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NOVELIZATION OF CIVIL PROCEDURAL LEGISLATION OF UKRAINE IN CASSATION REVIEW: PANACEA OR ILLUSION?*

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The article analyzes the novelties introduced to the civil procedural legislation in the

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cassation review. Cassation proceedings in Ukraine's current civil proceedings engender a post-appellate court decision review, the content and purpose of which are to ensure civil proceeding implementation based on the latter principle application. The author evaluates cassation filters as a positive step in forming the cassation appeal institution. They constitute self-limitation of the Supreme Court's jurisdiction and are designed to relieve it from reviewing an excessive number of cases. Simultaneously, the current legal regulation of cassation filters (grounds for appealing court decisions) is far from ideal and needs to be improved, given the shortcomings highlighted in the study. The non-parties to the case, possessing the right to cassation appeal, are not always burdened with participation in the case. Using the example of prosecutor participation in the cassation proceedings, the author illustrates how national law confers such rights on persons who did not take part in the case.

Keywords: *cassation review, persons who have the right to cassation appeal, non-parties to the case, objects of cassation appeal, grounds for appealing against court decisions in cassation.*

1. INTRODUCTION

Constitutionally, human and civil rights and freedom protection epitomise a crucial judiciary function, portraying system and unity of state justice policy. Building a cassation review model has proved to pose a challenging issue in developing the judicial system. Since the beginning the Civil Court of Cassation work (hereinafter – CCC SC), 27,500 cases have been transferred to it from the Supreme Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter - SSCU) and the Supreme Court of Ukraine (hereinafter – SCU).² Including new cases, 53,500 cases were pending in the CCC SC in 2018.

According to the civil proceedings state review in 2019, the Civil Court of Cassation of the Supreme Court received more than 26,000 procedural appeals: cassation appeals, appeals, court decision review applications due to newly discovered or exceptional circumstances, jurisdiction requests. The number slightly increased by 4.6% (1,100) compared to 2018. The predominant number of new applications to the CCC (25, 600) still entailed cassation appeals. According to the trial results by panels of three or five judges, 6.4 thousand local and appellate court decisions were revoked, which is 32.2% of the reviewed court decisions (19, 900); 367 court decisions were changed. Of the total number of revoked court decisions: 2,800 (44.1%) were revoked with a case referral for retrial; 1,700(26%) adopted a new decision; 1,100 (17.3%) upheld the court decision, 265 (4.1%) closed the proceedings not considering the application, 167 (2.6%) were revoked recommending further consideration.³ Thus, the SCU faced a problem— the uncontrolled flow of cassation appeals hindered the effective justice administration.

2 Editor's Note. For more details on the Ukrainian judicial system formation, see S Prylutskyi, O Strieltsova 'Ukrainian Judiciary Under The XXI Century Challenges' (2020) 2/3(7) *Access to Justice in Eastern Europe* 78-99.

3 'Analytical review of the state of civil proceedings in 2019' (*Supreme Court*) <https://supreme.court.gov.ua/userfiles/media/Analiz_Civil_sudu_2019.pdf> accessed 10 October 2020.

Given the excessive cassation court workload, the need to introduce cassation filters to ensure efficient justice administration and a reasonable time for case consideration remains relevant. Notably, filter implementation is not exclusively Ukrainian know-how. Thus, Republic of Kazakhstan CPC's (Civil Procedural Code) Part 2 of Article 434 refers to cases decisions in simplified proceedings regarding cases involving individual property interests with a claim less than 2,000 calculation indices per month and legal entities with a claim amount less than 30,000 calculation indices per month are not subject to cassation review.⁴

In turn, other foreign country legislation, such as Austria and Croatia, clearly defines the grounds for cassation appeals against court decisions of previous instances.⁵ Thus, foreign states unload the cassation courts differently, introducing formalized appeal procedures. Accordingly, on 15 January 2020, the Law on cassation filters⁶ was adopted, taking effect on 8 February 2020. This law established an exhaustive list of grounds for appellate court decisions (procedural and on dispute merits) to introduced cassation filters. It changed the cassation court's case consideration limits, especially regarding cassation appeal details and the deadline for resolving opening cassation proceedings issues. Given the dynamic legislative processes and the legislator's constant desire to change, and the cassation court's legal regulation, this article analyzes Ukraine's civil procedure legislation reform concerning cassation review, identifies weaknesses, and suggests ways to eliminate them.

2. CASSATION ESSENCE AND APPROACHES TO APPEALING UKRAINIAN CASSATION COURT DECISIONS

Literally, cassation (Latin *quassare* – shake; damage; break) means a higher state body's court decision review or revocation due to non-compliance or rule violation of procedure by the entity making the decision.⁷

Presumably, cassation (as a cassation proceeding) originated in medieval France during the absolute monarchy formation.⁸ Thus, the cassation institution's name was first enshrined in the French justice system, derived from the French verb *kasser* – to break. According to the French Code of Civil Procedure of 1806, the Court of Cassation was

4 Code of the Republic of Kazakhstan of 31 October 2015 № 377-V “Civil Procedure Code of the Republic of Kazakhstan” (as amended and supplemented on 07.07.2020) <https://online.zakon.kz/document/?doc_id=34329053#pos=2;-108> accessed 9 October 2020.

5 D Luspenyk, ‘Kasatsiini Filtry U Tsyvilnykh Spravakh Problemni Pytannia Sudovoho Pravotlumachennia Ta Pravoostasovuvannia’ [Cassation filters in civil cases: problematic issues of judicial interpretation and law enforcement] (15 June 2020) Judicial-legal newspaper <<https://sud.ua/ru/news/blog/171319-kasatsiyni-filtri-u-tsyvilnykh-spravakh-problemni-pitannia-sudovogo-pravotlumachennia-ta-pravoostasovuvannia>> accessed 10 October 2020.

6 Law of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine on Improving the Procedure for Judicial Cases” (hereinafter also Law №460-IX) [2020] Vidomosti of the Verkhovna Rada 29/194.

7 IO Kotovych, ‘Kasatsiine Provadzhennia Yak Dodatkova Harantiia Sudovoho Zakhystu Prav Osoby’ [‘Cassation proceedings as an additional guarantee of judicial protection of individual rights’] (2013) 4 European Perspectives 84.

8 AT Komziuk, VM Bevzenko, RS Melnyk, *Administratyvnyi Protses Ukrainy [Administrative process of Ukraine]* (textbook, Precedent 2007).

the highest court reviewing a judgment's compliance with the rule of law, while the appellate courts entailed the second court instance reviewing cases merits, considering factual and legal issues, allowing new evidence submission, verifying and evaluating.⁹ The cassation institution introduced in France was further developed in almost all European countries, developing peculiarities within these countries' national legal systems. Hence, this article will focus on the nuances of the Ukrainian cassation's subject procedural status right in light of the latest reform requirements, introduced procedural filters, cassation right objects, and the introduced filter application. This examination will unveil the complexity of the Ukrainian cassation appeal and the proposed procedural filters' quality.

2.1 Persons who have the right to cassation appeal

Traditionally, persons who have the right to cassation appeal comprise individuals who, following a civil law procedure, have the right to initiate an appellate court review in cassation.¹⁰ According to Part 1 of Article 389 of the Ukrainian CPC, parties and non-parties in the case have the right to file an appeal against the cassation court's decision if the court decided one's rights, freedoms, interests or responsibilities. The participant list is defined in parts 1-4 of Article 42 of procedural law, including parties and third parties (in the claim proceedings), the applicant and debtor (in the enforcement proceedings), the applicant and persons concerned (in special proceedings). Participant status in the case is also vested in bodies and persons who, by law, possess the right to go to court in others' interests. An example of the latter can involve the proceedings when the Parliamentary Commissioner for Human Rights applies to the court or the prosecutor's representation of state interests.

However, the latter's ability to go to court, including when initiating court cassation reviews, hinges on proving appeal validity. Hence, this research will explore the current case law prosecutor appeals against a court decision in the state's interests. According to R.M. Minchenko, to become a cassation appeal subject, a person must possess the right to a cassation appeal. This right engenders a state-guaranteed right of persons participating in the case and their successors and persons not taking part if the court decided on their rights, freedoms, and responsibilities. The cassation appeal aims to verify the court decision legality of the first instance after their appeal consideration, and appellate court rulings entered into force.¹¹ Since this definition does not fully cover all subjects, following the provisions of national law, can initiate a contested decision review in cassation, this interpretation is challenging to support.

9 KM Bida, 'Kasatsiine Provadzhenia V Hospodarskomu Sudochynstvi Ukrainy' ['Cassation proceedings in commercial litigation of Ukraine'] (Candidate of law thesis, Taras Shevchenko National University of Ukraine, 2005).

10 MY Stefan, *Tsyvilne Protseualne Pravo Ukrainy Akademichnyi Kurs [Civil procedural law of Ukraine: Academic course]* (Textbook for students of legal special higher education establishments, Concern Publishing House 'In Jure' 2005).

11 RM Minchenko, 'Kasatsiine Provadzhenia Obiekty Ta Subiekty Kasatsiinoho Provadzhenia' ['Cassation proceedings: objects and subjects of cassation proceedings'] [2012] Scientific works of NU OLA.

Thus, this definition follows the right-holders to a cassation appeal are divided into those participating in the case (or their successors) and those not participating in the case. At the same time, the scholar refers to the latter only as:

persons who did not participate in the case if the court has decided on their rights, freedoms, and responsibilities.' Instead, the exercise of the right of the other rights-holders to a cassation appeal, to the author's conviction, is burdened with participation in the case.

However, Part 3 of Article 24 of the Law of Ukraine of the Prosecutor's Office, amended on 3 July 2020, outlined the right to an appeal or a cassation appeal against a court decision in a civil, administrative, or commercial case, regardless if participation is granted to a higher prosecutor, namely: the General Prosecutor, one's first deputy and deputies, heads of regional and district prosecutor's offices, first deputies and deputy heads of regional prosecutor's offices, heads, deputy heads, heads of divisions of the Specialized Anti-Corruption Prosecutor's Office. Therefore, the definition by R.M. Minchenko asserted persons who have the right to cassation appeal against a court decision in civil proceedings does not cover the listed persons, who may apply to the cassation court with the relevant complaints.

The prosecutor's participation issue in civil proceedings remains relevant and debatable. Moreover, SCU's legal position assessment indicates the prosecutor's participation in cases to protect the state's interests. Thus, the Joint Chamber of the Commercial Court of Cassation decided on 7 December 2018 in case № 924/1256/17, interpreting Part 3 of Art. 23 of the Law of Ukraine 'On the Prosecutor's Office' in a systematic connection with the provisions of procedural law, noted that the prosecutor represents in court the legitimate interests of the state in case of violation or threat of violation of state interests, namely:

- if the protection of these interests thus exercised by a body of state power, a body of local self-government or another subject of power, the competence of which includes the authority to exercise such protection in disputed legal relations
- if there is no body of state power, the body of local self-government or another subject of power, the competence of which includes the authority to protect the state's legitimate interests in disputed legal relations¹²

The Grand Chamber of the Supreme Court (Grand Chamber) in the decision of 26 June 2019 in case № 587/430/16-c specified the Joint Chamber of the Commercial Court of Cassation, indicating the need to check in each case:

- arguments of the parties regarding the presence or absence of public authority power to protect legitimate interests in the manner the prosecutor chooses
- prosecutor arguments about the absence of a body competent to protect the state's legitimate interests¹³

Another Grand Chamber resolution detailed the grounds for representing the state interests by the court prosecutor. If the prosecutor uncovered the absence of a competent body to protect the legitimate state interests in disputes representing state interests,

12 Resolution in case №924/1256/17 (Joint Chamber of the Kyiv Commercial Court, 07.12.2018).

13 Resolution in case №587/430/16-ц (Grand Chamber of the Supreme Court, 26.06. 2019).

prosecutor argument, the court must verify it regardless of whether the prosecutor provided evidence of establishing the relevant body. The court independently checks whether anybody filed a lawsuit to protect the state's interests with such a prosecutor claim. The procedure provided for in Part 4 of Art. 23 of the Law of Ukraine 'On the Prosecutor's Office' applies only to establish the existence of grounds for representing the state's interests in court if the subject of authority not or improperly exercises the state's protection legitimate interests. In other words, the prosecutor is obliged to notify the relevant subject in advance before applying with the court, only when the prosecutor has the authority to protect the legitimate state interests in the disputed legal relationship but does not or improperly performs them. The Grand Chamber also cited when initiating proceedings on a prosecutor-filed claim statement in the state's interests, the person of a body authorized to perform state functions in contentious relations acquires plaintiff status. In the absence of such a body or authority to apply to the court, the prosecutor shall mention this in the claim statement, where the prosecutor shall acquire a plaintiff status.¹⁴ In cases of failure to prove the grounds of appeal, the prosecutor's cassation appeal is not accepted and returned based on Part 2 of Article 393, clause 5 of Part 2 of Article 392, and clause 4 of Part 4 of Article 185 of the CPC of Ukraine.

Thus, the prosecutor's state representation encompasses two cases. Generally, the prosecutor's participation in the trial of cases to protect state interests is appropriate. Furthermore, the prosecutor's entry cannot be justified by an excessively wide range of state interests. Hence, imposing the prosecutor's obligation to prove the validity of entering the process embodies a legislator's rational decision.

2.2 Procedural status of 'non-parties to the case if the court decided on their rights, freedoms, interests and (or) responsibilities' at the stage of cassation proceedings

Another right-holder to a cassation appeal constitutes persons not participating in the case if the court decided their rights, freedoms, interests or responsibilities as specified by case law. The SCU in its ruling of 11 July 2018 in case № 911/2635/17 stated, unlike an appeal against a court decision by a party to the case, a person not involved in the case must prove a legal connection with the parties to the dispute or directly with a court decision by substantiating three criteria: the court has decided on their right, interest, duty and such a connection is evident and unconditional, as opposed to probable. Thus, the decision is made on a person's rights and obligations not involved in the case. If the decisional motivation contains court conclusions on the individuals' rights and obligations, or in the operative decision, the court directly indicates such a person's rights and obligations.¹⁵ When distinguishing persons whose rights, freedoms, interests or obligations have been decided by the court from third parties, not making independent claims on the dispute's subject matter, one must pay attention to the following. According to Article 53 of the Ukrainian CPC, the court has grounds to involve a third party without independent claims when 'the decision in the case may affect its rights and (or) obligations to one of the parties.' The legislator's legal

14 Resolution in case №922/614/19 (Grand Chamber of the Supreme Court, 11.02.2020).

15 Resolution in case №911/2635/17 (Kyiv Commercial Court as a part of the Supreme Court, 11.07.2018).

technique insinuates the phrase ‘may affect’ covers broader cases than the verbiage ‘the court has decided on.’

Secondly, although such persons’ interest is procedural, not substantive, adopting a decision on the dispute’s merits encompasses third parties’ involvement without independent claims. However, as for the individuals whose rights, freedoms, interests or responsibilities the court has resolved, their appearance in the process does not depend on the decision on the merits of the claims. Thus, such persons’ rights may be resolved, for example, in decisions to secure a claim or approve a settlement agreement.

Also, per the requirements of Part 4 of Article 389 of the Ukrainian CPC, filing cassation appeals against court decisions by persons whose rights, interests, or obligations the court decided is possible only after the appeal review of such persons in appellate proceedings, except when the appellate court directly made the court decision. Hence, various legal positions in legal circles, directly admitting cassation appeals against court decisions, without obliging persons whose rights, obligations or interests the court decided to overcome the barrier of an appeal for their appeal notice. The primary supporting arguments provide direct access to file a cassation appeal to such persons are:

1. Part 4 of Art. 389 of the Ukrainian CPC, only covering the appeal against a court decision, thus excluding specified norm effect on appeal cases against appellate court decisions;
2. following Part 4 of Art. The court decided 389 Ukrainian CPC, persons whose rights, interests or responsibilities, are affected by the procedural party rights only after the cassation proceeding opens (apparently, in mandatory prior appeal, such persons would possess the party rights from the moment of opening the appellate proceedings based on Part 3 of Article 352 of the Ukrainian CPC);
3. the need to ensure the individual right to appeal the appellate court’s decision and prevent the person from falling into a vicious circle, in which the cassation appeal filing is subject to a condition that obviously cannot be fulfilled.¹⁶

Therefore, an appeal barrier for such persons following CPC Part 4 of Article 389 embodies a necessity, and these points do not refute this position, given the following. The first argument does not correspond to Part 1 of Article 258 of the Ukrainian CPC, personifying rulings from court decisions. Supporters have contended the second argument regarding the absence of an appeal barrier essentially appeals to the provision outlined in Part 4 of Article 389 of the Ukrainian CPC. In other words, supporters of this approach, the absence of Part 4 of Article 389, would testify the appeal is obligatory since instructions are already outlined in Part 3 of Article 352 of the Ukrainian CPC.

Nevertheless, given the provision of Part 4 of Article 389 of the Ukrainian CPC, the need to overcome the barrier of appeal does not exist. However, the last two procedural law provisions address different legal regulation subjects and do not contradict each other. Thus, Part 4 of Article 389 of the Ukrainian CPC is designed for cases where the appellate court decided the rights, interests or responsibilities of persons without their participation. In turn, Part 3 of Article 352 regulates cases where the court made such

16 V Barsuk, O Malinevsky, “‘Phantom’ interest’ (11 January 2019) Judicial Gazette <<https://yur-gazeta.com/publications/practice/sudova-praktika/fantomniy-interes.html>> accessed 10 October 2020.

a mistake in the first instance. Also, the absence of the provisions of Part 4 of Article 389 of the Ukrainian CPC would violate the access of these persons to justice, as it would make appealing the court decision impossible. Support for the third argument would mean transforming the cassation court into a court of law and fact, contrary to cassation appeal since the SCU is not such.¹⁷ Case law reflects this provision.¹⁸ Finally, the content of parts 2 and 3 of Article 370 of the Ukrainian CPC also testify to a court decided need for a preliminary appeal by persons whose rights, freedoms, and or interests without their participation. The cited norms authorize the appellate court when these persons apply to suspend the adopted decisions' validity and authorize the court to cancel them in procedural law cases. Hence, legal experts must pay attention to the case law on this issue.

Ruling the judgments of 14 February 2020 in case №463/2390/15-c, of 8 April 2019 in case №291/1008/18, and of 23 January 2019 in case №219/4727/18, the SCU stated the analysis of the provisions of parts 1 and 4 of Article 389 of the Ukrainian CPC gives grounds to conclude a person not participating in the case may file a cassation appeal, provided the appellate court reviews its appeal against the court decision of the first instance, as of the first instance determines the parties' composition.^{19;20;21} Thus, if the court decided on their rights, freedoms, interests or responsibilities remain independent right-holders to appeal, persons not participating in the case remain independent right-holders to appeal, but the appeal barrier burdens exercising their rights.

3. CASSATION APPEAL OBJECTS

The cassation appeal objects are defined in clauses 1-3 of part 1 of Article 389 of the Ukrainian CPC, including:

1. the court decision of the first instance after the appellate case review (appellate court decision of instance);
2. court decisions of the first instance determined by the procedural law after appellate proceedings review;
3. personalized in Part 3 of Article 389 of the Ukrainian CPC appellate court decisions.

Law №460-IX excluded from the cassation appeal objects such first-instance court decisions on the proceedings' opening, violating jurisdiction rules. It also amended clause 3 of part 1 of Article 389 of the Ukrainian CPC with a new provision based on clause 3. The appellate court decision to refuse to satisfy the review application on newly discovered or exceptional circumstances remains subject to appeal.

17 B Gulko, 'Verkhovnyi Sud – Ne Sud Faktu A Sud Prava' ['The Supreme Court is not a court of fact, but a court of law'] (*Verkhovnyi Sud*, 29 March 2018) <<https://supreme.court.gov.ua/supreme/pres-centr/news/457146/>> accessed 10 October 2020.

18 Resolution in case №П/811/1170/16 (Kyiv Administrative Court as a part of the Supreme Court, 19.07.2018).

19 The decision in the case №463/2390/15-ц (Kyiv Civil Court as a part of the Supreme Court, 14.02.2020).

20 The decision in the case №291/1008/18 (Kyiv Civil Court as a part of the Supreme Court, 8.04.2019).

21 The decision in the case №219/4727/18 (Kyiv Civil Court as a part of the Supreme Court, 23.01.2019).

Appealing individual court decisions in cassation proceedings as the cassation appeal object depends significantly on how the court operates. Clause 1 of Part 2 of Article 36 of the Ukrainian Law 'On the Judiciary and the Status of Judges' as amended on 20 June 2020 (Law 401402-VIII) stipulates the SCU administer justice as a cassation court and in procedural law as a first or appellate court, in the manner procedural law prescribes. According to clause 8 of part 2 of Article 129 of the Ukrainian Constitution, the judicial proceeding's basic principles include 'ensuring the right to an appellate review of the case and a cassation appeal against a court decision' as specified by law. A similar provision is duplicated in Article 14 of Law 21402-VIII.

The Academic Explanatory Dictionary defined the 'ensuring' of the right involves guaranteeing such a right, creating reliable conditions for its implementation.²² Therefore, from these national legislation provisions, citizens guarantee filing an appeal. Meanwhile, as for court decisions' cassation appeal, procedural law limits the latter's cases. This legislator's position corresponds to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention or the ECHR). The European Court of Human Rights (hereinafter referred to as the ECtHR or the Court) has long followed a consistent approach in its case-law, according to which clause 1 of Article 6 of the Convention provides a wide range of guarantees in proceedings at first instance but does not oblige the Member States to establish appellate and cassation courts. If the latter is created, the person must be guaranteed compliance with Clause 1 of Article 6 of the ECHR at these courts' level. However, in such cases, less stringent standards may be applied.^{23;24} From this point of view, the ECtHR distinguishes between the functions and tasks of the appellate and cassation courts: if the appellate review is considered a minimum standard of appeal, the cassation review is traditionally considered extraordinary given the unique cassation court as the highest instance court, the power specifics in terms of limitations regarding issues of law, and a greater degree of procedural formality.²⁵

Consequently, the idea of introducing cassation filters at the cassation appellate stage by Law №460-IX seems acceptable and aligns with the purpose of the court decision review. The additions made by Law №460-IX in cassation filters indicated the legislator had defined an exhaustive list of grounds on which court decisions can be appealed in cassation. Thus, part 2 of Article 389 of the Ukrainian CPC reworded the specified law, fixing the 'exclusive' grounds for appealing court decisions. Markedly, clauses 1-3 and paragraph 1 of clause 4 of the cited rule determine the grounds for appealing decisions on the dispute's merits. Instead, paragraph 2 of clause 4 of Article 389 of the Ukrainian CPC applies to appeals concerning procedural decisions provided for in clauses 2, 3 of part 1 of Article 389 of the Ukrainian CPC.

22 'Academic Explanatory Dictionary of the Ukrainian Language' <<http://sum.in.ua/>> accessed 10 October 2020.

23 Resolution of the European Court of Human Rights in *Delcourt v. Belgium*, no. 2689/65, 17 January 1970, § 25, Series A no. 11.

24 *Levages Prestations Services v. France* (App no 21920/93) ECHR 23 October 1996, § 48.

25 D Luspenyk, 'Systema Perehliadu Sudovykh Rishen U Tsyvilnomu Sudochnystvi Vidpovidnist Mizhnarodnym Standartam Ta Efektyvnist' ['System of review of judicial decisions in civil proceedings: compliance with international standards and efficiency'] (*Verkhovnyi Sud*, 1 July 2019) <<https://supreme.court.gov.ua/supreme/pres-centr/zmi/737883/>> accessed 10 October 2020.

3.1 Grounds for Appealing Court Decisions on Merit Application Conditions

According to clause 1 of part 2 of Article 389 of the Ukrainian CPC, the grounds to appeal a court decision do not take into account the SCU's conclusion on the application of the rule of law in similar appellate court legal relations, unless the SCU decision departs from such a ruling. National law does not define 'similar legal relations.' As a result, determining if legal relations' similarity is carried out considers the criteria formed due to law enforcement.

Thus, similar legal relationship can mean both those with only certain standard features and those legal relationships identical, the same as others. Their elements determined the similarity of legal relations: subjects (participants), objects, and content (rights and responsibilities of legal relation subjects). The theory of law embodies the subjective and objective criteria of similarity of legal relations, essential for the hypothesis of the rule of law. This premise must regulate these relations, indicating specific law subjects or objects to which this norm's disposition rule applies. If the rule of law does not ensure its effect applies only to a limited number of persons, the subjective criteria do not affect the individual legal relationship qualifications. Notably, the primary criterion entails legal content, participants' rights and obligations without which establishing the similarity of legal relations remains impossible.²⁶ In cases №№761/31121/14-П, 522/2202/15-П, the Grand Chamber of the SCU recognized the dispute objects' difference does not indicate legal relations dissimilarity.²⁷ The claim's subject, grounds, content, and facts, coupled with substantively regulating the disputed legal relationship, should help determine the similarity of legal relations.

The legislator seeks to justify introducing a filter of not considering the SCU similar legal relations conclusions, which should screen out individual cases during the opening stage. However, such legal relations' similarity is determined after the judges' panel opens it. Lack of legal relations similarity serves as the basis for closing the proceedings following clause 5 of part 1 of Article 396. In other words, when appealing a court decision on the grounds provided in clause 1 of Part 2 of Article 389 of the CPC must be met. In the absence of other technical defects of the applicant's appeal, the cassation proceedings shall be opened in any case. Clause 1 of part 2 of Article 389 of the Ukrainian CPC does not clearly answer the question concerning failure to consider SCU conclusions.

CPC Part 4 of Article 263 stipulates when choosing and applying the rule of law to the disputed legal relationship, the court considers the decisions applying the relevant rules of law set out in the SCU's rulings. Hence, the appellate court's failure to consider SCU's rulings validate revoking such decisions based on CPC clause 1 of part 2 of Article 389. Subclause 7 of paragraph 1 of the Transitional Provisions to the CPC specifies a court hearing a cassation case as a judicial panel or a chamber (joint chamber) shall refer the case to the Grand Chamber of the SCU if such a panel or chamber (joint Chamber) considers it necessary to depart from the conclusion, set out in a previous SCU decision.

26 'Judges of the general courts of the western regions of Ukraine discussed with a judge of the Supreme Court the significance of the conclusions of the Supreme Court on the application of the law in civil cases' (*Supreme Court*, 12 April 2019) < <https://supreme.court.gov.ua/supreme/pres-centr/news/689380/> > accessed 10 October 2020.

27 Resolution in case №761/31121/14-П (Grand Chamber of the Supreme Court, 12.12.2018).

In other words, the courts of first and appellate instances cannot deviate from the legal positions outlined in the SCU decisions when considering a particular case. Instead, if during the court consideration, the SCU reconsiders the court decision in similar legal cassation relations (in another case), the proceedings in the first case may be suspended until the end of the second cassation case (clause 10 of Part 1 of Article 252, clause 14 of Part 1 of Article 253 of the CPC of Ukraine).

The following circumstances also testify to the need to consider the Supreme Court's legal positions. Thus, the SCU in the decisions of 24 January 2018 in case №911/462/17, of 01 March 2018 in case №910/7109/17 in resolving the dispute, referred to SCU conclusions about similar legal relations.^{28;29} Also, in the decisions of 16 January 2018 in the case №377/237/15, of 16 January 2018 in the case №207/2008/15-ц, the SCU, guided by CPC Part 4 of Article 263, considered the SCU position.^{30;31} Finally, in cases where the SCU did not apply the SCU's legal positions, the SCU's findings could not be taken into account when considering the dispute, but the SCU's conclusions referred to by the party were not relevant to dispute legal relations.^{32;33}

Markedly, CPC clause 1 of part 2 of Article 389 designates the grounds for cassation appeal, providing disregard for an SCU decision and not merely an approved appellate court decision textual reference absence. Basically, clause 1 of Part 2 of Article 389 of the CPC concerns precisely the content and not the judgment form. The wording has posed difficulties in applying CPC clause 1 of part 2 of Article 389, excluding when the SCU deviates from such a ruling.

First, such legal techniques impose an additional obligation for the appellant to follow the latest case law without any official information systems considering the SCU's prevailing legal positions. Conceivably, when the SCU's legal position has already changed, but the general public has not received the positional shift in a resolution.

Secondly, CPC Part 2 of Article 416 obliges only the Chamber, the United, and the Grand Chamber to rule on applying the rule of law only, but most SCU resolutions, adopted at the board level, may also contradict one another. Should the SCU panels' legal positions be ignored? Hence, although a cassation court decision does not automatically mean an appropriate conclusion, taking into account, the SCU judicial panel positions seem rational.^{34;35}

According to CPC clause 2 of part 2 of Article 389, the judgment's revocation grounds justify the need to deviate from the rule of law conclusion in such legal relations set out in the SCU ruling and the appellate court applied. The application idiosyncrasies partly coincide with clause 1 of part 2 of Article 389 of the CPC, namely regarding

28 Resolution in case №911/462/17 (Kyiv Civil Court as a part of the Supreme Court, 24.01.2018).

29 Resolution in case №910/7109/17 (Kyiv Civil Court as a part of the Supreme Court, 01.03.2018).

30 Resolution in case №377/237/15 (Kyiv Civil Court as a part of the Supreme Court, 16.01.2018).

31 Resolution in case №207/2008/15-ц (Kyiv Civil Court as a part of the Supreme Court, 16.01.2018).

32 Resolution in case №906/538/16 (Kyiv Commercial Court as a part of the Supreme Court, 09.02.2018).

33 Resolution in case №910/5001/17 (Kyiv Commercial Court as a part of the Supreme Court, 12.03.2018).

34 Decision in case №809/109/18 (District Administrative Court of Ivano-Frankivsk region, 05.03.2018).

35 Decision in case №809/24/18 (District Administrative Court of Ivano-Frankivsk region, 09.02.2018).

similar legal relations and the lack of a legally established court conclusion definition. However, clause 2 of part 2 of the article separately outlines conditions for applying this provision. Thus, when filing a cassation appeal based on paragraph 2 of part 2 of the said article, the applicant must indicate the SCU decision, the appellate court applied, briefly formulate the legal conclusion from which the appellant intends to deviate and justify the need for such a nonconformity.

Therefore, the analyzed basis excessively lists evaluation categories: motivation, validity, similarity. Also, conceptually, when deciding on the cassation proceedings opening, the court should follow a formal conduct model, rather than investigative and superficially examine the cassation appeal content, for the court does not yet require the cassation proceedings materials. CPC clause 4 of part 1 of Article 396 allows the court to close the cassation proceedings in premature conclusions cases, confirming the need to open it. Therefore, validity and motivation should assess the case merits to a level such as a cassation filter's value and efficiency.

According to Ukrainian CPC clause 3, part 2 of Article 389, a court decision may also be appealed in cases without an SCU conclusion on applying the rule of law. Therefore, the application individualities also depend on the legal relation similarity. Moreover, clause 3 provides for the absence of an SCU conclusion in principle, and not only in the contested decision. The simultaneous applicant reference to CPC paragraphs 1 and 3 of Part 2 of Article 389 pose a problem because they are mutually exclusive. The case law experts have asserted to initiate cassation proceedings on this ground, the appellant can refer to the relevant CPC paragraph of Article 389.^{36;37}

The most challenging law enforcement problem emerges from the CPC clause 4 of Part 2 of Article 389. The paragraph refers to the provisions of Article 411 of the CPC. Thus, the judgment remains subject to revocation on the grounds in CPC part 2 of Article 411. Simply, this epitomises a gross procedural law violation, an unconditional ground for revoking the judgment. This court decision remains subject to cancellation and retrial on the following grounds: procedural law violation, violations making establishing case facts impossible, facts relevant to the proper case resolution. Inadequate resolution applies if the court:

- did not examine the evidence gathered in the case, subject to the conclusion the cassation appeal grounds stated in the cassation appeal (clauses 1-3 of the second part of Article 389 of the CPC);
- considered the case according to general claim proceeding rules of simplified claim proceedings;
- unreasonably rejected the request for demand, examination, or evidentiary review, another party request (statement) to establish the circumstances vital for the proper case resolution;
- established substantial circumstances based on inadmissible evidence.

36 Resolution in case №662/211/19 (Kyiv Civil Court as part of the Supreme Court, 22.05.2020).

37 Resolution in case №607/3119/19 (Kyiv Civil Court as part of the Supreme Court, 13.04.2020).

3.2 Failure to indicate the grounds for appealing against cassation court decisions: shortcomings in the quality of procedural law

By ratifying the Convention and its protocols, Ukraine has guaranteed everyone under its jurisdiction the rights and freedoms outlined in the Convention and these protocols. Article 17 of the Ukrainian Law outlines ECtHR case law judgement, enforcement and application as amended on 2 December 2012, providing for the Convention's application. The ECtHR case law engenders the court law source. Article 18 of this Law defines the procedure for referring to the Convention and the Court case-law. Notably, it goes about Court case law precisely as disclosed in Article 1 of this Law, following ECHR case law and the ECHR and not only Ukraine's decisions. The rule of law in ECtHR decisions concerning Ukraine connects to law quality and legal certainty requirements. Thus, in the judgment of 10 December 2009 in *Mikhailyyuk and Petrov v. Ukraine*, application № 11932/02, the Court stated the expression 'per the law' refers to the relevant legislation quality and requires availability to the person concerned, who must foresee its consequences and this legislation must comply with the rule of law.³⁸

Also, revealing the legal phenomenon of quality of law, the ECtHR has formulated numerous conclusions:

- current national legislation provisions must be formulated sufficiently and clearly for practical application;³⁹
- no rule can be considered a 'law' if it is not formulated with a precision sufficiently enabling the citizen to regulate one's conduct: the individual must be able, if necessary, after appropriate consultation, to foresee the consequences that may follow from one's actions. These consequences should not be predicted with absolute certainty. While certainty in law is highly desirable, it can be unduly rigid, and the law must keep pace with changing circumstances;⁴⁰
- a legal provision can withstand a quality check if that provision is sufficiently clear in the vast majority of cases national bodies decided.⁴¹

In view of the above, we propose to pay attention to the 'quality of the law', which regulates cases of non-indication of grounds for appealing against court decisions in cassation procedure. Thus, CPC clause 5 of part 2 of Article 392 stipulates the appellant, filing a corresponding cassation appeal, is obliged to indicate a specific ground (or several grounds) to appeal the court case decision. In this case, the claimant independently chooses such a ground, based on the list of grounds set out in CPC Article 389. Therefore, the failure of the person filing the cassation appeal to state the relevant grounds for appealing the court decision represents a shortcoming in executing a cassation appeal.

From the provisions of CPC part 2, Article 393, and Article 185, the consequence of violating Article 392's requirements regarding the form and content of a cassation

38 *Mykhailyuk and Petrov v. Ukraine* (App No 11932/02) ECHR 10 December 2009,.

39 'Resolution of the European Court of Human Rights in the case of 22 June 2004' (2004/00) № 4 Case law of the European Court of Human Rights. Decision. Comments.

40 'Judgment of the European Court of Human Rights in the case of *Volokha v. Ukraine* of 2 November 2006' (2007/04 (23) Official Gazette of Ukraine, 958.

41 'Resolution of the European Court of Human Rights in *Gavenda v. Poland* of 14 March 2002' (2002/00) 2 Case law of the European Court of Human Rights. Decision. Comments.

appeal involves leaving such an appeal without motion. Basically, if the person filing the cassation appeal fail to indicate the grounds for appealing the court decision, the appeal can be left without motion. Additionally, CPC paragraph 4 of part 4 of Article 393 specifies the complaint will not be accepted for consideration, and the court will return it if it does designate the grounds for appealing a court cassation decision. Thus, the current legal regulation provides for different legal consequences of identical situations. In cases where the appellant has not personally given the grounds for appealing the court decision, the appeal can be either left without motion or returned at the judiciary panel's discretion. Moreover, procedural law does not indicate which rule has priority.

Unfortunately, various jurisdictional cassation courts and internal cassation court panels of the respective jurisdiction have disputed this issue. Thus, case law has illustrated Administrative Court of Cassation judiciary panels in some cases have left the cassation appeals without motion, and in others have not accepted and returned them.^{42;43;44} At the same time, the Civil Court of Cassation judiciary panels in cases where the appellant does not specify the grounds for appealing the court cassation decision apply CPC Part 2 of Article 393 and leave the complaint without motion.

Consequently, the second approach in appealing the decisions provided for in CPC clause 1 of part 1 of Article 389 cites court decisions of the first instance after their review on appeal and appellate court decisions, correctly adjusts CPC clause 4 of part 4 of Article 393 when accompanying Law On Cassation Filter's amendments entail a legislator legal shortcoming. Since CPC clause 5 of part 2 of Article 392 was amended on 01 January 2020, before the amendments to the Law On Cassation Filters, it established the duty of a person filing a cassation appeal to indicate the incorrect substantive law court application or procedural law violation. Failure to comply with this obligation will enact CPC clause 4 of Part 4 of Article 393, followed by the appellant complaint's return. Since CPC clause 5 of part 2 of Article 392 has been changed in terms of appealing the decisions provided for in CPC clause 1 of Part 1 of Article 389, no need exists to apply paragraph 4. Part 4 of Article 392 when appealing such court decisions.

However, the grounds for appealing court decisions on procedural issues, procedural law court decisions of the first instance after their appeal review, and the appellate court decisions have not changed. Such grounds include the substantive law court or procedural law violation incorrectly applying the CPC's wording of 01 January 2020. When appealing court rulings delineated CPC clauses 2-3 of part 1 of Article 389, applying CPC clause 4 of part 4 of Article 392 and returning cassation appeals demonstrates a logical outcome of not specifying the grounds for appealing the relevant court rulings.

Thus, the current procedural legislation governing cassation proceedings opening and possible non-compliance consequences with cassation appeal guidelines requires immediate changes and additions, as procedural law quality in the cassation review remains questionable. Hence, the legislator should change the grounds for appealing court decisions

42 Resolution in case №810/2632/16 (Kyiv Administrative Court as a part of the Supreme Court, 19.02.20020).

43 Resolution in case №640/972/19 (Kyiv Administrative Court as a part of the Supreme Court, 16.04.2020).

44 Resolution in case №560/2953/19 (Kyiv Administrative Court as a part of the Supreme Court, 12.05.2020).

on procedural issues or introduce an updated procedure for appealing decisions on the merits. Specifically, it should address procedural decisions regarding the consequences of not stating the grounds for appealing court decisions, or, ultimately, determine which rules have priority: CPC Part 2 of Art 393 or clause 4 of Part 4 of Article 393.

4. CLOSURE OF CASSATION PROCEEDINGS: SOME REMARKS

In summarizing civil procedural novelties in the cassation review, the grounds for closing the cassation proceedings have supplemented the Ukrainian CPC (Civil Procedural Code) by Law №460-IX of 15 January 2020. Such grounds constitute the provisions in CPC clauses 4 and 5 of Part 1 of Article 396, for its content reduced to the following cases:

- if the person filing the cassation appeal refers to the SCU conclusion absence regarding applying the rule of law in such legal relations, but such an SCU ruling has already taken place
- if a person refers to the appellate court instance on not considering the SCU decision as a ground for cassation appeal. However, the SCU has already deviated from this conclusion in the appellant's opinion, where the appellate court did not consider it. The appellate court resolved the dispute, considering the SCU's new conclusion, except when the SCU decides to deviate from the new conclusion.

The complexity of applying CPC clause 4 of Part 1 of Article 396 involves no official information systems stores the SCU's current legal opinions in the context of Law on Cassation Filters.

The appeal 'unless the Supreme Court decides it is necessary to deviate from such a conclusion,' needs examination. The appellate or cassation proceedings closure engenders an interdisciplinary and collaborative institution typical of court proceedings in the relevant court, regardless of jurisdiction. Since such an institution is procedural, its application is due to process peculiarities. The CPC defined, CAS (Code of Administrative Procedure) or ComPC (Commercial Procedural Code) is not related to the substantive disputed legal relationship. However, a separate appeal in the provision of CPC clause 4 of Part 1 of Article 396 illustrates the institution's closing of the cassation proceedings depends on how the dispute merits were resolved, not corresponding to the legality of such an entity. Moreover, no other grounds for closing the cassation proceedings are provided in CPC clauses 1-3, 5 of part 1 of Article 396 relating to substantively regulating disputed legal relations.

Logically, the decision to close or not close the cassation proceedings per CPC clause 4 of Part 1 of Article 396 is possible only after processing the evidence, so the deadline for deciding on dispute merits may coincide with issuing a decision to close the cassation proceedings. As a result, the question arises: why close the cassation proceedings when the possibility to decide to leave the cassation appeal unsatisfied exists, not changing the contested decision. Meanwhile, the court's conviction to diverge from the previous legal position may express the judiciary bias of those previously supporting a party's position.

CPC Clause 5 of Part 1 of Article 396 designates the cassation court closes the cassation proceedings if after the cassation opening proceedings under clause 1 of the second part of Article 389 of this Code the court finds the law application ruling set out in

the SCU and referred to by the appellant in the cassation appeal concerns non-similar legal relationships. This procedure applies only to cases where the cassation proceedings were initiated under paragraph 1 of the second part of Article 389 of the CPC if the appellate court in such legal relations applied the rule of law without considering the SCU conclusion. The SCU decision of 08 April 2020 strikingly exemplifies enacting the grounds provided in CPC clause 5 of Part 1 of Article 396, in which the court analyzed legal relations similarity based on such criteria as the claim subject (of initial claims assessment), claim grounds (factual case circumstances and substantive legal regulation of the disputed legal relationship) and the parties.⁴⁵ Incidentally, neither CPC clause 4 nor clause 5 of Part 1 of Article 396 delineates the proceeding closure initiator. Consequently, the question arises whether the court can independently, given the civil dispositive process, close the cassation proceedings if it meets the grounds provided in these clauses. Hence, in this case, the cassation court has the right to close the proceedings, as the court discretion covers resolving this issue.

Another civil procedure legislation novelty comprises transferring the case to the established jurisdiction court. Thus, following CPC Part 4 of Article 414, if the cassation court closes the proceedings based on paragraph 1 of the first part of Article 255 of this code, the court, at the plaintiff's request, decides in writing to transfer the case to continue the trial, the jurisdiction of which includes such a case consideration, except in proceedings closed on several claims to consider in different proceedings or the case transfer in part for a new trial or further consideration. This progressive change aims to ensure persons applying to the court have access to justice and rendering inert-jurisdictional court disputes impossible.

Court case transfer due to legal instrument jurisdiction is actively employed.^{46;47} Markedly, the appellate or cassation courts execute case transfer to the respective jurisdiction and only in cases where they close the proceedings on non-jurisdictional grounds. Therefore, higher court decision changes, if the first instance court closed the proceedings because the case should be considered under other proceeding rules, does not constitute grounds for transferring the case to an established jurisdiction court. Case №813/1056/18 typifies these guidelines. The Lviv District Administrative Court received a claim statement from an individual to the State Register of Legal Entities, Individual Entrepreneurs and Public Associations of the State Registration Office of the Legal Department of the Lviv City Council, the State Register of Legal Entities, Individual Entrepreneurs and Public Associations of the Regional Municipal enterprises of the Lviv Regional Council 'Bureau of Technical Inventory and Expert Assessment', demanding to cancel several registration actions regarding changes to legal entity statutory documents. The Lviv District Administrative Court closed the proceedings because the disputed legal relationship should consider the case according to civil procedure rules.⁴⁸

According to the Eighth Administrative Court of Appeal's decision, the Lviv District Administrative Court's decision of 13 February 2019 to close the proceedings in the

45 Resolution in case №910/16868/19 (Kyiv Commercial Court as a part of the Supreme Court, 08.04.2020).

46 Resolution in case №695/1446/17 (Kyiv Commercial Court, 16.06.2020).

47 Resolution in case №175/660/17 (Kyiv Commercial Court, 29.04.2020).

48 Resolution in case №813/1056/18 (Lviv District Administrative Court, 13.06.2018).

administrative case №813/1056/18 did not change changes.⁴⁹ According to a decision of 1 April 2020, the Grand Chamber of the SCU upheld the cassation appeal partially. The Lviv District Administrative Court decision of 13 February 2019 and the Eighth Administrative Court of Appeal's decision of 23 April 2019 changed the case's referral to the general court's jurisdiction, determining the plaintiff's right to sue in commercial proceedings. On the other hand, the Lviv District Administrative Court decision of 13 February 2019 and the Eighth Administrative Court of Appeal's on 23 April 2019 did not change unchanged.⁵⁰

Refusing to transfer the case to the established jurisdiction, the Grand Chamber of the SCU, in the decision of 6 May 2020 in case №813/1056/18, noted the case transferred to the appropriate jurisdiction where the cassation court closes the proceedings are executed. Therefore, since the first instance's court decided to close the proceedings and not the Grand Chamber of the SCU, the case referral to the Commercial Court of Lviv region should have been refused.⁵¹ Thus, Law №460-IX of 15 January 2020 also specifies additional grounds for closing cassation proceedings. Hence, the legislator, in this case, was inconsistent. The grounds for closing the cassation proceedings provided for in Ukrainian CPC paragraph 4 of part 1 of Article 396 are essentially not procedural. As for Ukrainian CPC paragraph 5 of part 1 of Article 396, in this case, the decision to close the cassation proceedings depended on the judiciary panel's conclusion of the similarity of legal relations, which may be streamlined. In other words, the issue decision relevant to the applicant, in this case, significantly depended on court discretion.

5. CONCLUSIONS

These results lead to the following conclusions. First, cassation proceedings in Ukraine's current civil proceedings encompass a post-appellate court decision review, the content and purpose of which is to implement civil proceedings based on the latter's principles. The idea of implementing cassation filters depicts a positive step in cassation appeal, as they display SCU's self-limitation of jurisdiction, relieving it from excessive case reviews. After all, the court cassation exemplifies a court of law, not fact. Furthermore, cassation filters' legal regulation (grounds for appealing court decisions) is far from ideal and needs improving, given the shortcomings highlighted in the study. Consequently, effective cassation filters application requires:

- providing participants with a single information system revealing the current legal SCU positions
- developing a unified method of reflecting legal opinions in a court decision
- preventing law enforcement practices in similar legal relations within various appellate districts

Individuals with the right to cassation appeal should not be burdened with case participation. Prosecutor participation in cassation proceedings typified how national law confers such rights on persons not participating in the case. The basis for the process entry of such persons, including the cassation appeal, should directly reference the law.

49 Resolution in case №813/1056/18 (The Eighth Administrative Court of Appeal, 23.04.2019).

50 Resolution in case №813/1056/18 (Grand Chamber of the Supreme Court, 01.04.2020).

51 Resolution in case №813/1056/18 (Grand Chamber of the Supreme Court, 06.05.2020).