 (in Georgian).

³⁹ *Qetsbaia E.*, Admissibility Conditions of Cassation Appeal in Civil Proceedings, Journal "Justice", 2007, №2, 158 (in Georgian).

⁴⁰ Authority of Fair Trial, Tbilisi, 2001, 162; Resolution Accepted at the Meeting of Chairmen and Judges of Supreme Courts of Central and East Europe on Strengthening Judicial Authority in Central and East European Countries, theme: Supreme Court and Constitutional Court: Interrelations Between a Role, Authority and Function, Prague and Brno, 21-23 October, 1988 (in Georgian).

⁴¹ Fair Trial Right, Tbilisi, 2001, 157 (in Georgian).

⁴² *Ibid*, 165.