

UDC: 347.992(497.22)

APPEAL AS THE COURT OF SECOND INSTANCE, ITS ESSENCE AND SIGNIFICANCE

Nato Karchaidze, PhD candidate
Grigol Robakidze University, Tbilisi, Georgia

Abstract:

In early years, the civil procedural legislation considered only cassation rule of appeal against court adjudication. Nowadays, establishment of the appellat system is one of the most important results of the reform of the court system of our country. Theoretical investigation of the institute of appeal against court adjudications is of utmost importance to effectively raise realization of the right of court protection which is one of the most important constitutional rights of citizens.

I.

The constitution of Georgia ensures the realization of fundamental human rights. Among them the right of legal protection is especially important. According to the first part of the Article 42 of the Constitution of Georgia “Everyone has the right to apply to a court for to protect his/her rights and freedoms”. This right is especially significant as it is essential for every individual and at the same time, realizes a human’s all rights and freedoms set by the Constitution.

The constitutional right of legal protection is realizes by applying to the justice using different means and forms: the right of appealing against a sentence is one of them.

In Georgian Civil Law proceedings there are two ways of applying against the acts enacted by the Court of First Instance:

First – appellate, what implies appealing against those adjudications made by the Court of the First Instance which have not been enforced yet (Article 364 of the Civil Procedural Code) [1, 160].

Second- cassation, what implies appealing against those adjudications made by the Court of Appeal which have not been enforced yet (Article 391 of the Civil Procedural Code) [1, 169].

The legal system of Soviet Georgia recognized only the cassation way of appealing against the decision made by the court which started after the revolution of 1917 soon after the first decree on court was issued. According to the legislative acts of that period, the

decision made by the Court of First instance could be overviewed on the basis of the protest expressed by high rank officials of the Prosecutor's Office and the Superior Court of Georgia and the other USSR republics. The Cassation Instance Court had the right to abolish decisions made by the Inferior Court not only because of law abrogation, but also for the lack of arguments. It had the right to examine the factual side of the case. Namely this distinguished the Soviet system of cassation of appeal from the foreign one (24, 527].

Proceedings could continue endlessly in the Soviet system of justice; enforced sentences could be overviewed any time. Consequently, the fundamental principle of the legal security of the sides was ignored [2, 35].

After Georgia gained independence in 1991, the ongoing economic reforms and the complicated civil relations required the fundamental reform of the legal system of Georgia. The legal reform carried out in Georgia in the 90s of the last century aimed at reorganizing the system of justice and adding to it the principles that would ensure making right and effective decisions and minimizing the probability of mistakes. In 1999, the new Civil Procedural Code of Georgia was enforced which essentially differed from the one of 1964. In 1997, the Parliament of Georgia enacted the organic law in "Common Law Courts". In 2005, the amendments made in the law even more strengthened protection of the aforementioned principles.

Finally, as a result of legal reform, minding the European experience of the legal system, the three-staged legal system was established; one of the major units of the legal system – appeal, as the Court of Second Instance, was set and cassation is the third, final instance. The rules and the scopes of the appeal against court adjudications were formed in the new way: adjudications made by the Court of First Instance that have not been enforced yet can be appealed in the Court of Appeal and adjudications made by the latter can be appealed in the Cassation Court. The adjudications made by the latter are final, without right to appeal.

Establishing of the appeal proceedings and working out of the suitable norms in the Civil Procedural Code of Georgia got the strong impulse of development.

Appeal proceeding has a number of advantages over the cassation rule of appeal:

- 1) The appealing proceeding is more democratic;
- 2) It enables sides to fully provide rights in the court;
- 3) Any mistake made by the Court of First Instance can be corrected on the Court of Appeal and the procedural expenses can be minimized;
- 4) The institute of appeal proceedings serves formation of homogeneous court ruling.

The essence of appeal is appealing against adjudications made by the Court of First Instance not having been enforced yet for the purpose of correcting the court's mistake.

It is practically impossible to fully exclude more or less essential mistakes on the Court of First Instance. That is why law proceeding and its regulating norms consider special ways to criticize and eradicate mistakes made by the court. That is appealing against the adjudications made by the Court of First Instance which have not been enforced yet. The essence of the institution of appeal is that individuals participating in the case have the right to present appeal in the terms set by the law. The appeal is examined in the Court of Appeal which proved the legality of the appealed act, changes or abolishes it.

The right of appeal guarantees the possibility for individuals participating in the case to protect their position even after the adjudication is made by the Court of First Instance. They can achieve changing that resolution of the court which contradicts their interests [24, 525].

The Court of Appeal is obliged to examine the adjudication made by the Court of First Instance from the factual and legal standpoints.

The system of appeal originated in the Roman Empire where verdicts made by the Inferior Court could be appealed in the Superior Court. Consequently, the appeal could reach even the Emperor. The word "appeal" originates from the Latin word "apellatio".

At present, courts of many countries (France, Germany, Austria, Belgium, England, the USA, etc) recognize the system of appeal in the hierarchic order according to which, the adjudication can be appealed to the Superior Court only after it is discussed in the Inferior Court. In most foreign countries the system of examining court acts is presented in two instances where the second instance is appeal which carries on the suit once again. This contributes to avoiding mistakes made by the Court of First Instance.

"The essence of appeal in the civil legal proceedings is that appellants have the right to appeal to the Court of Appeal against the adjudications made by the Court of First Instance that have not been enforced yet" [15, 432].

In the civil procedure, the appeal proceedings have the following characteristics:

1. An appellant can appeal against the adjudications and verdicts made by the Court of First Instance that have not been enforced yet;
2. On the basis of an appeal, a case is passed to the Superior Court of Appeal where the suit is proceeded by three judges;
3. An appeal can be caused when an appellant does not agree with the adjudication and verdict made by the Court of First instance. This disagreement can be caused by the

misuse of the current legislation, incomplete factual circumstances, ignoring important circumstances related to the case;

4. The Court of Appeal examines both the factual and juridical circumstances related to the case;
5. The Court of Appeal has a right to return the case to the Court of First Instance for retrial or make the adjudication itself;
6. The rights of the Court of Appeal are restricted while retrial;
7. Execution of the appealed adjudication is stopped (apart from the case when the adjudication should be executed immediately).

There are two types of appeal in the world practice: complete and incomplete.

Complete or unrestricted appeal implies full trial on the basis of not only the presented materials, but also newly obtained evidences. Appellants have the right to present new evidences (new factual data, new considerations and explanations) in the Court of Appeal alongside with the evidence already presented in the Court of First Instance. In the given case the Court of Appeal has the right to ascertain new facts. Thus, it does not have the right to return the case to the Court of First instance; instead, it is obliged to make the adjudication on the basis of the ascertained facts. In case of complete appeal, the Court of Appeal examines not only the adjudication made by the Court of First Instance, but also re-examines the adjudication made by itself. In case of complete investigation, the Court of Appeal fully investigates the factual side of the case, i.e. the Court carries out the same actions to investigate the case, estimates the evidence as the Court of First instance does.

In case of incomplete or restricted appeal, the proof of appeal is examined on the basis of those factual circumstances and evidences that were presented in the Court of First Instance and which were examined and estimated by this court. As for new facts and evidences, they can be presented in the Court of Appeal only in case of circumstances determined by the law and only in exceptional cases (for instance, if there are excuses when they cannot be presented in the Court of First Instance). In case of incomplete appeal, the Court of Appeal carries on the trial on the basis of those evidences which were the subject of trial on the Court of First Instance, i.e. which were investigated by the Court of First Instance.

In case of incomplete appeal, the Court of Appeal does not hold the trial once again. It examines the adjudication. Thus, the aim of incomplete appeal is to correct the mistakes made by the court and not those made by the sides [12, 173].

In case ascertained by the law, the Court of Appeal has the right to return the case to the Court of First Instance for proceeding retrial and making the adjudication.

The Civil Procedural Code of Georgia recognizes unrestricted appeal (Civil Procedural Code of Georgia, Article 385, part 1). The Court of Appeal examines the adjudication made by the Court of First Instance to prove the factual and legal sides of the appeal. It means that the dispute mooted and adjudged at the Court of First instance will not be mooted at the Court of Appeal once again. Thus, appeal is not repetition of the first instance. It can be considered as continuation of the proceedings carried out in the Court of First instance [2, 12].

References:

Civil Procedural Code of Georgia of November 14, 1997. N 1106. According to the situation of November 1, 2011. Tbilisi.

Liluashvili T. Appeal in the Civil Procedure. Practical text-book. Tbilisi, 2005.

Liluashvili T. Civil Procedural Law. Tbilisi, 2005.

Liluashvili T., Khrustali V. Comments on the Civil Procedural Code of Georgia. Tbilisi, 2007.

Kurdadze Sh. Trial on Civil cases at the Superior Court. Tbilisi, 2006.

Cornu G., Fouer J. Procédure civile. Paris, 1996.

Jauernig O. Zivilprozessrecht, Verlag C.H. Beck, 28., Auflage, 2003.

Thomas/Putzo. Zpo. Zivilprozessordnung. FamFG Verfahren in Familiensachen, GVG-Einführungsgesetze, EG-Zivilverfahrensrecht, Kommentar, 31. Auflage. Verlag C.H. Beck München, 2010.

Thamas H., Reichold K., Putzo H., Husstege R. Zivilprozessordnung, Kommentar, Verlag C.H. Beck, 24., Auflage. München, 2002.

Zeiss W., Schreiber K. Zivilprozessrecht, II. Auflage. Mohr Siebeck, 2009.

Afanesyev S. F., Zaistev A. I. Civil Procedural Law. Moscow, 2011.

Borisova E. A. Appeal in the Civil (Arbitral) Process. Moscow, 2008.

Borisova E. A. Appeal to the Civil Procedure against adjudications not having been enforced yet. Moscow, 2003.

Borisova E. A. Types of Appeal // Novels about the Civil Procedural Law: Materials of Scientific-Practical Conference dedicated to M. S. Shakaryan's 80th anniversary. Moscow, 2004.

Vlasov A. A. Civil Procedural Law. Text-book. Moscow, 2004.

Civil Procedural Code of Germany. Introductory Law to the Civil Procedural Law. Translated from German. Moscow, 2006.

Civil Procedure of Foreign Countries. Text-book. Ed. A. G. Davtyan. Moscow, 2011.

Eliseev N. G. Civil Procedural Law of Foreign Countries. Moscow, 2004.

Kudryabtseva E. V. Civil Legal Proceedings of England. Moscow, 2008.

New Civil Procedural Code of France. Translated by V. Zakhvataev. Kiev, 2004.

Reshetnikova I. V. Law of Evidence of England and the USA. Moscow, 1999.

Smagina E. S. Appeal Proceedings in Civil Process. Moscow, 2007.

Civil Process: reader. Ed. Treushnikova. Moscow, 2005.

Civil process. Text-book. Ed. Jarkov. Moscow, 2009.

Andrews N. The System of Civil Procedure of England. Moscow, 2011.