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Importance of Judicial Precedent [*Darina V. Maliyevskaya*]

Key words: *statutory instrument, judicial precedent, The Supreme Court.*

Annotation: *The article writer considers the possibility of consolidation of judicial precedent as source of law in Kazakhstan in this article. Based on Kazakhstan legislation and law practice the article writer makes a conclusion about the necessity of recognition of judicial precedent as source of law in Kazakhstan.*

The further development of Kazakhstan as a constitutional democratic state is inconceivable without improvement of its law enforcement, especially its court system. The Leader of the nation Nursultan Nazarbayev wrote the message to the people of Kazakhstan, which is called «The Strategy «Kazakhstan - 2050 – new political course of established state». The President explained that «Equality before the law must become tangible ground of legal order. Realization of rights of access to courts which is guaranteed by the Constitution by citizens is the most important issue of law policy»[1] That is why the issues of improvement of the law system of Kazakhstan are really urgent.

Each law system confirms which law forms exist and are acknowledged by legal doctrine and legislation. The Kazakhstan law system traditionally belongs to civil law. Civil law is based on statutory instruments as basic sources of law. As a general principle, the notion of statutory instruments is the synonym of the notion legislation in wide sense. So, this is the basic law source in the civil law countries [2], for example in FRG, Kazakhstan, France and Russia. However, recognizing the need for the base on the law and statutory instruments we consider that judicial precedent as a result of judicial legislation is very important among other legal sources. We agree with M.K. Kuandykov that the essence of doctrine of precedent is that the courts have to follow the decisions of the courts of higher level, and the fact that appeals courts have to follow their previous decisions [3].

At the moment regulatory resolutions of the Supreme Court of the Republic as the source of judicial legislation are legal. The article 4 of the working Constitution of Kazakhstan confirmed regulatory resolutions of the Supreme Court as law in force of the Republic of Kazakhstan [4]. This statement is also confirmed in the procedural law of Kazakhstan, particularly in the code of civil procedure of the Republic of Kazakhstan (item 2 of article 2). It is said that «International treaty obligations and other obligations of the Republic of Kazakhstan as well as regulatory resolutions of the Constitutional Council and the Supreme Court of the Republic of Kazakhstan are the components of the code of civil procedure» [5]. Stated regulatory resolutions of the Supreme Court are created for the purpose of improvement of the process of law enforcement. We consider that Y. B. Abdrasulov is correct when he says that «the main link in directives of the Supreme Court is the content that

defines how it is necessary to understand one or the other term, expression or standard in general, and how it is necessary to qualify those and these facts, and how it is necessary to use this or that law» [6]. However there is a problem of using regulatory resolutions of the Supreme Court of Kazakhstan by lower courts as a practical matter.

It is very often that the specified regulatory resolutions are intended to interpret and explain one or another legal standard and clear up the definitions which were not explained in a very detailed way by the legislator. However these goals are not always fulfilled in a full way. For example, regulatory resolution of the Supreme Court of the Republic of Kazakhstan # 5 issued on July 16, 2007 «About some issues of dispute resolutions connected with the protection of estate of freehold» [7], item 15 points that when considering suits reclamation of property from a good-faith purchaser for the purpose of enforcement of stability of civil circulation the courts have to take into account the fact that interests of consumer who was rational, careful, conscientious and discreet should be protected.

This legal standard explains provisions of article 261 of the civil code of the Republic of Kazakhstan. However it does not give the unambiguous answer about the cases when a person may be recognized as a good-faith purchaser because it does not disclose the concepts of proper care, conscientiousness, circumspection, possession, usage of property. In connection with this there are different definitions of specified legal standard by different courts. That is why we think that it is necessary to amend the legal doctrine and legislation of Kazakhstan to authorize judicial precedent as a legal source. Provisions of supervisory authority, which is the Supreme Court of Kazakhstan, could be the precedent for making decisions by lower courts. This position seems to us as quite valid because the function of judicial legislation is secured to the Supreme Court of Kazakhstan in the legislation of the country.

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