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Supervisory Review in Post-Soviet Legal Systems: Forward to the Rule of Law or Back to Soviet Survivals?

Keywords: Supervisory Review; res judicata; finality of judgment; independence of the judiciary; separation of powers

Introduction

Post-Soviet legal systems are developing in the current conditions of world globalization and integration. These processes have a significant effect on the emergencing of new, on the transormation nature of existing and on the cessation of the existence of many legal phenomena. After the collapse of the Soviet Union many of its legal phenomena that existed in the Soviet past should have been ceased to exist or changed substantially. However, after about 30 years of the collapse of the Soviet Union, in the post-Soviet space its legal phenomena remain. They have adapted to the current conditions of the legal development and continue to function.

Such regularities and trends have provided the ground for scientist Rafal Manko to substantiate and construct a new concept – legal survivals, which is a useful tool for analyzing changing and transforming legal systems. One of such legal survivals the scientist indicates in particular the institution of Supervisory Review (nadzor)[1].

The issues of Supervisory Review (hereinafter referred SR) is devoted the useful article by William Pomeranz, in which he analyzed the nature of this phenomenon in sufficient detail, its negative impact on the principle of the finality of judgment[2]. However, this research was conducted regarding one of the post-Soviet legal systems – the Russian Federation, and about ten years ago. Therefore, it remains relevant in current reality to study the issues of a complete picture of the state of the SR in all post-Soviet legal systems.

Most of the post-Soviet states joined the European legal space, their legal systems evolve under the influence of European legal standards. According to these standards, the institution of supervisoty review and its separate elements may contradict the rule of law, its constituent elements of legal certainty and the principle of res judicata, as repeatedly stated by the European Court of Human Rights[3].

It is important, in connection with the SR in the post-Soviet legal systems, to clarify the role of the constitutional courts in its functioning. After all, all post-Soviet states in their constitutions stated the provisions on human rights and the principle of the separation of powers. The SR creates a significant threat to the right to a fair trial and the principle of judicial independence. Accordingly, in constitutional courts' practice of the post-Soviet states there should have been examples of the recognition of this institution or its separate elements unconstitutional. However, such an assumption requires verification and more detailed study.

What is the current state of the SR in the post-Soviet legal systems, is it consistent with the rule of law or is it the spread legal survival, which can confirm the movement of post-Soviet legal systems to the past? How are the European legal standards and their application by the European Court of Human Rights influenced the existence and development of this institution in the post-Soviet legal space? What are the role and significance of constitutional courts in the functioning of this institution in the post-Soviet legal systems?

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[1] R. Manko, *Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture,* [in]: The Effectiveness of Law in Post-modern Society. Papers of the 73rd Scientific Conference of the University of Latvia (Latvia University Press, Riga, Latvia, 2015), available at <https://www.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juristi_73-konf.pdf>.

[2] W. Pomeranz, *Supervisory Review and the Finality of Judgments under Russian Law*, Review of Central and East European Law 34, 2009, p. 15–36

[3] D. Vitkauskas, G. Dikov, *Protecting the right to a fair trial under the European Convention on Human Rights* (Council of Europe Publishing, Strasbourg, 2017), p. 41–42, available at <https://edoc.coe.int/en/index.php?controller=get-file&freeid=7492>.

The article is devoted to these key issues. Such a study will allow to form a complete picture of the SR and make useful conclusions about the development of modern legal systems of Central and Eastern Europe.

1. Soviet Model of Supervisory Review

First of all, to address the above mentioned it is necessary to highlight issues that are not sufficiently studied in Western jurisprudence, in particular the doctrinal substantiation of the SR in the Soviet legal science, as well as the issue of the development of the SR at various stages of Soviet law. This will contribute to a comparative analysis of the Soviet and post-Soviet models of this institution.

The insitution of Supervisory Review (sudebnyi nadzor, peresmotr sudebnykh reshenyi v poriadke nadzora, nadzornoe proyzvodstvo) was researched at different times by many legal scholars. In particular, issues of SR were researched in the writings of N. Abdullaev[4], Y. Andryanov[5], K. Banchenko-Liubymova[6], M. Hrodzynskyi[7], Y. Yodkovskyi[8], S. Kats[9], K. Komyssarov[10], N. Polianskyi[11], P. Trubnykov[12] and others.

Thus, in the Soviet procedural science, a number of both theoretical and practical issues of reviewing judicial decisions in the supervisory order were discussed and debated, in particular regarding: the tasks of judicial supervision; the nature of the extraordinary of the supervision review; its distinction from cassation review of court decisions; differences from reviewing due to new appeared circumstances; the procedure for reviewing protests in the courts of supervisory instance, etc. In procedural doctrine there were also other discussed issues of the SR, in particular its procedures, terms, grounds and consequences, etc.

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[4] N. Abdullaev, *Peresmotr sudebnykh reshenyi y opredelenyi, vstupyvshykh v zakonnuiu sylu, v poriadke nadzora v sovetskom hrazhdanskom protsesse* (Moscow, 1954).

[5] Y. Andryanov, *Poniatye y sushchnost nadzornoho proyzvodstva po sudebnym hrazhdanskym delam* (Moscow, 1983).

[6] K. Banchenko-Liubymova, *Peresmotr sudebnykh reshenyi v poriadke nadzora* (Hosiuryzdat, Moscow, 1959).

[7] M. Hrodzynskyi, *Kassatsyonnoe y nadzornoe proyzvodstvo v sovetskom uholovnom protsesse* (Hosiuryzdat, Moscow, 1949).

[8] Y. Yodkovskyi, *Poriadok nadzora v protsesse*, Ezhenedelnyk Sovetskoi Yustytsyy 37, 1923, available at <https://www.prlib.ru/item/331868>.

[9] S. Kats, *Sudebnyi nadzor v hrazhdanskom sudoproyzvodstve* (Yurydycheskaia lyteratura, Moscow, 1980).

[10] K. Komyssarov, *Zadachy sudebnoho nadzora v sfere hrazhdanskoho sudoproyzvodstva* (Sverdlovsk, 1971).

[11] N. Polianskyi, *Nadzor za sudebnymy ustanovlenyiamy,* Pravo y Zhyzn 3–4, 1924, available at <https://naukaprava.ru/catalog/435/993/558187/37079>.

[12] P. Trubnykov, *Peresmotr reshenyi v poriadke sudebnoho nadzora* (Yurydycheskaia lyteratura, Moscow, 1974).

We consider it expedient to analyse some of these theoretical and practical issues of the SR that were highlighted and discussed by Soviet legal scholars and then summarize its characteristic features.

First of all, the SR was ideologically opposed to the review of court decisions in bourgeois legal systems and was justified as a preponderance of Soviet law. During the Soviet period, scientific studies of various legal phenomena, institutes, procedures began with the fact that Soviet law was significantly different from bourgeois law, that the Soviet legal institutions were more perfect. Also the SR was not an exception to this.

The scientists convinced that the reviewing of sentences in the Soviet criminal process were based on fundamentally different principles from the first day of its existence, the main procedural provisions contained in the Decree on Court was the categorical refusal of the appeal, the very term 'cassation' received an entirely new content in the Soviet criminal-procedural law, which had nothing in common with the content that the bourgeois law imposed in that period, the Soviet government simplified the organization of the court, had making it completely accessible to the population and eliminating any departmentalism in the conduct of cases[13].

There was substantiated the difference between Soviet reviewing and the class character of bourgeois legal proceedings, in which the main and direct task of extraordinary judicial control lied in the deliberate, subordinated to the interests of the ruling classes and the political administration of justice, but the elimination of specific court errors turned out to be secondary. In turn in the USSR, the direct, immediate task of judicial supervision was a check of the legality and reasonableness of court decisions in specific cases that came into force[14].

It is worth noting that the institution of supervision of judicial decisions was justified not only by the need to protect public interests, but also by the protection of subjective rights. Asserted that judicial review became a legal guarantee of socialist legality in so far as it was a guarantee of subjective rights. This turnaround was due to the fact that socialism was characterized by the unity of social and personal interests. The Soviet state considered consistent protection of subjective rights of citizens and legal entities as one of its main care.

The task of the SR of court decisions was related to the need to eliminate court errors and to manage the judicial practice of lower courts. In the Soviet doctrine, representatives of both civil and criminal procedural theory, discussed the issue of primary (direct) and secondary (indirect) tasks of reviewing cases in the order of supervision.

In the opinion of scholars, the direct task of judicial supervision in the USSR was to verify the legality and reasonableness of judicial acts that came

[13] Hrodzynskyi, *op. cit.* note p. 7, 13, 17
[14] Komyssarov, *op. cit.* note p. 10, 5.

into force in order to correct existing mistakes found in them. The secondary and derivative task was to manage the practice of lower courts in order to ensure the legality in judiciary[15]. At the same time, both the tasks of judicial supervision, both direct and indirect, were subordinated to a single goal – the strengthening of socialist legality.

Along with the correction of court mistakes in specific cases after the adoption of decisions, rulings and judgments that came into force, the task of the courts of the supervisory instance was to turn court practice to the exact conformity with the law, making, where necessary, corrections in judicial practice, ensuring strict and exact observance of the material and procedural norms, uniform and correct application of laws by the courts[16].

By examination the legality and validity of sentences and the correctness of decisions, by repealing or modifying those sentences and rulings and eliminating mistakes and violations, if they were admitted to the case, the judicial control authority exercised control over the lower courts and governed their activities. Thus, the review of the sentences in the order of supervision protected the rights and interests of the participants in the process, ensured the correct application of Soviet laws, and, accordingly, as well as cassation review ensured compliance with socialist legality and the implementation of socialist justice[17].

The extraordinary nature of the institution of reviewing court decisions in the supervisory procedure was lied in that only court decisions that came into force and only on the initiative of special authority bodies provided for by laws could had been reviewed. In the Soviet legal doctrine, the extraordinary nature of the SR was primarily connected with the actors that could initiate that procedure. At the same time, the necessity of such actors was substantiated by various arguments.

Petro Trubnykov noted that the strictly limited range of persons authorized by law to contest judicial decisions that came into force was fairly considered in legal literature as one of the peculiarities of reviewing cases in the order of supervision, which characterized that procedure as the extraordinary[18]. The granting of the authority to apply for review of court cases in the order of supervision by only certain officials of the court and the prosecutor's office was also explained by the desire to avoid unfounded, for formal reasons, raising the issue of reviewing cases in the supervisory order

Attention was drawn to the fact that the persons involved in the case did not have the right to initiate supervisory procedure, but it did not change the merits of the case. By whose initiative the superior court did review the decision, he always fulfilled his duty both before the state and before the parties, because

[15] *Ibid.,* p. 7.
[16] Trubnykov, *op. cit.* note p. 12, 11.
[17] Hrodzynskyi, *op. cit.* note p. 7, 190.
[18] Trubnykov, *op. cit.* note p. 12, 14.

in their interests he had to review the decision, eliminate possible mistakes in it and thereby ensured the restoration of the violated subjective rights[19].

Regarding the extraordinary nature of the review in the supervisory order, there was a discussion – this procedure is exceptional, since it provided for special grounds for review, was it exceptional, because it was not a compulsory stage in the trial?

Some authors drew attention to the fact that in the legal literature extraordinary of the SR, in contrast to the review in cassation, were associated with such a ground as a significant violation of the rules of the substantive and procedural law. They believed that in cassation and supervision orders there were no differences between the grounds for the annulment of decisions. They argued that both in the cassation, and in the supervision order, the legality and reasonableness of judicial decisions were checked. Significant violation of the law was a violation that led or had could lead to an incorrect solving of the case. A mistaken decision had could not been left unchanged, in which order the matter had wouldn't be considered – in the cassation or in the supervisory procedure. That's why some scholars justified that the review of judicial decisions in order of supervision had had an extraordinary nature not in connection with the probable difference in the grounds for cancellation of decisions by the courts of cassation and supervisory instance, but because that stage, unlike cassation, wass not compulsory, a successive instance to consider the case[20].

The SR was constructed as an independent and separate institution and stage of judicial procedure, which significantly differed from the institution of cassation proceedings and the institution of the reviewing court decisions under newly discovered circumstances.

In the procedural theory pointed out to the fact that, unlike the cassation proceedings in the supervisory order, it was not initiated by the persons involved in the case, that was, not in connection with the submission of the cassation appeal or submission of cassation protest, but only by the protest of the officials of court or prosecutors. If cassation checked the legality and reasonableness of decisions that had not came into force, then the subject of review in the order of the supervision had could be only the decisions that had come into force. The possibility to protest in the order of supervision was not regulated by the termination of a certain period from the day these decisions were pronounced[21].

In the legal literature the attention was drawning to the differences of the supervision review from the review of court decisions that came into force when new circumstances appear, in particular, it was drawn attention to the fact that if the ground for SR was a mistake committed by the court when making a decision, which was seen in the materials of the case and additional materials, then

[19] Komyssarov, *op. cit.* note p. 10, 9.
[20] Trubnykov, *op. cit.* note p. 12, 11.
[21] Trubnykov, *op. cit.* note p. 12, 5; Hrodzynskyi, *op. cit.* note p. 7, 20.

the ground for reviewing the case for newly discovered circumstances was not a court mistake, but the emergence of such essential circumstances for the case, which at the moment of the trial had not and had could not be known to the applicant[22].

The SR had problems in its functioning and was subjected to significant modified during its existence. In the legal literature, there are separated several stages of the formation and development of the SR[23]: 1) the stage of formation (1918–1922); 2) the stage of centralization (1922–1926); 3) the stage of decentralization (1926–1938); 4) the stage of centralization (1938–1954); 5) the stage of decentralization (1954–1989).

The separation of these stages depended on some parameters. First of all, it concerned authorized by law officials and bodies to initiate SR before the relevant authorities. Thus, at the stages of the centralization of the SR authorized by law officials and bodies to initiate SR were Prosecutor of the USSR, prosecutor of the Republic and provincial prosecutors through the Prosecutor of the Republic (1922–1926); Prosecutor of the USSR, prosecutors of the Union Republics, Chairman of the Supreme Court of the USSR, chairmans of the supreme court of the Union republics (1938–1954).

At the stages of the decentralization of the SR (1926–1938, 1954–1989) the scope of authorized by law officials and bodies to initiate SR were more wider. Both the Prosecutor of the USSR, the Chairman of the Supreme Court of the USSR, both the prosecutor of the republics, his assistants to the Supreme Court, the chairmans of the Supreme Court and his deputy, provincial prosecutors and the chairmans of the provincial courts, the people's commissars of justice of the republics, the regional and district prosecutors had could initiate SR.

Secondly, the separation of the centralized and decentralized stages of the SR depended on authorized by law judicial bodies to review in supervisory instance. At the centralized stages only Supreme Court of the USSR (1922–1926), the Plenary Session of the Supreme Court of the USSR, the Judicial Collegium of the USSR Supreme Court, the judicial collegiums of the supreme courts of the Union republics (1938–1954) had could review decisions that came into force in supervisory order.

At the decentralized stages along with the above-mentioned judicial bodies Plenum of the Provincial Court colleges and plenums of regional and district courts (1926–1938), Presidium of the Supreme Court of the Union Republic Presidium of the Supreme Court of the Autonomous Republic, Regional,

[22] Trubnykov, *op. cit.* note p. 12, 6.

[23] For more details see: S. Yu. Nykonorov, *Razvytye ynstytuta proverky vstupyvshykh v zakonnuiu sylu sudebnykh postanovlenyi v poriadke nadzora*, Arbytrazhnyi y hrazhdanskyi protsess 6, 2004, p. 18–24; E. A. Borysova, *Apelliatsyia, kassatsyia, nadzor po hrazhdanskym delam* (Norma: YNFRA_M, Moscow, 2016), p. 61–66; L. A. Terekhova, *Nadzornoe proyzvodstvo v hrazhdanskom protsesse: problemы razvytyia y sovershenstvovanyia*, (Wolters Kluwer, Moscow, 2009), p. 11–20.

Territorial, Court and the Autonomous Region Court (1954–1989) had could realized SR as well.

Thirdly, there were differences at grounds and subject of SR in centralized and decentralized stages of the development of SR. For example, at the centralized stage (1922–1926) grounds and subject of the SR were related with the protection of the interests of the workers' and peasants' state and the masses of working people, at decentralized stages grounds and subject of the SR were detalised to an especially material violation of the current laws or an obvious violation of the interests of the working-peasant state or the working masses, contrary to the direct demand of the law (1926–1938), to the unreasonableness or substantive violations of the rules of material or procedural law (1954–1989).

But notwithstanding the changes in the history of the SR, it was characterized by such unchanging features: 1) only judicial decisions that came into force had could be reviewed in the supervisory order; 2) its initiators were only specially authorized by law officials and bodies; the parties and other persons involved in the case had could not initiate review of judicial decisions in the supervisory order, they had could only apply to the authorized officials and bodies for such a necessity; 3) the subject of review in the order of supervision were both the grounds of legality (the question of law), and the reasonableness (the issue of fact) of court decisions; 4) the scope of the review in the order of supervision was not limited to the arguments of the protest, and the case was reviewed in full; 5) no time limit was set during which protests could be filed after judicial decisions came into force[24].

These characteristic features of the SR will be important for further analysis of this institution in the post-Soviet legal systems, since in part of them it remained almost unchanged, and in part – substantially modified.

2. Abandonment and Transformation of Supervisory Review in Post-Soviet Legal Systems

After the collapse of the Soviet Union, all post-Soviet states had reformed their judicial systems[25]. It would seem all the states would had to abandon the institution of SR because its violated the principle of the separation of power and the independence of the judiciary. However not all post-Soviet states had abandoned

[24] At one stage of the functioning of the institution of supervisory review and in certain Soviet republics such time limit (term) was established.

[25] More details on the reforms of judicial systems in the post-Soviet states see: L. M. Moskvych, *Novyi etap sudovoi reformy: ochikuvannia ta spodivannia*, Pravo Ukrainy 7, 2016, p. 24–33; V. V. Ershov, N. A. Petukhov, *Sudebnye systemy hosudarstv, obrazovavshykhsia na postsovetskom prostranstve*, Rossyiskoe pravosudye 5 (97), 2014, p. 5–28, available at <http://files.sudrf.ru/1858/user/43144051.pdf>.

the SR. Some post-soviet countries significantly transformed the institution of Supervisory Review. In some post-soviet countries the Soviet model of Supervisory Review is conserved almost unchanged.

Schematicly, the current state of the institution of Supervisory Review in post-Soviet legal systems can be shown in the table. Below in the article, in more detail, the data presented in it will be analyzed.

TAB		**Institution of the Judicial Supervisory Review**		
№	**post-Soviet Legal Systems**	**Abandonment**	**Conserving**	
			Transformed Model	**Soviet Model**
1.	Azerbaijan	–	+	–
2.	Armenia	–	+	–
3.	Belarus	–	–	+
4.	Estonia	+	–	–
5.	Georgia	+	–	–
6.	Kazakhstan	–	+	–
7.	Kyrgyzstan	–	–	+
8.	Latvia	–	+	–
9.	Lithuania	–	+	–
10.	Moldova	+	–	–
11.	Russia	–	+	–
12.	Tajikistan	–	–	+
13.	Turkmenistan	–	–	+
14.	Uzbekistan	–	–	+
15.	Ukraine	+	–	–

After the collapse of the Soviet Union some post-Soviet states had abandoned the SR. The SR was abolished mainly by adopting new or by amending existed laws on the judiciary and procedural codes. An analysis of the current legislation of post-Soviet countries suggests that the SR is currently completely abolished in Georgia, Estonia, Moldova, and Ukraine.

Georgia was one of the first which abolished . Thus, on 15 May 1999, the provisions of new laws, in particular the Organic Law on General Courts of 13 June 1997[26] and the Civil Procedure Code No. 1106-IS of 14 November 1997[27], which cancelled the SR, came into force.

In Ukraine, in 2001, after the so-called «small judicial reform», in particular, on 21 June 2001, the amendments to the Law on the Judiciary[28], to the Civil

[26] Organic Law of Georgia on General Courts, adopted 13 June 1997 *(The Parliamentary Gazette, No 33, 31 July 1997, p. 75)*

[27] Civil Procedure Code of Georgia, adopted 14 November 1997, available at <https://matsne.gov.ge/en/document/download/29962/98/en/pdf>.

[28] «Zakon Ukrainy «Pro vnesennia zmin do Zakonu Ukrainy «Pro sudoustrii Ukrainy» vid 21.06.2001 № 2531-III *(Holos Ukrainy vid 05.07.2001, № 116)*, available at <http://zakon3.rada.gov.ua/laws/show/2531-14>.

Procedural Code[29] and to the Criminal Procedural Code[30] were adopted. By these amendments the review of court cases could be carried out only in the appellate, cassation order and in the order of newly discovered circumstances. Thus, since 29 June 2001, since the amendments to these laws came into force, the SR ceased to exist in Ukraine.

In Moldova, the institution of SR operated until 2003. Since 12 June 2003, new Civil Procedural Code of 30 May 2003[31] and new Criminal Procedural Code 14 March 2003[32] came into force. They provided for the reviewing procedure in the order of revision, and the SR was cancelled.

It is worth paying attention to the provisions of legislation of Kyrgyzstan. On 1 January 2019, new procedural codes, in particular the Civil Procedure Code of 25 January 2017[33] and the Criminal Procedural Code of Kyrgyzstan of 02 February 2017[34], which also do not provide for the Institution for Supervision Review, will come into force. notwithstanding the provisions of the current Law «On the Supreme Court and Local Courts» of 18 July 2003 No. 153 provides for the powers of the Supreme Court to review cases in the order of supervision, which should be carried out in the manner prescribed by the procedural law[35], but if new procedural codes come into force on 1 January 2019, there will not be possibility to exercise these powers.

One of the important factors that significantly influenced the abandonment of SR in these post-Soviet countries was the consideration by the European Court of Human Rights of individual complaints regarding the violation of the right to a fair trial against these states.

Thus, in a series of decisions against various post-Soviet states, the ECtHR has established a violation of the right to a fair trial in connection with

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[29] «Zakon Ukrainy «Pro vnesennia zmin do Tsyvilnoho protsesualnoho kodeksu Ukrainy» vid 21.06.2001 № 2540-III *(Holos Ukrainy vid 05.07.2001, № 116)*, available at <http://zakon5.rada.gov.ua/laws/show/2540-14>.

[30] «Zakon Ukrainy «Pro vnesennia zmin do Kryminalno-protsesualnoho kodeksu Ukrainy» vid 21.06.2001 № 2533-III *(Holos Ukrainy vid 05.07.2001, № 116),* available at <http://zakon3.rada.gov.ua/laws/show/2533-14/ed20010621>.

[31] Hrazhdanskyi protsessualnyi kodeks respublyky Moldova ot 30.05.2003 Nr. 225 *(Monitorul Oficial, Nr. 130–134, statia № 415),* available at <http://lex.justice.md/index.php?action=view&view=doc&lang=2&id=348338>.

[32] Uholovno-protsessualnyi kodeks respublyky Moldova ot 14.03.2003 Nr. 122 *(Monitorul Oficial, Nr. 248-251, statia №: 699),* available at <http://lex.justice.md/index.php?action= view&view= doc&lang=2&id=350171>.

[33] Hrazhdanskyi protsessualnyi kodeks Kyrhyskoi respublyky ot 25 yanvaria 2017 hoda № 14 *(hazeta «Эrkyn-Too», 12–13 (2737–2738),* available at <*http://cbd.minjust.gov.kg/act/view/ru-ru/111521*>.

[34] Uholovno-protsessualnyi kodeks Kyrhyskoi respublyky ot 2 fevralia 2017 hoda № 20 *(hazeta «Эrkyn-Too», 23–28 (2748–2753),* available at <*http://cbd.minjust.gov.kg/act/view/ru-ru/111530*>.

[35] See Art. 14 (2), Art. 17 (4), «Zakon Kyrhyzskoi Respublyky «O Verkhovnom sude Kyrhyzskoi Respublyky y mestnykh sudakh» № 153 ot 18 yiulia 2003 hoda *(hazeta «Эrkyn-Too», 55),* available at <*http://cbd.minjust.gov.kg/act/view/ru-ru/1279*>.

the application of the SR. However, as will be demonstrated in the following sections, such decisions of the ECtHR have had different effects on the post-Soviet states, since some of them have not canceled, but transformed the SR.

Thus, in Ukraine in the case of Sovtransavto holding v. Ukraine of 25 Jule 2002, the Court noted that «judicial systems characterised by the objection (протест) procedure and, therefore, by the risk of final judgments being set aside repeatedly, as occurred in the instant case, are, as such, incompatible with the principle of legal certainty that is one of the fundamental aspects of the rule of law for the purposes of Article 6 § 1 of the Convention»[36].

In respect of Moldova, the European Court of Human Rights has ruled the decision in case Rosca v. Moldova, in which stated that «request for annulment was a procedure by which the Prosecutor General's Office could challenge any final decision upon the request of one of the parties to the proceedings». The Court further noted that «by allowing the request lodged by the Prosecutor General under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in a final and enforceable judicial decision and thus *res judicata*»[37].

Also European Court of Human Rights mentioned the SR in cases concerning Georgia, in particular in case Mumladze v. Georgia of 8 January 2008[38].

It should be noted that in substantiating these and other cases, ECHR used the case against such post-socialist state as Romania, which also had the SR. This is a well-known precedental case of «Brumarescu v. Romania» of 28 October 1999[39].

As to the positions and approaches of the constitutional courts in these countries regarding the SR, the issues of its functioning was not the subject of their consideration, so the abolishing this institution in these post-Soviet countries was solely political decisions of the legislature.

Such constitutional courts' passivity in that period regarding functioning the SR may be seem astonishing, since the constitutions of these countries had already provided for the right to a fair trial, the principle of the separation of powers and the independence of judges, but on the other hand, they began to operate independently in these countries in a relatively recent time and had no such active experience as other European constitutional courts.

After the collapse of the Soviet Union, post-Soviet countries substantially changed their judicial systems. The SR also did not remaine unchanged.

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[36] ECtHR, Application no. 48553/99, *Sovttransavto holding v. Ukraine,* Judgment of 25 July 2002, para 77, available at <http://hudoc.echr.coe.int/eng?i=001-60634>.

[37] ECtHR, Application no. 6267/02*, Roєca v. Moldova,* Judgment of 22 March 2005, para 26–27, available at <http://hudoc.echr.coe.int/eng?i=001-68580>.

[38] ECtHR, Application no. 30097/03, *Mumladze v. Georgia*, Judgment of 8 January 2008, available at <http://hudoc.echr.coe.int/eng?i=001-84264>.

[39] ECtHR, Application no. 28342/95, *Brumєrescu v. Romania,* Judgment 28 October 1999, available at <http://hudoc.echr.coe.int/eng?i=001-58337>.

Comparison Criterions	The Institution of the Supervisory Review	
	Soviet model	**Transformed post-soviet model**
1.	**persons that have authority to initiate the Supervisory Review**	
only specially authorized by law officials and bodies were initiators; the parties and other persons involved in the case had could not initiate review of judicial decisions in the supervisory order, they had could only apply to the authorized officials and bodies for such a necessity		special officials and bodies may to apply to a court of supervisory review not on their own initiative, but only on the initiative of persons who turned to these special officials and bodies; other persons may also apply to the court of supervisory review, along with special authorized officials and bodies; special officials and bodies that are authorized to apply to a court of supervisory review can apply only in cases if they take part in that cases
2.	**subject matter of the Supervisory Review**	
both the grounds of legality (the question of law), and the reasonableness (the issue of fact) of court decisions;		only a matter of legality, without a matter of reasonableness
3.	**the scope (limits) of the Supervisory Review**	
not limited to the arguments of the protest, and the case was reviewed in full		only the arguments (reasons) of the applicants
4.	**the terms during which persons can apply for the Supervisory Review**	
not limited by terms		introduction of terms during which judicial decisions that came into force may be reviewed

Studying of the current legislation of the post-Soviet countries suggests that in part of them the Soviet model has been significant transformed. The transformation of the SR, that is, the change of its essential elements, took place in such post-Soviet countries Azerbaijan, Armenia, Kazakhstan, Latvia, Lithuania, Russia and relates to such aspects: terminology; officials and bodies that have authority to initiate Supervisory Review; subject and scope (limits) of Supervisory Review; the terms during which officials and bodies can apply for a Supervisory Review.

Let's analyze these elements of the transformed model of the SR in post-Soviet legal systems.

The countries that modified the SR has officially abandoned the use of the terms «supervision», «supervisory instance», «supervisory», etc. in the legislation, but some of the terminology elements of this institution remain in these countries. So, in Azerbaijan, Armenia, Latvia, though they refused the terminology concerned Supervisory Review, however, they had remained such terms as «prosecutor protest», «cassation protest». In Azerbaijan, the name of the proceedings «in order of additional cassation» was introduced, in Latvia the chapter

of the procedural code, which provides the modified Supervisory Review, called «the review of cases in connection with a substantive violation of the norms of material and procedural law».

An exception of such terminology is Russia. In the procedural laws, the terms «review in the order of supervision», «supervisory instance» were retained, however, they renounced the terms «protest», and replaced by the terms «submision», «complaint».

Above all, the transformation of the SR concerns the officials and bodies that have authority to initiate. Firstly, special officials and bodies may to apply to a court of Supervisory Review not on their own initiative, but only on the initiative of persons who turned to these special officials and bodies, secondly, other persons may also apply to the court of Supervisory Review, along with special authorized officials and bodies; and thirdly, special officials and bodies that are authorized to apply to a court of Supervisory Review can apply only in cases if they take part in that cases.

Thus, in Azerbaijan, the Chairman of the Supreme Court may initiate a submision for decisions of the appellate courts that came into force only on the basis of a previous petition of the persons not involved in the case if judicial acts affect their interests. In Azerbaijan, a prosecutor may protest against judicial acts only in cases where the prosecutor was a plaintiff or applicant in that court case[40].

In Armenia, along with the Prosecutor General and his deputies, lawyers who have a special license and registered with the Court of Cassation has the right of cassation protest against the decisions of the courts that came into force[41].

In Lithuania, in addition to the Prosecutor General, initiate a new review of court decisions that are legally binding may also be made by parties, third parties, persons who did not take part in the case, but in respect of which the court decision which came into force violated rights and legitimate interests[42].

In Russia, along with the Prosecutor General and his deputies, persons who participated in the case and other persons, if their rights, freedoms and legitimate interests are violated by these judgments, have the right to appeal in the order of supervision the court decisions that came into legal force[43].

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[40] See Art. 403.2, Art. 423, Code of Civil Procedure of the Azerbaijan Republic, adopted 28 December 1999, *(The Azerbaijan newspaper of 4 January 2003, No. 2),* available at <http://cis-legislation.com/document.fwx?rgn=2585>.

[41] Judicial code of the Republic of Armenia No. ZR-135, adopted 07 April 2007, *(Official sheets of the Republic of Armenia, on April 18, 2007, No. 20 (544), Art. 489),* Art. 56, available at <http://www.parliament.am/legislation.php?sel=show&ID=2966&lang=eng>.

[42] Lietuvos Respublikos civilinio proceso kodeksNo. IX-743, 2002 m. vasario 28 d, *(Valstybės žinios, 2002-04-06, Nr. 36–1340)*, available at <https://e-seimas.lrs.lt/portal/legalAct/en/TAD/TAIS.162435>.

[43] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy № 138-FZ, pryniat 14 noiabria 2002 *(Sobranye zakonodatelstva Rossyiskoi Federatsyy ot 2002 h., N 46, st. 4532),* Art. 391.1, available at <http://pravo.gov.ru/proxy/ips/?docbody=&link_id=7&nd=102078828&intelsearch=>.

Also, in Russia, the Chairman of Supreme Court and his deputies may appeal in the order of Supervisory Review, but not on their own initiative, but on the complaint of interested persons or upon the submission of the prosecutor[44]. As well the Prosecutor General and his deputies have the right to appeal in the order of Supervisory Review of the court decisions that came into force only in cases where the prosecutor participated in the trial[45].

The only exception to this is Latvia, in which the Prosecutor General or the Ober Prosecutor of the Department of Personal and State Protection of the Prosecutor General's Office may appeal to review of the court decision to the Supreme Court on its own initiative[46].

Thus, in those countries where officials of the judiciary can initiate the SR, even though the petitioners have been appealed about that, there remain threats to respect the principle of impartiality and independence of the judiciary.

Another important element of the SR that has undergone significant changes is the subject matter and scope (limits) of review in the supervisory order.

The subject of SR have substantially modified in the post-Soviet countries and is only a matter of legallity, unlike the Soviet model, in which the subject of SR was the question of both the legallity and the reasonableness of court decisions.

So, in Azerbaijan, the plenary session is considering cases exclusively on law matters[47]. In Armenia, the grounds for the cassation protest are violation of the material and procedural rights of the persons involved in the case[48]. In Lithuania, the Prosecutor General can file an application for a new review in order to protect the public interest, in particular if there is a obvious error in the application of the legal norms, both by the courts of first instance and courts of appeal[49]. In Russia, during the consideration of the case in the order of supervision, «the Presidium of the Supreme Court checks the correct application and interpretation of the norms of substantive law and the rules of procedural law by the courts that considered the case ...» [50], and the submission of the Chairman of the Supreme Court or his deputies on the review of court decisions in the order of supervision may be filed «in order to eliminate fundamental violations of material and procedural legal norms that have affected the legality of the appealed court decisions»[51].

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[44] *Ibid.,* Art. 391.11.

[45] *Ibid.,* Art. 391.1, para. 3.

[46] Civil Procedure Law of the Republic of Latvia, adopted 3 November 1998, Art. 483, available at <http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Citi/Civil_ Procedure_Law.pdf>.

[47] Code of Civil Procedure of the Azerbaijan Republic, *op. cit.* note 40, para. 424.1.

[48] Civil Procedural Code of the Republic of Armenia No. Al-247, adopted 17 June 1998, Art. 225, available at <http://www.parliament.am/legislation.php?sel=show&ID=1918&lang=eng>.

[49] Lietuvos Respublikos civilinio proceso kodeks№, *op. cit.* note 42, Art. 365, para 2, Art. 366, para. 2.

[50] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy, *op. cit.* note, 43, Art. 391.12, para. 2.

[51] *Ibid.,* Art. 391.11, para 1.

In some post-Soviet states (Kazakhstan, Russia), there are other special grounds for SR. In Kazakhstan, the grounds for cassation review on the submission of the Chairman of the Supreme Court and the protest of the Prosecutor General are as follows: 1) when the execution of the adopted decision may lead to serious irreversible consequences for life, health or for the economy and security of the Republic of Kazakhstan; 2) when an adopted decisions violate rights and interests of an uncertain circle of persons or other public interests; 3) when the adopted decisions violate the uniformity in the interpretation and application of the rules of law by the courts[52].

In Russia, grounds for canceling or changing a court decision in the order of supervision are cases where the contested decision violates: 1) the rights and freedoms of man and citizen, guaranteed by the Constitution of the Russian Federation, generally accepted principles and norms of international law, international treaties of the Russian Federation; 2) the rights and interests of an uncertain circle of persons or other public interests; 3) uniformity in the interpretation and application of the rules of law by the courts[53].

Also, in Russia, the Chairman of the Supreme Court and his deputies may submit a petition for review of court decisions in the order of supervision if the court decisions ... deprived the participants of material and procedural legal possibilities of exercising the rights guaranteed by the Code, including the right to access to justice, the right to a fair trial a trial based on the principle of competition and equality of the parties, or substantially limited those rights[54].

Important difference with the Soviet model of the SR is related to the scope (limits) of SR. In transformed model they are only the arguments (reasons) of the applicants, unlike the Soviet model, in which the court of Supervisory Review had been checking the case in full.

Thus, in Armenia «the Cassation Court reviews decisions and rulings of courts within the limits of the grounds specified in the cassation protest»[55].

In Kazakhstan, the court at the hearing ... checks the legality ... within the limits of the materials available and in the limits of the arguments of petitions, submissions, protests[56].

In Latvia «the court, when considering a case in cassation examines the legality of a decision in a part that is appealed and against a person who appealed the decision or joined the cassation complaint and the arguments cited in the cassation appeal»[57].

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[52] Hrazhdanskyi protsessualnyi kodeks Respublyky Kazakhstan No. 377-V, pryniat 31 oktiabria 2015, Art. 438, para. 6, available at <http://www.wipo.int/wipolex/en/ text.jsp?file_id =404272>.

[53] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy, *op. cit.* note, 43, Art. 391.9.

[54] *Ibid.,* Art. 391.11, para 1.

[55] Civil Procedural Code of the Republic of Armenia, *op. cit.* note 48, Art. 235

[56] Hrazhdanskyi protsessualnyi kodeks Respublyky Kazakhstan, *op. cit.* note 52, Art. 449, para. 1.

[57] Civil Procedure Law of the Republic of Latvia, *op. cit.* note 46, Art. 473, para. 1.

In Russia, when reviewing the case in supervisory order, the court checks it within the scope of the arguments of the supervisory complaint and submission. In so doing, the Presidium of the Supreme Court is not authorized to establish and assume proven circumstances that were not established or rejected by the court of the first or appellate instance or to decide on the authenticity or unreliability of a particular evidence, the advantage of some evidence of other evidence and determine which judgment must be made during the new consideration of the case[58].

However, among the post-Soviet legal systems, which have substantially transformed the SR, there are countries (Kazakhstan, Latvia, Russia) that authorized the relevant judicial bodies to go beyond the arguments (reasons), indicated in the application. At the same time, such authority differs significantly from the Soviet model by the fact that in the Soviet model a review the case at all scope was compulsory to the courts of supervisory instance, and in post-Soviet countries it is their right in certain cases.

Thus, in Kazakhstan, «cassation court, in the interests of legality, has the right to go beyond the limits of petitions, submissions or protests and check the legality of the appealed judicial act in full»[59]. In Latvia «the court may cancel the decision as a whole, despite appeals only in its part, if it ascertains such violations of the law that led to the incorrect decision of the case as a whole»[60]. In Russia, the Presidium of the Supreme Court has the right to go beyond the arguments of the supervisory complaint, submission in the interests of legality[61].

The SR has been modified as well in the introduction of terms during which judicial decisions that came into force may be reviewed. The terms for initiate SR are introduced in all post-Soviet legal systems in which this institution remains.

So, in Armenia, a cassation protest in civil and administrative cases may be given in the three-month term, and in criminal cases – within six months from the date of entry into force of the judicial act of a lower court that decides on the merits[62]. In Azerbaijan, submission, complaint or protest can be filed within two months after the Supreme Court's decision was taken by the board of Supreme Court.[63]. In Latvia, the protest of the relevant authorities may be passed if no more than ten years have elapsed since the entry into force of the decision[64]. In Lithuania, an application to initiate a new trial may be filed within three months from the day the person learned or should have become aware of the circumstances that are the reason for the start of a new trial. An application for the

[58] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy, *op. cit.* note, 43, Art. 391.12, para. 2.
[59] Hrazhdanskyi protsessualnyi kodeks Respublyky Kazakhstan, *op. cit.* note 52, Art. 449, para. 1.
[60] Civil Procedure Law of the Republic of Latvia, *op. cit.* note 46, Art. 473, para. 2.
[61] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy, *op. cit.* note, 43, Art. 391.12, para. 2.
[62] Judicial code of the Republic of Armenia, *op.cit.* note 41, Art. 55, para. 1.
[63] Code of Civil Procedure of the Azerbaijan Republic, *op. cit.* note 40, Art. 426.2.
[64] Civil Procedure Law of the Republic of Latvia, *op. cit.* note 46, Art. 483.

commencement of a new trial can not be filed if more than five years have elapsed after the decision or ruling entered into[65]. In Russia, the relevant court decisions may be appealed in the supervision order within three months from the date of their entry into force[66].

However, in the legal system of Russia there are provided exception and the possibility of extending that term. The term for filing a supervisory complaint, submission, missed from the significant grounds recognized by the court, can be restored by a judge of the Supreme Court on the application of interested persons[67].

Thus, in the overwhelming majority of post-Soviet states, the institution of supevisory review has been substantially transformed. It is noteworthy that the legal systems that have been substantially transformed the institution of supevisory review belong to the Council of Europe, except for the Central Asian country of Kazahstan.

In this regard, issues arise as to the influence of standards of the Council of Europe, in particular how did the practice of the European Court of Human Rights act on the transformation of the institution of the SR.

The European Court of Human Rights in a number of cases against these states had considered the nature of the institution of the supevisory review and its compatibility with the provisions of the Convention, in particular the right to a fair trial, provided for in Article 6 of the Convention.

One of the first case, in which the issue of the compatibility of the institution of SR with the Convention 1950 was raised, was the case of Ryabykh v. Russia of 23 July 2003 (the application was filed on 19 August 1999 and found admissible on 12 February 2002).

In the present case, the Court considered that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official. By using the Supervisory Review procedure to set aside the judgment of 8 June 1998, the Presidium of the Belgorod Regional Court infringed the principle of legal certainty and the applicant's «right to a court» under Article 6 § 1 of the Convention[68].

However, if, in a similar case Sovttransavto holding v. Ukraine, the Court categorically recognized the very nature of the institution of SR in a manner contrary to the principle of legal certainty[69], then in the argumentation of the deci-

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[65] Lietuvos Respublikos civilinio proceso kodeks№, *op. cit.* note 42, Art. 468

[66] Hrazhdanskyi protsessualnyi kodeks Rossyiskoi Federatsyy, *op. cit.* note, 43, Art. 391.2, para. 2.

[67] *Ibid.*

[68] ECtHR, Application no. *52854/99*, *Ryabykh v. Russia,* Judgment of 24 July 2003, para. 56–57, available at <http://hudoc.echr.coe.int/eng?i=001-61261>.

[69] ECtHR, *op. cit.* note 36, para. 77. The Court considered that judicial systems characterised by the objection (protest) procedure and, therefore, by the risk of final judgments being set aside repeatedly, as occurred in the instant case, were, as such, incompatible with the principle of legal certainty.

sion in this case against Russia, the Court softened its position and foresaw the possibility of departing of legal certainty. Thus, the Court noted that «he review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character»[70].

It should be noted that the European Court of Human Rights, using such valuated notions as in the case of «Ryabykh v. Russia», actually opened the path to the justification of not refusal this institution, but its transformation in Russia. And although theses notions can be flexible and take into account the different circumstances of court cases, such grounds may also cause abuse of the cancelling of decisions that came into force.

Some issues regarding the institution of the supevisory review were resolved by the European Court of Human Rights against Azerbaijan. Thus, in the case of Rakhmanov v. Azerbaijan of 10 July 2008, the was appealed the the changement by the Plenary Session of the Supreme Court, but essentially, the annullement, the decision of Supreme Court.

The European Court of Human Rights, considering the differences between the institution of additional cassation, which exists in Azerbaijan, and the institution of the supevisory review, stated that these distinctions, however, were not of crucial importance. What was relevant in the present case was that the procedure of additional cassation had allowed a final and binding judicial decision to be quashed on the ground that the substantive law had not been applied correctly by the ordinary civil courts. ECtHR stated the fact that the Supreme Court's President and Plenum disagreed with the assessment made by the domestic courts was not, in itself, an exceptional circumstance warranting the reopening of the proceedings concerning the applicant's case and using this extraordinary remedy to set aside a binding and enforceable[71].

Also European Court of Human Rights considered the nature and the institution of the supevisory review in cases concerning Latvia. Thus, in the case «Yelverton Investments and others v. Latvia» of 18 November 2014[72], the applicants contested the protest of the Head of the Civil Chamber of the Senate of the Supreme Court regarding the revision of the court decision that came into force as violated the principle of legal certainty and impartiality of the court. Although the ECtHR ruled out the case from the list of cases, due to the corresponding changes in the legislation of Latvia and the adoption of the corresponding decision of the Constitutional Court of Latvia, however, in this case ECtHR analyzed

[70] ECtHR, *op. cit.* note 68, para. 52.

[71] ECtHR, Application no. 34640/02, *Rahmanova v. Azerbaijan,* Judgment of 10 July 2008, para. 59–60, 64, available at <http://hudoc.echr.coe.int/eng?i=001-87418>.

[72] ECtHR, Application no. 57566/12, *Yelverton Investments and others v. Latvia,* Judgment of 18 November 2014, available at <http://hudoc.echr.coe.int/eng?i=001-148923>.

the change and development of the institution of the supevisory review in the legal system of Latvia.

European Court of Human Rights considered cases against such another country, in which the SR had been transformed, as Lithuania. Thus, in the case of Varnienė v. Lithuania of 12 November 2013, the applicant complained about the reopening of the court proceedings and the review of the Supreme Administrative Court's final decision. The European Court of Human Rights, using its precedent cases «Brumarescu v. Romania» and «Ryabykh v. Russia», held that the resumed examination of the applicant's case and setting aside the decision of 12 February 2002 infringed the principle of legal certainty and the applicant's «right to a court» under Article 6 § 1 of the Convention[73].

The above analysis of the European Court of Human Rights case-law suggests that the consideration and resolving of cases against these post-Soviet states significantly influenced the transformation of the SR.

It should be noted that not only the ECHR practice, but also the constitutional courts' practice influenced on the transformation of the SR in these post-soviet states. There are a number of constitutional courts' decisions that justified the constitutionality of certain elements of the SR.

Constitutional Court of Azerbaijan considered one case with the constitutional complaint by a citizen of Zalov. The issue was about the exercise of powers by the Supreme Court during the review of the court decision in the order of additional cassation. The applicant Zalov complained that the Plenum of the Supreme Court considered the case in the order of additional appeal at merits. In this regard, the Constitutional Court substantiated that, from the point of view of the legal nature of the proceedings in the order of additional cassation, amendments to the cassation court decision within the framework of this proceeding should cover circumstances not belonging to the merits of the case. Accordingly, the additional cassation court is not empowered to amend the decision of the cassation court, referring to circumstances that were not established in the previous court instances of the merits of the case. Consequently, the Constitutional Court recognized that the decision of the additional cassation court in this disputed civil case violated the applicant's right to a judicial guarantee of rights and freedoms, which is provided for by the Constitution of Azerbaijan[74].

Also Constitutional Court of Latvia in a number of cases considered the nature of the SR and its compatibility with the constitutional provisions.

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[73] ECtHR, Application no. 42916/04, *Varnienė v. Lithuania,* Judgment of 12 November 2013, para. 40–45, available at <http://hudoc.echr.coe.int/eng?i=001-128034>. P. 40–45.

[74] Constitutional Court, «Decision of the Plenum of the Constitutional Court of Azerbaijan Republic On complaint lodged by Aydin Hasanbala oglu Zalov concerning verification of conformity of the decision of the Presidium of the Supreme Court of Azerbaijan Republic of February 1, 2002 to Constitution and legislation of Azerbaijan Republic», judgment of 21 May 2004, available at <http://www.constcourt.gov.az/decisions/82>.

Thus, in the case No. 2001-10-01 of 5 March 2002, the State Bureau of Human Rights complained about the constitutionality of the exclusive right of the Prosecutor General and his deputy to protest the judicial decisions in criminal cases that came to legal force. The State Bureau of Human Rights believed that other participants of the criminal procedure should have this right. The Latvian Constitutional Court has recognized the constitutionality of such exclusive powers of the Prosecutor General and his deputy. The Latvian Constitutional Court argued that the supervisory procedure was initially excluded from the Criminal Procedure Code, and then again restored. In fact, it was based on a supervisory institution that developed in the Soviet criminal procedure and was not distributed in democratic states. The restoration of legal proceedings in a case that culminated with a decision that came into force is a manifestation of a typical conflict between the basic principles that contradict each other – justice and legal stability. Such a conflict in each particular case is solved either in favor of legal stability or in in favor of justice – this is mainly the task of the legislator[75].

Also in the practice of the Constitutional Court of Latvia, there are cases in which the issues arised regarding the violation of the impartiality of the court. The violation of the impartiality was challenged in the case of submission by the Head of the Department of Civil Affairs of the Supreme Court the protest in supervisory order[76]. The Constitutional Court of Latvia drew attention to the fact that the contested norm allowed the Senate to examine cases that it had initiated itself. This kind of regulation was incompatible with the principle of a fair court. Hence, if the Chairperson of the Senate Department of Civil Cases exercised the aforementioned right, it had could give rise to doubts in society regarding the impartiality of the court. The right to a fair court demands that even a semblance of impartiality of the court must be prevented. The contested norm caused such semblance and, thus, was incompatible with the right to an impartial court.

Consideration the nature and compatibility with the constitutional provisions of the SR was given by the Constitutional Court of the Russian Federation. The most significant decision in such a case was the decision of 05 February 2007. In this decision, the Constitutional Court of the Russian Federation drew attention in particular to the fact that the review legal acts that came to legal force in the order of super-

[75] Constitutional Court, «Reshenye Konstytutsyonnoho suda Latvyiskoi Respublyky v dele № 2001-10-01 ot 5 marta 2002 hoda «O sootvetstvyy statei 390-392I Uholovno-protsessualnoho kodeksa Latvyy y punkta 3 perekhodnykh pravyl zakona ot 20 fevralia 1997 hoda «Yzmenenyia v Uholovno-protsessualnom kodekse» state 92 Konstytutsyy Latvyiskoi Respublyky», judgment of 5 March 2002, para. 9, available at <http://www.satv.tiesa.gov.lv/wp-content/uploads/2018/06/2001-10-01.pdf>.

[76] Constitutional Court, «Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2012-13-01 of 14 May 2013 «On Compliance of Section 483 insofar as it Establishes the Right of the Chairperson of the Senate Department of Civil Cases so Submit a Protest with Article 92 of the Satversme of Republic of Latvia», judgment of 14 May 2013, para. 14.2.3., available at <http://www.satv.tiesa.gov.lv/wp-content/uploads/2012/06/2012-13-01_Spriedums_ENG.pdf>.

vision is only possible as an additional guarantee of the legality of such acts and provides for the establishment of special grounds and procedures for the conduct of this stage of the process, which are in line with its legal nature[77].

Thus, in some post-Soviet legal systems, the SR is substantially reformed and differs from the Soviet model. The European Court of Human Rights has contributed to such a substantial reform in a number of cases. The constitutional courts of these states, in one hand, also influenced at legislators on its transformation, and on the other hand, caused conservation of the institution of the SR in these states.

If to compare the transformed model of the SR with the Soviet model, then one can state that if its Soviet model significantly violates the principles of independence of the judiciary and the right to a fair trial, then the transformed model is basically in line with the European standards for the administration of justice and the right to a fair trial. Therefore, assessing the conserving of the transformed model of the SR in these post-Soviet countries as a legal survival in modern conditions seems to be unfounded. As a legal survival one can only appreciate the conserving of the Soviet model of the SR in some Post-Soviet Legal Systems.

3. Conserving Soviet Model of Supervisory Review in Post-Soviet Legal Systems

The SR remains unchanged, mainly in Central Asian countries such as Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The presence of the Soviet model in these countries could be characterized as a typological feature of the Central Asian countries, their legal identity, as indicated in the publication of the Venice Commission[78].

However, the unchanged Soviet model is also functionig in such an Eastern European country as Belarus. This gives reason for asserting that the SR was a means of centralizing power and exercising control over the judiciary both in the Soviet period, both remains such means in some post-Soviet countries.

Let's consider on the basis of analysis and generalization of current legislation features of the Soviet model of the institution of supervisory in these post-soviet legal systems. Consideration will also be given for the substantiation of this institution in the practice of their constitutional courts.

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[77] Constitutional Court, «Postanovlenye Konstytutsyonnoho Suda Rossyiskoi Federatsyy № 2-P ot 5 fevralia 2007 hoda «Po delu o proverke konstytutsyonnosty polozhenyi statei 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 y 389 Hrazhdanskoho protsessualnoho kodeksa Rossyiskoi Federatsyy v sviazy s zaprosom Kabyneta Mynystrov Respublyky Tatarstan, zhalobamy otkrытykh aktsyonernykh obshchestv «Nyzhnekamskneftekhym» y «Khakasэnerho», a takzhe zhalobamy riada hrazhdan», judgment of 5 February 2007, available at <http://doc.ksrf.ru/decision/KSRFDecision19704.pdf>.

[78] H. Dykov, E. Talapina, y dr., *Obzor sudebnykh system stran Tsentralnoi Azyy* (YD «Iurysprudentsyia», Moscow, 2015), p. 45–46.

Characteristic features of the Soviet model of the SR that remains in these countries are the following.

First of all, the terminology concerning the SR, that was formed in Soviet times, is conserved including terms – «review in the order of supervision», «protest in the order of supervision», «court of supervisory instance», etc.

At the same time, in such states as Belarus and Turkmenistan, definition of these terms is given in the procedural codes. Thus, in Belarus definition of the term «protest in the order of supervision» is enshnrined as a protest of the official authorized by this Code of the cancellation or change of court decisions that came into force», and the «court of supervisory instance» – as «a court authorized to review the case in the order of supervision for protests against the court decisions that came into force and make decisions within its competence»[79].

Secondly, special official and bodies may apply to the courts of the supervisory instance with appropriate application (submission, protests) to review the court decisions that came into force on their own initiative, regardless of whether they participated in the case.

Thus, on their own initiative, in Belarus – the Supreme Court and its deputies, the Prosecutor General and his deputies, the chairmans of regional, Minsk city courts, prosecutors of the regions, and the city of Minsk; in Uzbekistan – the President of the Supreme Court and his deputies, the Prosecutor General and his deputies; in Tajikistan – the President of the Supreme Court and the Prosecutor General; in Turkmenistan – the Attorney General and his deputies – may apply to the courts of supervisory instance with a submission or protest about such a review.

At the same time, the parties and other persons who participated in the case, as well as persons who did not take part in the case, but the rights and interests of which were the subject of the court decisions that came into force, can not initiate SR of court decisions on their own initiative. They should address these special officials and bodies about the need to review court decisions in the supervisory order.

Next, both the legality and the reasonableness of court decisions are the subject of appeal and review in the order of supervision.

In such post-Soviet countries as Belarus and Turkmenistan, the grounds for SR are both the legality and reasonableness of the court decisions that came into force. Thus, in Belarus «the court, when considering the case in the order of supervision, checks the legality and reasonableness of a court decision»[80].

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[79] Hrazhdanskyi protsessualnyi kodeks Respublyky Belarus № 238-З, pryniat 11 yanvaria 1999 hoda *(Natsyonalnyi reestr pravovykh aktov Respublyky Belarus, 1999 h., № 18–19, 2/13),* Art. 1, para. 15, 20, available at <http://etalonline.by/?type=text&regnum=HK9900238#load_text_none_1_>.

[80] *Ibid.,* Art. 445, para. 2

Important feature that remains unchanhed is that the courts of the supervisory instance are obliged to review the court decisions that came into force in full, and not only within the scope of the appeal.

For example in Belarus forseen that «during the consideration of the case in the order of supervision the court ... checks ... the court decision both in the protested and in the unprotested parts, and equally in relation to persons not specified in the protest», «the court is not bound by protest and obliged to check the cases in full»[81].

And in Turkmenistan also states that during the review of cases in the order of supervision, the court checks ... court decisions on available in the case materials in the context of the arguments presented in the complaint and submission, in separate categories of court cases, the court of supervisory power is obliged to check in full the legality and reasonableness of court decisions[82].

However, in these post-Soviet states there is still one difference from the Soviet model. Such a difference concerns the introduction of time-limits for appeals in the supervisory order.

In Belarus, a supervisory complaint may be filed within three years from the date of entry into force of the court decision[83]. In Tajikistan, a supervisory complaint and a protest may be filed in the court of the supervisory instance within a year from the date of their entry into force[84]. In Turkmenistan, a complaint or submission in the order of supervision may be filed (filed) within one year from the date of entry into force of the judicial decision[85]. In Uzbekistan, there is no the term during which the submission can be provided.

At the same time, in Belarus and in Kazakhstan there are provided exceptions and the possibility of extending these terms.

Thus, in Belarus, supervisory complaints submitted after the expiration of the relevant term are not subject to review, with the exception of complaints by defendants against judicial decisions taken in their absence, without proper notification of the time and place provided that the case is not destroyed due to the expiry the term of storage established by the legislation. The supervisory complaint for decision of the court of the first instance, which has not been appealed in cassation, is accepted only if the reasons for which the cassation appeal has not been filed are confessed significant by the persons who have the right to

[81] *Ibid.,* Art. 445, para. 3.

[82] Zakon Turkmenystana «Ob utverzhdenyy y vvedenyy v deistvye Hrazhdanskoho protsessualnoho kodeksa Turkmenystana» № 260-V, pryniat 18 avhusta 2015 hoda *(Vedomosty Medzhlysa Turkmenystana, 2015 h., № 3, st. 94),* Art. 396, available at <http://minjust.gov.tm/ru/mmerkezi/doc_view.php?doc_id=15067>.

[83] Hrazhdanskyi protsessualnyi kodeks Respublyky Belarus, *op.cit* note 79, Art. 437.

[84] Hrazhdanskyi protsessualnyi kodeks Respublyky Tadzhykystan, pryniat 5 yanvaria 2008 hoda, Art. 365, para. 2, available at <http://www.asia-realty.ru/co-zakon-tajikistan.php?Id=210>.

[85] Zakon Turkmenystana «Ob utverzhdenyy y vvedenyy v deistvye Hrazhdanskoho protsessualnoho kodeksa Turkmenystana», *op.cit* note 82, Art. 386.

accept the protest[86]. In Kazakhstan, rules on terms for filing submissions and protests can not be applied to cases in which the Chairman of the Supreme Court and the Prosecutor General may file a submission and protest[87].

However, I believe that this difference does not significantly affect the conserving of the essence of the Soviet model of the SR in these post-Soviet countries.

Thus, in some post-Soviet space there are some countries in which the SR of court decisions has been remained almost unchanged and its Soviet model is functioning. It is noteworthy that all countries, in which the Soviet model of SR is conserving, are not the members of the Council of Europe, and accordingly there are no obligations to observe and implement the relevant European standards.

However, although these countries are not members of the Council of Europe, their constitutions include the right to a fair trial, the principles of the separation of powers and the independence of the judiciary. Then the question arises whether had the constitutional courts of these countries examined the compatibility of the SR with that constitutional provisions?

The analysis of the constitutional courts' practice of these countries confirms the opposite. In all cases, where the issues arose about the constitutionality of the SR or its separate elements, their compliance with constitutional provisions was stated.

For example, in Kyrgyzstan, citizen Aliyev, J., appealed to the Constitutional Chamber of the Supreme Court the provision of Art. 356 of the Civil Procedure Code, which empowered the Judicial College of Supreme Court to consider, cancel and amend the court decisions that came into force in the supervisory order. In the opinion of the complainant, these powers violated the principle of justice and the right to judicial protection[88].

However, in ruling of Constitutional Chamber of the Supreme Court Kyrgyzstan, the legal nature of the court of supervisory instance was aimed at eliminating errors in judicial acts that have entered into force. In addition, in the system of legal regulation of civil proceedings supervisory instance was stated as an additional guarantee of equity and legality of judicial acts, if all the available verification and elimination in courts of the first, appeal and cassation instances had been exhausted. At the same time, the supervisory procedure was recognized as an influential method of legal protection ensuring equal use of the rule of law and the law, and the powers of the supervisory instance court were considered as

[86] Hrazhdanskyi protsessualnyi kodeks Respublyky Belarus, *op.cit* note 79, Art. 437.

[87] Hrazhdanskyi protsessualnyi kodeks Respublyky Kazakhstan, *op. cit.* note 52, Art. 436, para. 3.

[88] Constitutional Court, «Reshenye Konstytutsyonnoi palaty Verkhovnoho suda Kyrhyzskoi Respublyky 12 fevralia 2014 hoda «Po delu o proverke konstytutsyonnosty punkta 3 staty 331, punktov 3, 4 staty 356 Hrazhdanskoho protsessualnoho kodeksa Kyrhyzskoi Respublyky v sviazy s obrashchenyem hrazhdanyna Alyeva Zholdoshbeka», judgment of 12 February 2014, available at <http://constpalata.kg/wp-content/uploads/2014/02/Aliev-ZH.-rss-11.pdf>.

been the complete mechanism for exercising the right to judicial protection. Therefore, Constitutional Chamber of the Supreme Court Kyrgyzstan stated that there was no reason to confess that that authority, noted by the applicant, contradicted the Constitution.

Also, the Constitutional Court of Belarus, by checking the constitutionality of amendments to the civil procedural code on the SR, argued that the review of court decisions that came into force was an additional guarantee of the implementation of the constitutional right to judicial protection. And the statutory grounds for the annulment and modification of decisions aimed at ensuring a balance between the legality of court decisions and their stability, based on such important components of the rule of law as legality and legal certainty[89].

Thus, in the constitutional courts' practice of these post-Soviet states, the approach to the nature of the SR is significantly differed from the approach and assessment of the European Court of Human Rights. And although the constitutionality of this institution is justified in the constitutional courts' practice by the need to adhere to the principle of the rule of law and legal certainty, its functioning in the Soviet unchanged model does not conform to European legal standards. However, such a conservation of the Soviet model in these states may indicate the challenges and threats to the independence of the judiciary and the realization of the right to a fair trial.

Conclusions

The study of the current state of the SR in the post-Soviet legal systems, which was conducted within the article, had the main task to determine whether it confirms the movement of these systems forward to the rule of law or, conversely, back to the Soviet past.

Consequently, on the basis of the analysis of the doctrinal substantiation of the SR in Soviet legal science, the current legislation of the post-Soviet countries, the practice of the European Court of Human Rights in cases against the post-Soviet states that are members of the Council of Europe and the practices of the constitutional courts of the post-Soviet states, it should be summarized the following conclusions.

1) In the Soviet legal doctrine, the SR had been substantiated as the preponderance of socialist law, which has substantially distinguished it from bourgeois law. A number of both theoretical and practical issues the SR were dis-

[89] Constitutional Court, «Reshenye Konstytutsyonnoho Suda Respublyky Belarus № R-1111/2017 ot 28 dekabria 2017 h. «O sootvetstvyy Konstytutsyy Respublyky Belarus Zakona Respublyky Belarus «O vnesenyy yzmenenyi y dopolnenyi v Hrazhdanskyi protsessualnyi kodeks Respublyky Belarus», judgment of 28 December 2017, available at <http://www.kc.gov.by/main.aspx?guid=48033>.

cussed and debated, in particular regarding: the tasks of judicial supervision; the nature of the extraordinary of the supervision review; its distinction from cassation review of court decisions; differences from reviewing due to new appeared circumstances; the procedure for reviewing protests in the courts of supervisory instance, etc.

During its existence the SR had problems in its functioning and was subjected to significant modifying. This institution had been changing several times and these changes concerned first of all: authorized by law officials and bodies to initiate SR before the relevant authorities; authorized by law judicial bodies to do SR; grounds and subject for SR.

The Soviet model of the SR, regardless that changes in the history of its functioning, could be characterized by such unchanging features: 1) only judicial decisions that came into force had could be reviewed in the supervisory order; 2) its initiators were only specially authorized by law officials and bodies; the parties and other persons involved in the case had could not initiate review of judicial decisions in the supervisory order, they had could only apply to the authorized officials and bodies for such a necessity; 3) the subject of review in the order of supervision were both the grounds of legality (the question of law), and the reasonableness (the issue of fact) of court decisions; 4) the scope of the review in the order of supervision was not limited to the arguments of the protest, and the case was reviewed in full; 5) no time limit was set during which protests could be filed after judicial decisions came into force.

2) After the collapse of the Soviet Union, part of the post-Soviet states at various times became members of the Council of Europe and committed themselves to complying with international obligations to recognize the rule of law and respect for human rights, in particular the right to a fair trial.

In accordance with European legal standards, the functioning of the Soviet model of the SR substantially violates the principle of the rule of law, in particular its components as legal certainty and the principle of res judicata. Thus, the post-Soviet states would have to abandon the Soviet model of the SR

As a result, part of such post-Soviet states as Georgia, Estonia, Moldova and Ukraine abandoned the SR at all. Such a refusal was a political decision of the legislature of these countries and was manifested in the adoption of new or ammendments to existing laws on judiciary and procedural codes. The refusal of the SR in these countries was not influenced by its recognition unconstitutional by constitutional courts. The European Court of Human Rights has played an important role in the refusal from the SR by these countries. Consideration by the European Court of Human Rights of cases against these states in connection with the use of the SR and recognition of violation the right to a fair trial has stimulated state authorities to cancel the SR. Thus, it can be stated that these countries confirmed the movement of their legal systems in the direction of ensuring the rule of law.

3) The other part of the post-Soviet states, which are also members of the Council of Europe – Azerbaijan, Armenia, Latvia, Lithuania and Russia – did not completely refuse the SR, but significantly transformed it.

The transformed model of the SR in these post-Soviet countries is characterized by the following features: 1) officially abandonment of the using terms «supervision», «supervisory instance», «supervisory» etc.; 2) special officials and bodies may to apply to a court of Supervisory Review not on their own initiative, but only on the initiative of persons who turned to these special officials and bodies; 3) other persons may also apply to the court of Supervisory Review, along with special authorized officials and bodies; 4) special officials and bodies that are authorized to apply to a court of Supervisory Review can apply only in cases if they take part in that cases; 5) the subject of Supervisory Review is only a matter of legality, without a matter of reasonableness; 6) the scope (limits) of the Supervisory Review is only the arguments (reasons) of the applicants; 7) introduction of terms during which judicial decisions that came into force may be reviewed.

Such a significant transformation the SR in these states has also been affected by the European Court of Human Rights. However, if in cases against states that completely abandoned the SR, the European Court of Human Rights was categorical in its violation of the principle of legal certainty, as indicated in particular in the case «Sovtransavtoholding v. Ukraine», in turn in cases against states in which the institution had been substantially transformed, the approach and position regarding the violation of the principle of legal certainty had become more flexible. Thus, the European Court of Human Rights in the case «Ryabykh v. Russia» substantiated that «a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character».

Constitutional courts of Azerbaijan, Armenia, Latvia, Lithuania and Russia also significantly influenced the transformation the SR in theses post-Soviet countries. These constitutional courts in some cases substantiated and recognized the constitutionality of some elements of the SR, thereby contributing to its conserving, while on the contrary, in some cases had recognized certain elements of the SR as unconformity with constitutional provisions and as violated the right to a fair trial. The main arguments in these constitutional proceedings were the principles of legal certainty and res judicata.

Thus, it can be argued that these countries are also moving forward in ensuring the rule of law.

4) The transformed model of the SR in these post-Soviet countries mainly complies the rule of law, but in some post-Soviet countries there are exceptions to it, which may pose a threat to the rule of law.

Thus, in some of these post-Soviet countries (Azerbaijan, Russia) there is a Soviet legal survival, according to which the officials of judicial power may

initiate a review of the case in the supervisory order. Such initiation of the Supervisory Review by officials of the judiciary poses a threat to the principle of impartiality of the court and thus may violate the right to a fair trial.

Also, in the legal systems of Latvia and Russia there is another Soviet legal survival, related to the scope of Supervisory Review. In these post-soviet countries, in certain cases, the courts of the supervisory instance can review cases not only in the appealed part, but also in the part that is not contested. Such a way out of the court beyond the scope of the appeal may violate the principle of competitive litigation and indicate a violation of the principle of impartiality of the court.

Another element of the SR, which remains in some post-Soviet legal systems (Latvia, Russia) concerns the terms for the appeal in the supervisory order. So, in Latvia, such a time limit for appealing a decision that came into force is very long-lasting – 10 years. In Russia, the relevant terms of appeal, in case of their omission, may be extended on the initiative of the court.

Thus, some of the post-Soviet legal systems (Azerbaijan, Latvia, Russia), which are members of the Council of Europe, conserve some Soviet legal survivals, which constitute a threat to the rule of law.

5) The Soviet model of the SR remains almost unchanged in those post-Soviet states that are not members of the Council of Europe. Mostly these are the states of Central Asia – Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The only exception of these Central Asian countries Kazakhstan is, in which the SR has significantly transformed. Also, to the post-Soviet states, in which the Soviet model of the SR is conserved, belongs the Eastern European state – Belarus.

One difference, which does not significantly affect the conserving of the essence of the Soviet model of the SR in these states, is the introduction of terms of appeal in the order of supervision.

Despite the fact that the constitutions of these states also provide for the principle of the separation of powers, the independence of the judiciary, and the right to a fair trial, in the constitutional courts' practice, the constitutionality of the SR is substantianed and recognized as complianced with the constitutional provisions.

Important arguments for recognizing the constitutionallity of the SR and its individual elements in these post-soviet countries are the principle of the rule of law, in particular its component – legal certainty, as well as the need to protect the right to a fair trial. Nevertheless such an interpretation of the rule of law does not correspond and contradicts European legal standards, and on the contrary is largely similar to the Soviet doctrinal justification of the SR.

Therefore, it can be clearly stated that in such post-Soviet countries as Belarus, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan maintain a Soviet model of the SR, indicating the movement of their legal systems not to the direction of rule of law, but to the Soviet past.

Summing up, those post-Soviet states that are members of the Council of Europe have abandoned and transformed the review institution in the supervi-

sory order, confirming the movement towards the rule of law, albeit not in the same way and to the same extent. In the part of the post-Soviet states, which are predominantly Central Asian, the Soviet model of the SR is conserved almost unchanged.

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Перегляд судових рішень в порядку нагляду в пост-радянських правових системах: вперед до верховенства права чи назад до радянських пережитків?

Анотація

У статті досліджено стан інституту перегляду судових рішень в порядку нагляду у пост-радянських правових системах та визначено, чи він свідчить про рух цих систем у напрямку до верховенства права, чи навпаки – назад у радянське минуле.

Проаналізовано доктринальне обґрунтування інституту перегляду у радянській юридичній науці, чинне законодавства пост-радянських країн, практику Європейського суду з прав людини у справах проти пост-радянських держав, які є членами Ради Європи, а також практику конституційних судів пост-радянських держав.

У радянській правовій доктрині інститут перегляду обґрунтовувався як перевага соціалістичного права, яка суттєво відрізняла його від буржуазного права.

Радянську модель інституту перегляду в порядку нагляду, незважаючи на зміни протягом історії його функціонування, можна охарактеризувати такими істотними

ознаками: 1) лише судові рішення, які набрали юридичної сили, могли бути переглянуті в порядку нагляду; 2) ініціаторами перегляду могли бути лише спеціально уповноважені законом посадові особи та органи влади: сторони та інші учасники справи не могли ініціювати перегляд судових рішень в порядку нагляду, вони могли лише звертатись до уповноважених посадових осіб та органів влади про таку необхідність; 3) предметом перегляду в порядку нагляду були як питання законності (питання права), так і обгрунтованості (питання факту) судових рішень; 4) обсяг перегляду в порядку нагляду не обмежувався підставами та аргументами протесту, і судове рішення підлягало перегляду в цілому; 5) не було часового обмеження щодо можливості звернення з протестом на судове рішення, що набрало чинності.

Після розпаду Радянського Союзу частина пост-радянських держав у різний час стали членами Ради Європи та зобов'язались виконувати міжнародні зобов'язання щодо визнання принципу верховенства права та поваги та захисту прав людини, зокрема права на справедливий суд.

Відповідно до європейських правових стандартів функціонування радянської моделі інституту перегляду суттєво порушувало принцип верховенства права, зокрема такі його складові як правову визначеність та принцип res judicata. Таким чином пострадянські держави мали б відмовитись від радянської моделі інституту перегляду.

Відтак частина таких пост-радянських держав, як Грузія, Естонія, Молдова та Україна відмовилась від інституту перегляду повністю. Така відмова була політичним рішенням законодавчої влади цих країн та проявилась у прийнятті нових або внесенні змін у чинні закони про судову владу та процесуальні кодекси. Відмова від інституту перегляду у цих країнах не відбувалась під впливом визнання цього інституту таким, що не відповідає конституції. Важливий вплив на відмову у цих країнах від інституту перегляду здійснив Європейський суд справ людини. Розгляд та Європейським судом з прав людини справ проти цих держав у зв'язку із використанням інституту перегляду та визнання у них порушення права на справедливий суд стимулювало державну владу скасувати інститут перегляду. Таким чином, можна констатувати, що ці держави підтвердили рух їх правових систем у напрямку утвердження верховенства права.

Інша частина пост-радянських держав, що також є членами Ради Європи – Азербайджан, Вірменія, Латвія, Литва та Росія, не відмовились повністю від інституту перегляду, а суттєво його трансформували.

Трансформована модель інституту перегляду у цих пост-радянських країнах характеризується такими істотними ознаками: 1) офіційна відмова від термінології «нагляд», «наглядова інстанція», «перегляд в порядку нагляду» та ін.; 2) спеціально уповноважені особи та органи влади можуть звернутись до суду наглядової інстанції не за власною ініціативою, але лише за ініціативою осіб, які звернулись до цих уповноважені особи та органи влади; 3) інші особи також можуть звертатись до суду наглядової інстанції, поряд із спеціально уповноваженими особами та органами влади; 4) спеціально уповноважені особи та органи влади можуть звернутись до суду наглядової інстанції лише у тих справах, в яких вони брали участь; 5) предметом перегляду в порядку нагляду є лише питання законності (питання права), а не питання обґрунтованості (питання факту); 6) обсяг перегляд в порядку нагляду обмежується лише доводами заявників; 7) запроваджуються строки, протягом яких можна звернутись за переглядом в порядку нагляду.

На таку суттєву трансформацію інституту перегляду у цих державах також вплинув Європейський суд з прав людини. Однак, якщо у справах проти держав, в яких повністю відмовились від інституту перегляду, Європейський суд з прав лю-

дини був категоричним щодо порушення ним принципу правової визначеності, про що зазначав зокрема у справі «Совттрансавтохолдинг проти України», то у справах проти держав, в яких інститут суттєво трансформовано, підхід та позиція щодо порушення ним принципу правової визначеності стала більш гнучкою. Так, Європейський суд з прав людини у справі «Рябих проти Росії» обґрунтував, що «відступ від цього принципу виправданий лише тоді, коли це зумовлено обставинами істотного та переконливого характеру».

Радянська модель інституту перегляду в порядку нагляду зберігається у незмінному стані у тих пост-радянських державах, які не є членами Ради Європи. Переважно це держави Центральної Азії – Киргистан, Таджикистан, Туркменістан та Узбекистан. Винятком є така центрально-азійська країна, як Казахстан, у якій інститут перегляду суттєво трансформували. Також до пост-радянських держав, в яких зберігається радянська модель інституту перегляду, належить східноєвропейська держава – Білорусія. Однією відмінністю, яка істотно не впливає на збереження сутності радянської моделі інституту перегляду у цих державах, є запровадження строків оскарження в порядку нагляду.

Незважаючи на те, що у конституціях цих держав також передбачено принцип розподілу державної влади, проголошено незалежність судової влади та закріплено право на справедливий суд, у практиці конституційних судів обґрунтовується та визнається відповідність інституту перегляду в порядку нагляду цим конституційним вимогам.

Констатовано, що ті пост-радянські держави, які є членами Ради Європи, відмовились та трансформували інститут перегляду в порядку нагляду, підтверджують рух до утвердження верховенства права, хоч в не в однаковий спосіб та в однаковій мірі. У частині пост-радянських держав, які переважно є центрально-азійськими, зберігається у майже незмінному стані радянська модель інституту перегляду.

Ключові слова: перегляд судових рішень в порядку нагляду; остаточність судових рішень; незалежність судової влади; принцип розподілу влад

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Oskarżenie wyroków sądowych w trybie nadzoru w systemach postsowieckich: do przodu do praworządności czy wstecz do sowieckich przeżytków?

Streszczenie

Artykuł poświęcony jest analizie stanu instytucji zaskarżenia wyroków w trybie nadzoru w postradzieckich systemach prawnych oraz określeniu, czy świadczy to o rozwoju tych systemów w kierunku do praworządności, czy odwrotnie – w kierunku do radzieckiej przeszłości.

Artykuł również mieści analizę doktrynalnego uzasadnienia instytucji nadzoru w

radzieckiej nauce prawnej, obowiązujące ustawodawstwo postradzieckich państw, orzecznictwo Europejskiego Trybunału Praw Człowieka w sprawach przeciwko postradzieckim państwom, które są członkami Rady Europy, oraz orzecznictwo trybunałów konstytucyjnych postradzieckich państw.

W radzieckiej doktrynie instytucja nadzoru rozpatrywana była jako przewaga socjalistycznego prawa, która znacznie różnie się od prawa burżuazyjnego. Radziecki model instytucji nadzoru, bez względu na zmiany w ciągu historii jego funkcjonowania, można scharakteryzować przez następujące istotne jego cechy: 1) wyłącznie obowiązujące wyroki sądu mogły być poddane nadzorowi; 2) inicjatorami nadzoru mogli być wyłącznie specjalnie upoważnieni do tego urzędnicy oraz organy władzy; strony oraz inni uczestnicy postępowania nie mieli prawa inicjować nadzoru wyroków sądów, mieli prawo wyłącznie zwrócić się do upoważnionych urzędników oraz organów władzy z odpowiednim podaniem; 3) przedmiotem nadzoru mogły być zarówno legalność (kwestia prawa), jak i uzasadnienie (kwestia faktu) wyroków sądowych; 4) nadzór nie ograniczał się do podstaw i argumentów, zaznaczonych w skardze, wyrok rozpatrywany był w całości; 5) złożenie skargi na obowiązujący wyrok sądu nie miało ograniczeń czasowych.

Po rozpadzie Związku Radzieckiego część postradzieckich państw została członkami Rady Europy i zobowiązała się do wykonywania standardów międzynarodowych w dziedzinie wyznania zasady nadrzędności prawa oraz szacunku i obrony praw człowieka, zwłaszcza prawa do sprawiedliwego sądu.

Zgodnie z europejskimi standardami prawnymi funkcjonowanie radzieckiego modelu instytucji nadzoru znacznie naruszało zasadę nadrzędności prawa, zwłaszcza pewność prawa oraz zasadę *res judicata*. W związku z tym, państwa postradzieckie musiały zrezygnować z instytucji nadzoru.

Tak więc część postradzieckich państw, takich jak: Gruzja, Estonia, Mołdowa oraz Ukraina, zrezygnowała z instytucji nadzoru całościowo. Była to polityczna decyzja władzy ustawodawczej tych państw i przejawiała się w przyjęciu nowych lub poprawek do istniejących ustaw dotyczących sądownictwa i kodeksów postępowania. Rezygnacja z instytucji nadzoru w tych państwach nie nastąpiła na podstawie konstytucji. Ważny wpływ na podjęcia odmowy miał Europejski Trybunał Praw Człowieka, ponieważ rozpatrywanie przez niego skarg przeciwko tym państwom na wykorzystywanie instytucji nadzoru oraz uznanie przez EPTCz naruszenia prawa do sprawiedliwego sądu było jednym z czynników prowadzących do skasowania tej instytucji. W związku z tym można konstatować, że wskazane państwa wybrały kierunek rozwoju swoich systemów prawa w stronę stwierdzenia praworządności.

Inna część postradzieckich państw, które także są członkami Rady Europy – Azerbejdżan, Armenia, Łotwa, Litwa oraz Rosja, nie zrezygnowały całkiem z tej instytucji, ale znacznie ją przekształciły. Transformowany model instytucji nadzoru we wskazanych państwach postradzieckich charakteryzuje się następującymi istotnymi cechami: 1) oficjalną rezygnacją z terminów «nadzór», «nadzorcza instancja», «rozpatrzenie sprawy w trybie nadzoru» i in.; 2) specjalnie upoważnieni urzędnicy oraz organy władzy nie mają prawa zwrócić się do sądu z własnej inicjatywy, lecz tylko na podstawie podania od osób, które zwróciły się do nich; 3) inne osoby także mają prawo zwrócić się do sądu nadzorczej instancji, równolegle ze specjalni upoważnionymi urzędnikami oraz organami władzy; 4) specjalnie upoważnieni urzędnicy oraz organy władzy mają prawo zwrócić się sądu nadzorczej instancji wyłącznie w tych sprawach, w których byli stroną; 5) przedmiotem rozpatrywania może być tylko kwestia legalności (kwestia prawa), lecz uzasadnienie (kwestia faktu) już nie; 6) nadzór ograniczony tylko argumentami skarżą-

cych; 7) określone zostały także terminy zwrócenia się do sądu w trybie nadzoru.

Na taką transformację także miał wpływ Europejski Trybunał Praw Człowieka. W sprawach przeciwko państwom, gdzie skasowano instytucję nadzoru, Europejski Trybunał Praw Człowieka był kategoryczny w stwierdzeniu naruszenia zasady pewności prawa, co zaznaczono p. w sprawie «Sovtransavto Holding przeciwko Ukrainie», lecz w sprawach przeciwko państwom, które znacznie przekształciły instytucję nadzoru, podejście i stanowisko wobec naruszenia zasady pewności prawa były znacznie bardziej elastyczne. Europejski Trybunał Praw Człowieka w sprawie «Ryabyh przeciwko Rosji» zaznaczył «odstąpienie od wskazanej zasady będzie uzasadnione tylko wtedy, gdy będzie to spowodowane istotnymi oraz przekonującymi okolicznościami».

Radziecki model instytucji nadzoru został zachowany w niezmiennym stanie tylko w tych państwach postradzieckich, które nie są członkami Rady Europy. Głównie są to państwa Azji Środkowej – Kirgistan, Tadżykistan, Turkmenistan oraz Uzbekistan. Wyjątkiem jest Kazachstan, gdzie instytucja nadzoru została znacznie zmodernizowana. Do państw, gdzie została zachowana instytucja nadzoru należy również Białoruś. Jedyną różnicąjest to, że został ustalony termin zaskarżenia w trybie nadzoru.

Bez względu na to, że w konstytucjach wskazanych państw również przewidziano zasadę podziału władz, zadeklarowano niezawisłość władzy sądowniczej oraz zagwarantowano prawo do sprawiedliwego sądu, w orzecznictwie trybunałów konstytucyjnych uzasadnia się oraz uznaje się zgodność instytucji nadzoru z wymogami konstytucyjnymi.

Stwierdzono, że państwa postradzieckie, które są członkami Rady Europy i które skasowały instytucję nadzoru, potwierdzają rozwój w kierunku ustanowienia praworządności, choć nie w ten sam sposób ani w tym samym stopniu. W części państw postradzieckich, które są głównie państwami Azji Środkowej, sowiecki model instytucji nadzoru pozostaje prawie niezmieniony.

Słowa kluczowe: zaskarżenia wyroków w trybie nadzoru; zasadę *res judicata;* niezależność sądownictwa; zasadę podziału władz