
Informal Aspects and Civil Procedure

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Abstract

Issues of relationship and interconnection of informal institutions and law as a set of rules of conduct established or sanctioned by the state in modern conditions of the civil society development acquire special relevance. Analyzing informal institutions, researchers often speak about the development of informal justice, informal justice and informal procedures in society as opposed to official, state justice, and “formal” procedures. As a rule, in general, we talk about alternative methods of resolving disputes. In this article, we tried to reveal the nature of the concept of “informal aspects” as a special phenomenon in its relationship with law in general and civil law in particular. Parallel to official justice non-state methods of dispute resolution are directly related to the freedom of choice by the parties not only of the norms of substantive law but also of the norms of other social regulators that do not contradict the rules of human life. In our study we analyze problems of informal methods practicing in formal justice on the example of negative judicial practice in Kazakhstan. The use of informal approaches and methods is often a sign of fair and lawful decision-making in state courts. This approach can exclude cases, when court decisions are obtained in the correct form, but in fact are anti-human.

Keywords: alternative dispute resolution, informal justice, civil justice, social regulators, formal justice

1. INTRODUCTION

The issues of correlation and interconnection, on the one hand, of informal institutions and, on the other hand, of law as a set of rules of conduct established or sanctioned by the state in modern conditions of the development of civil society acquire special relevance. Analyzing informal institutions, the authors often speak in the legal press about the development of informal justice and informal procedures in society, as opposed to official, state justice, “formal” procedures. In general, we are talking, mostly, about alternative ways of resolving disputes. In

this article, we tried to reveal the nature of the concept of “informal aspects” as a special phenomenon in its relationship with the law in general and civil law in particular.

In the scientific literature, there are no unified approaches to such a concept as “informal” from a philosophical and legal point of view. On the one hand, “informal” is what is outside state control, is not regulated by state authorities¹. Consequently, alternative methods of dispute resolution traditionally referred to as “informal justice” and “near-legal” phenomenon², seem to fall under the category of informal institutions, since the alternative to state resolution of a legal conflict is the right of the conflicting subjects independently, without the participation of the state, to determine the path and procedure for resolving conflicts³.

On the other hand, in some countries there is an active process of formalization, i.e. state authorization and regulation of mediation and other alternative methods of dispute resolution⁴, which largely denies the thesis of the absence of state control in the field of “informal justice”. State control is to a certain extent determined by the resolutions of international directives, which require, on the one hand, the provision of accessible justice by the state in accordance with international human rights standards, and on the other hand, admitting that justice may not be administered through the official systems of justice, if this is done in a way that respects and upholds human rights to enhance the implementation of human rights obligations by ensuring affordable justice for individuals and communities where the formal justice system does not have the necessary capacity or geographic reach⁵. In addition, judicial mediation, carried out, for example, in the Republic of Kazakhstan, can hardly be called a completely alternative way of resolving private law disputes, if we proceed from the point of view that alternative methods are characterized by their informality, i.e. do not come from government. Hence, in accordance with the provisions of Articles 179, 180 of the Code of Civil Procedure of the Republic of Kazakhstan (hereafter referred to as the Code of Civil Procedure), the judge who conducts mediation ultimately checks the content of the agreement on the settlement of the dispute (conflict) by way of mediation and makes a ruling on its approval and termination of the proceedings⁶. A mediation agreement not executed voluntarily is a subject to compulsory execution on the basis of a writ of execution issued by the court at the request of the person who entered into the mediation agreement.

Here we see the direct participation of a public official (judge) in the resolution of a civil dispute through mediation. The indirect participation of a judge in an alternative method is provided for in Article 174 of the Code of Civil Procedure, which establishes that the court takes measures to reconcile the parties, assists them in settling the dispute at all stages of the process. The parties can settle the dispute in full of mutual requirements or in part by concluding an amicable agreement, an agreement on the settlement of a dispute (conflict) by way of mediation or an agreement on the settlement of a dispute by way of a participatory procedure or using other methods in the manner prescribed by the Code of Civil Procedure.

¹ Barsukova (2009), p. 144.

² Kalashnikova (2013).

³ Tsikhotskiy (2007), p. 346.

⁴ “On Mediation”; “On Arbitration”.

⁵ UN Development programme (2015).

⁶ “Civil Procedure Code of the RK”.

American researcher Carrie Menkel-Meadow calls this procedure for resolving disputes, which is also typical for the United States, semi-formal justice, noting that “the use of informal mechanisms for resolving disputes by formal government services is a type of semi-formal settlement mechanism, which is sometimes provided for at the legislative level, and sometimes agreed through a contract or by virtue of recommendations”⁷.

However, even the resolution of conflicts and disputes outside state bodies by professional and non-professional mediators can ultimately be ensured through the indirect participation of the state in the mediation process by establishing general rules for mediation in a special law, as well as legal regulation of the selection of mediators.

Therefore, non-professional mediators in accordance with Art.16 of the Law of the Republic of Kazakhstan “On Mediation” must be included in the register of non-professional mediators by representatives of local government authorities—*akims* of a district (city of regional significance), district in a city, city of district significance, settlement, village, rural district. And professional mediators, in accordance with Articles 13-14 of the Law of the Republic of Kazakhstan “On Mediation”, are included in the register by organizations of mediators, which are non-profit, non-governmental, self-financed and self-governing organizations, created on the initiative of mediators in the organizational and legal forms provided for by the Law of the Republic of Kazakhstan “On Non-Commercial Organizations”.

Thus, the thesis that “informal” is “always something which is outside state control, is not regulated by state power” cannot be applied directly to relations related to methods of resolving disputes and conflicts that are alternative to the state.

In modern conditions, the category of “informal” resolution of disputes and conflicts as a complete absence of state control can be viewed even to some extent in a negative format, when informal systems, for example, in Tajikistan,

play a significant role in creating obstacles to the access or to justice in remote rural areas. Religious leaders occupy a leadership position in Islamic marriages, and, therefore, can influence the vulnerability of women in problematic divorces by encouraging or turning a blind eye to state registration of marriage, etc.⁸

Or there is another negative example, when “with dubious legal reasoning when resolving some conflicts, the citizens of Kyrgyzstan prefer to resolve disputes using other methods” rather than by *aksakal* court as an informal justice⁹.

2. WHAT DOES THE CONCEPT OF “INFORMAL PROCEDURES” MEAN?

The next aspect in the category of “informal” from the point of view of civil procedural law is its linking to the concept of “procedure”, when the phrase “informal procedure” is used. Hence, N. V. Sukhova notes that “modern methodological guidelines make it possible to discern an amazing variety of formal and informal (alternative) procedures for resolving and settling

⁷ Menkel-Meadow (2012), p. 130.

⁸ Eurasia Foundation of Central Asia (2013).

⁹ *Ibid.*

disputes.”¹⁰ Analyzing the content of the settlement agreement, T. V. Sakhnova also uses the concept of “informal procedure”¹¹.

However, the use of notion “informal procedure” raises some doubts, since a procedure is always a set of formally defined rules that establish the order (sequence) of performing certain significant actions, i.e. the procedure usually involves a certain algorithm or program. In this regard, Oscar Chase writes that “even cultural or ethnic groups using traditional methods of resolving disputes, over time, come to such a degree of formalization and regulation of these procedures that researchers allow themselves to speak of the system of norms regulating these procedures as a system of law”¹². This means that dispute resolution procedures alternative to state justice are necessarily formalized, although to a lesser extent than in the state justice system. This can be seen on the example of the procedures established in the Laws of the Republic of Kazakhstan “On Arbitration” and “On Mediation”, as well as in the regulations approved by the organizations of mediators or arbitration courts¹³.

The approach, in which formal and informal procedures are distinguished, in our opinion, is a consequence of a general methodological error that allows “the existence of formal and informal law”¹⁴. However, law as a social regulator, recognized or approved by the state, always has a form expressed externally in one source or another: a normative legal act, a court decision, a custom sanctioned by the state, a normative agreement, etc.

Informal law, about the content of which, for example, N. S. Tsintsadze, listing the telephone law, mutual guarantee, nepotism, shadow justice, etc.¹⁵, is, in fact, not a law, but a social phenomenon characteristic of an offense or bordering on illegal behaviour. Consequently, speaking of “informal law”, we put into it only a negative, everyday meaning, but we do not consider it as one of the types of law, i.e. do not consider it an official social regulator.

If we proceed from the fact that it is difficult to consider informal aspects in the resolution of civil legal disputes as institutions completely autonomous from the state, and procedures cannot be informal in principle, then the conclusion suggests itself: what is the category of “informal aspects” correlation to and in relation to traditional legal procedures provided for in civil procedure law? What place do they occupy in modern legal reality?

Such a need to identify the essence of “informal aspects” is due to the fact that today they act as an objectively existing phenomenon in the state-legal sphere, but differ from classical legal procedural standards, despite the fact that it is impossible to clearly divide the methods of resolving disputes exclusively into two categories: formal and informal. Such a division can be admitted only conditionally on a number of grounds.

“Informal” methods of dispute resolution, called alternative, in particular mediation, are more predictable than purely state justice, which, as N. Andrews writes, is associated with a difficult battle for it, leading to costs, delays and worries. Pure justice is, in fact, a private war, even if the judges pretend to be governed by detailed rules and conciliatory principles designed to take the

¹⁰ Sukhova (2015), p. 188.

¹¹ Sakhnova (2014), p. 50.

¹² Chase (2012).

¹³ International arbitration court (IAC).

¹⁴ Tsintsadze (2012).

¹⁵ *Ibid.*, p. 354.

edge off the competition. Moreover, justice is the process of awarding victory to only one person¹⁶.

3. APPLICATION OF INFORMAL METHODS IN FORMAL JUSTICE

In this regard, extrajudicial mediation can be called the delegation by the state of its powers to resolve private-law disputes to professional or non-professional mediators, or rather, the authorization by the state of the possibility of non-state dispute resolution methods parallel to official justice with the approval of minimum standards for the content of the activities of such subjects (mediators) and procedural aspects. This way of encouraging the possibility of alternative dispute resolution can be called modelling, the desire of the state to direct public relations in the desired direction through the adoption of a legislative act, even if such an initiative did not initially come from the “bottom”, as, for example, in Kazakhstan, where the state was looking for ways to reduce the burden on judicial institutions in connection with the congestion of the courts of various kinds of disputes and used world practice.

Ultimately, the state legalized and regulated the procedure for the adoption of a mediation agreement on the settlement of a dispute concluded before the consideration of a civil case in court, defining it in paragraph 4 of article 27 of the Mediation Law as a transaction aimed at establishing, changing or terminating civil rights and obligations of parties. In case of non-fulfilment or improper fulfilment of such an agreement, the mediation party that violated the agreement shall be liable in the manner prescribed by the laws of the Republic of Kazakhstan.

However, the legislator’s hopes for extrajudicial mediation in unloading the courts, in our opinion, did not come true in full, since there are problems in the implementation of mediation agreements concluded before the trial, and in the ability of the disputing parties to pay the costs associated with the organization of mediation procedures, since “professional mediators who carry out their activities on a paid basis often try to take on cases with high remuneration, but many people cannot afford the services of mediators”¹⁷.

Therefore, the concept of “informal aspects” in the resolution of private-law disputes in relation to civil proceedings is more acceptable for judicial mediation, since the norms of Article 179 of the Code of Civil Procedure prescribe that the parties have the right, before the court is heading to the deliberation room in the courts of the first, appeal, cassation instances, to file a motion for the settlement of the dispute (conflict) by way of mediation. At the same time, the majority of participants in civil proceedings are interested, as practice shows, in mediation by a judge, in connection with which the case, as a rule, is transferred to another judge. However, at the request of the parties, mediation may be carried out by the judge in charge of the case. For mediation in an appellate court, the case is usually transferred to one of the judges of the collegial composition of the court.

When we talk about formal and informal procedures, we should bear in mind not so much the absence of formal aspects in “informal procedures”, but rather the degree of their formalization in comparison with the formal procedures provided for in the civil procedure. However, the results when choosing this criterion can be different even in the public justice system when comparing the legislation of individual countries. As noted by Oscar Chase, “the civil procedure,

¹⁶ Andrews (2012).

¹⁷ Dyachuk (2019), p. 144.

for example, in Germany can be regarded as highly informal when compared with the civil procedure in the United States. The rules governing the role of judges and parties in adversarial proceedings in Germany are much less stringent. In the United States, by contrast, the litigation “question-answer” technique, governed by numerous rules regarding the process of evidence in a case, is extremely strict and rigid”¹⁸.

Nevertheless, comparing the legal procedures provided for in the Code of Civil Procedure and the legal procedures provided for in the Law of the Republic of Kazakhstan “On Mediation”, we can talk about the least formalization of the latter, which can be guided by a mediator, including a judge, when he applies clause 5. Article 179 of the Code of Civil Procedure, prescribing that mediation in court is carried out in accordance with the Law of the Republic of Kazakhstan “On Mediation” and with the specifics established by the Code of Civil Procedure.

In our opinion, informal aspects in the conduct of alternative methods of resolving disputes concern, in equal measure, both procedural rules and substantive law, or rather, the possibility, when settling a dispute, to partially or completely deviate from the mandatory requirements of civil law or a private law contract. As an example, when the conditions for the fulfilment of the debtor’s obligations were changed was the mediation agreement concluded in the district court No. 2 of the Almalinsky district of Almaty in the process of considering a civil case on the claim of “BRD” LLP against citizen M. for the collection of the amount of debt on a bank loan. During the trial, the parties applied to the court with a statement that the parties reached an agreement on the settlement of the dispute (conflict) through judicial mediation, submitting it for approval by the court, on the terms: “BRD” LLP refuses to collect the amount owed in the amount of 4,264,000 KZT and gives the defendant five years to pay off the debt in equal instalments, and the defendant M. recognizes the debt in the amount of 3,000,000 KZT and voluntarily undertakes to pay monthly until the 20th day within five years. The court ruling approved an agreement on the settlement of a dispute (conflict) through judicial mediation, concluded between the parties with the participation of a mediator judge, and the proceedings were terminated¹⁹. Here we see a clear example of the use and application of alternative dispute resolution options that were not provided for in the original individual-legal agreement of the disputing parties.

“Informal aspects” are also interconnected with “clean” official justice in the course of judicial application of civil law norms. This is generally predetermined by Articles 224-225 of the Code of Civil Procedure, which establish that a court decision must be lawful and justified, that the court, when making a decision, determines which law should be applied in a given case. In addition, from the meaning of the provisions of Art. 412 of the Code of Civil Procedure, that the court of appeal verifies the correctness of the application and interpretation of substantive law by the court of first instance, it follows that the court has the right to interpret the rules of law. In the course of applying and interpreting the norms of substantive law, the court may deviate from the usual, formal framework in interpreting the law if life circumstances turn out to be more complicated than those norms that regulate the relevant relations. Otherwise, there may be options for reducing the effectiveness of legal regulation, not fully achieving its goals.

Let us give an example from judicial practice, considered by us earlier, when a formal approach to legal prescriptions did not give the proper results, did not ensure the protection of

¹⁸ Chase, *supra* note 12, p. 43.

¹⁹ District Court No. 2 (2019).

the rights and interests of a person and a citizen²⁰. So, on 15 November 2016, the Temirtau city court of the Karaganda region (hereafter referred to as the city court) applied to the Constitutional Council of the Republic of Kazakhstan with the submission “On recognizing unconstitutional subparagraph 3) of paragraph 7 of the Rules for processing documents for leaving the Republic of Kazakhstan for permanent residence, approved by a resolution of the Government of the Republic of Kazakhstan dated 28 March 2012 No. 361” (hereafter—the Rules)²¹.

One of the main arguments about the impossibility of resolving the case in the claim proceeding on the merits was substantiated by the city court by the fact that its competence does not include granting permission to move out, since it belongs to the competence of the internal affairs bodies, and also does not include the competence to instruct the defendant to give such permission, since this is contrary to the basic principles of civil proceedings.

However, in accordance with paragraph 2 of Article 76 of the Constitution of the Republic of Kazakhstan, the judicial power applies to all cases and disputes arising on the basis of the Constitution, laws, other regulatory legal acts and international treaties of the Republic. Therefore, the Rules have correctly established that in cases where the applicant for some reason cannot receive such a statement, the issue is resolved in court. This means that departing from the stereotyped formal approach, applying the analogy of the law, the city court could, in our opinion, decide the case on the merits, proceeding from the following. Paragraph 2 of Article 304 of the Code of Civil Procedure prescribes: “If, when filing an application or considering a case in a special proceeding, it is established that there is a dispute about a right within the jurisdiction of the court, the court shall issue a ruling on leaving the application without consideration, by which it explains to the parties and interested parties their right to apply to the court in the lawsuit manner.” Despite the fact that the Code of Civil Procedure does not contain a similar provision on the possibility of considering a case in the reverse order (on the possibility of switching from a claim to a special proceeding), the court could, in our opinion, apply the analogy of the law and consider the case in special proceedings. The court was fully competent to make such a decision with reference to the fact that in the course of studying the materials of the case in the claim proceeding, in the presence of only an indirect dispute about the right, the possibility of changing the legal situation only through special proceedings was established. The court in such circumstances would apply paragraph 3 of Art. 305 of the Code of Civil Procedure, that authorizes it to establish other facts of legal significance, unless the legislation of the Republic of Kazakhstan provides for a different procedure for their establishment. In this case, the city court, in a special procedure, could establish the fact that citizen B. did not have alimony obligations, which would be one of the legal grounds for her to obtain permission to travel outside P, since the establishment by the city court of the fact that citizen B. did not have alimony obligations would be tantamount to a notarized statement by citizen M. that he had no objections to citizen B. The legal fact should have been established by involving a circle of interested persons, including citizen M. Establishing such a fact would become the basis for the internal affairs bodies to give permission to move out for permanent residence outside Kazakhstan. If the Ministry of Internal Affairs refuses to issue a permit to leave when the court

²⁰ Abdrasulov, & Abdrasulova (2019).

²¹ “On Approval of the Rules for Drawing up Documents...”

established the fact that there are no alimony obligations for persons leaving the Republic of Kazakhstan for permanent residence, they have the right to apply to the court with a statement challenging the legality of actions (inaction) and decisions of state bodies, local authorities local governments, public associations, organizations, officials and civil servants in accordance with Art.292-296 of Code of Civil Procedure.

As a result of the appeal of the city court to the Constitutional Council of the Republic of Kazakhstan, sub. 3, clause 7 of the Rules was established in accordance with the Constitution of the Republic of Kazakhstan with recommendations to the Government on improving some norms of the considered Rules in accordance with the legal positions of the Constitutional Council of the Republic of Kazakhstan (Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated 14 December 2016, No. 1 “On checking the constitutionality of sub. 3, clause 7 of registration of documents for leaving the Republic of Kazakhstan for permanent residence, approved by the Resolution of the Government of the Republic of Kazakhstan dated 28 March 2012, No. 361, on the proposal of the Temirtau city court of the Karaganda region”). Unfortunately, later such amendments were made to the Rules, which, in our opinion, did not increase the effectiveness of legal regulation, but, on the contrary, complicated it; moreover, the legality of the introduced novels raises serious doubts. Firstly, if earlier the issue of obtaining a notarized statement of consent to leave was not fully settled, when the person avoided issuing such an application, now instead of the application it is necessary to obtain an agreement, the form of which, like any other conciliation document, is much more difficult than a simple statement. The ways of obtaining such an agreement, if the person evades drawing it up, are not regulated, as before. Secondly, in the Family Code the conclusion of such an agreement is the right of the parties, and the Rules now imperatively require the provision of such an agreement, which has become a serious contradiction to the provisions of the law.

All these inconsistencies and problems in legal regulation initially arose, in our opinion, due to the fact that the city court was guided by stereotypical models of legal regulation and did not choose an “informal” option for solving the court case—did not apply the analogy in procedural law in combination with various methods and techniques of interpreting legal regulations without applying to the Constitutional Council of the Republic of Kazakhstan.

4. CONCLUSIONS

Thus, in modern conditions, the concept of “informal aspects” in relation to the civil procedure is a special phenomenon, relatively isolated and not included in the system of state institutions, but closely related to them through legal regulation directly or indirectly of many of its parties in civil procedural law and special laws. On the one hand, such informal institutions as organizations of mediators or arbitration courts are not included in the system of state justice, but, on the other hand, their activities are generally subject to state legal regulation. It can be said that state justice and alternative methods of resolving disputes can no longer function independently of each other, since there is a constant process of mutual influence and interpenetration.

Dispute resolution procedures, alternative to state justice, are usually formalized, although to a lesser extent than in the state justice system. However, there are exceptions here: the arbitration process is no less formalized than the procedures in the civil procedure, but “it certainly

represents a more efficient, quicker and confidential alternative to regular proceedings due to delays and technical difficulties of the latter”²².

Informal aspects in the course of alternative methods of resolving disputes are directly related to the parties’ freedom to choose not only the norms of substantive law but also the norms of other social regulators that do not contradict the rules of human society: “the use of individual, religious, ethical, social principles in resolving a conflict”²³.

The use of informal approaches and methods is often a sign of fair and lawful decision-making in state courts. This approach excludes the system of judicial application of law, when court decisions are obtained in the correct form, but in fact—mockery.

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²² Chase, *supra* note 12, p. 49.

²³ Menkel-Meadow, *supra* note 7, p. 126.

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