

The burden of proof in civil process

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Abstract. This article examines the civil procedural legislation of the Republic of Kazakhstan. The characteristic features of the process of judicial proof as an indirect form of judicial knowledge are analyzed. The need to introduce new provisions into the civil procedural code has been identified and substantiated.

Keywords: civil process, duty of proof, presumption, evidence, court.

Introduction: Despite the long research of the institution of distribution of evidentiary duties in the science of civil procedural law, the problems of their legal nature remain unresolved until now.

In the literature, the procedural scientists express different opinions about the existence of the institution of distribution of responsibilities for proving the substantive value along with procedural significance.

Main body: M.A. Gurvich believed that "the burden of proof is the material and legal institution that regulates the relationship between the parties in the civil process" [1, p.14-15].

In the opinion of A.F. Kleinman, proof is a legal obligation, failure of which entails reclamation of evidence by the court or unprofitable material consequences (satisfaction of the claim, refusal of the claim) [2, p.23].

O.V. Baulin considers that if the duty – is a measure of due behavior, then in this sense the concept is not applicable to proving for the purpose of considering the dispute on the merits. On a detailed examination, it turns out that the participant of the process in the evidential activity does not owe anything to anyone. Particularly, this is manifested, in the fact that it is impossible to force the execution of the "obligation" to prove the circumstances to which a person refers [3, p.91]. It also seems that the unfavorable consequences for the party in material and legal relations are the result

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of its actions precisely in these relations. The imposition on the person of responsibility for causing harm is the result of his guilty unlawful actions, but not his attitude to the performance of evidentiary duties. The participant of the process may relate to the execution of his procedural duties, including proof, in different ways, and this attitude may affect the outcome of the case, but it may not. In this regard, we emphasize once again that there is no direct material and legal content for the procedural institution of distribution of the evidentiary burden [3, p.93].

M.K. Treushnikov supposes that it is possible to talk about proving simultaneously both as a law and as a duty of the persons participating in the case, primarily the parties. As the right to prove - this is the possibility of submitting pre-evidence, participation in their research, preliminary assessment, guaranteed by a set of procedural norms and implemented by the persons concerned personally in accordance with their procedural interests and choice of conduct. The right is realized by the will of the authorized persons themselves. As a duty of proof, unlike law, there is a need to complete a set of actions for proving, defined not by the choice or discretion of the subject of proof, but by the threat of unfavorable consequences after failure or other measures of influence, for example, A fact confirmed by the party, in the event of failure to fulfill the obligation to prove it [4, p.52].

Summing up the consideration of the issue of the duty or the right of proving in civil proceedings, it can be concluded that there is not sufficient evidence for the parties to prove the facts as their legal duty. If we talk about the duty of proof, then this duty is not a legal, but an actual one [5, p.106].

V.V. Molchanov in his works compared the legal duty with the duty to prove and concluded that failure to fulfill the obligation to prove in public legal relations does not have signs of an offense, if only because the failure to perform this duty does not have a sign of public danger and does no harm State in the sphere of justice [5, p.104]. We must agree with his opinion, since in the civil procedural law for failure to fulfill the duty to prove, it is precisely "consequences", and not "responsibility" or "sanctions". Thus, in accordance with Article 46 of the Civil Procedure Code of the Republic of Kazakhstan, it was established: "Failure to fulfill procedural duties by persons participating in the case entails the occurrence of procedural consequences provided for by the CPC."

In view of the foregoing, I think it is necessary to consider the "duty of proof" as a special legal phenomenon that differs from the traditional classification of the rights and obligations of the parties.

In the Kazakhstani civil procedural legislation there were also innovations in the duty to prove. For example, Article 65 on the old CPC of the RK, the duty to prove in the new Code is fixed under Article 72 and supplemented with the following content: 1. Each party must prove the circumstances to which it refers as grounds for its demands and objections, use defenses, assert, challenge facts, provide evidence and objections to evidence within the terms established by the judge, which correspond to the good conduct of the process and are aimed at facilitating production.. 2. The

burden of proof for the cases specified in Chapter 29 (Production of applications for challenging decisions, actions (inaction) of local executive bodies that violate the rights of citizens to participate in criminal proceedings as a juror) is assigned to state authorities, local self-government, Public association, organization, officials and civil servants, whose acts, actions (inaction) are appealed [6].

The oldest principle of the distribution of responsibilities for proof, leading its history since the time of Rome, is the rule "He must prove who the author of a provision requiring evidence" [7, p. 243.] According to our procedural legislation, proof is a duty. The duty to prove certain facts lies with the party that refers to them as the basis of their claim or objection. The plaintiff must prove the circumstances that constitute the basis of the claim: the facts that led to the emergence, change or termination of the disputed legal relationship; facts that indicate a violation or challenge by the respondent of the right of the plaintiff. The defendant must prove the facts supporting his objections to the claim. A third person, who claims independent requirements for a dispute and enjoys all the rights of the plaintiff and performs all his duties, proves the circumstances with which he justifies his requirements. A third person who does not declare independent requirements must prove the facts that influence his attitude to the party in the process. The prosecutor, state structures and local government structures, legal entities or citizens who apply to the court in accordance with the law must prove the circumstances laid down in the basis of the claim.

O.V. Baulin correctly emphasized that the evidentiary burden should be regarded as a stable and not a dynamic phenomenon. It can and must be pre-allocated at the beginning of the process, otherwise the institution can not perform the function of eliminating uncertainty, and the facts can not be established reliably, with the help of evidence [8, p.172].

The following circumstances are grounds for the release of evidence under Article 76 of the Civil Procedure Code of the Republic of Kazakhstan:

- well-known facts are circumstances that are not included in the subject of proof in the case because of their wide popularity in a certain territory, including the court and persons involved in the case;
- prejudicial facts are facts that do not require proof because they are established by an enforceable judicial act;
- legal presumptions;
- Facts that do not require proof, provided that, under the due process of law, the opposite is not proven [6].

Here I would like to compare our Civil Procedural Legislation with the Civil Procedure of Germany. In German civil legal proceedings are not subject to proof:

1. the recognized facts referred to by the party do not need to be proved insofar as in the course of the proceedings in the case they are recognized as an adverse party in the oral proceedings or in a statement made to the authorized judge or to the judge who executed the letter of request for entry into the record (§288 (1) of the GPU of Germany) [9, p.96].
2. Indisputable facts, which are equated with recognized facts. The facts, which are not disputed directly, are considered recognized insofar as from the other explanations of the party there should be no intention to challenge them (§138 (3) of the GPU of Germany) [9, p.56].
3. Facts known to the court: a) well-known facts - facts that are obvious to the court do not need proof. (§291 of the GPU of Germany) [9, p.96]. These are facts that are familiar to most people from the press, television, broadcasting, whose plausibility is beyond doubt, for example the day of the week of a specific date, the distance between two settlements, etc. B) prejudicial facts are facts that became known to the court in connection with the exercise of professional activity, judicial practice, for example, the decision or ruling of a court in civil or criminal proceedings [10, p.63];
4. Legal presumptions. If the law presupposes the existence of any fact, then the proof of the contrary is allowed, since the law does not provide otherwise. (§292) of the GPU of Germany [9, p.96];
5. Experimental provisions based on general knowledge from life are not subject to proof.

It follows from the comparison that the list of circumstances that are not subject to proof in German civil procedural legislation is slightly wider than in our code. The German CPC includes in this list the facts recognized by the other party, but this provision does not exist in the CPC of the Republic of Kazakhstan. However, in accordance with article 171, if the defendant recognizes the claim in full or in part in preparing the case for trial or until the court is removed to the deliberation room, the court is released from examining the evidence in full or in the part in which the claim is recognized by the defendant [6]. In my opinion, releasing a court from examining this type of evidence suggests that the court recognizes the facts of the case as proven and does not consider it right to investigate an already recognized fact. Therefore, I think it is necessary to adopt this provision from the German CPC into our code in order to supplement the list of grounds for exemption from proof. This will allow the parties to collect other evidentiary materials on time in which they base their demands and objections, and will also allow the court to examine other submitted evidence.

So the presumption should be regarded as a legal phenomenon. Because, one can not use an illegal assumption in the process of civil proceedings. For example, when considering an event of deprivation of parental rights, the judge can not leave the claim without satisfaction, referring to the fact that parents usually take care of their children, and that means that the specific respondent also fulfills his parental duties properly. However, the court can not refer to such factual assumptions until they are given the importance of legal presumptions.

The facts, which are supposed to be established by law, are not proved in civil proceedings (Part 6, Article 76 of the Civil Procedure Code of the Republic of Kazakhstan). In certain norms of substantive law, it is established that there is a certain fact in the case of the proof of other facts connected with it. For example, in civil law, two pre-evidence presumptions are the most common: 1) the presumption of the fault of the causer of harm, including causing harm to a source of increased danger. In a case that the plaintiff proves the following three facts - the commission of the action by the respondent for causing harms, the occurrence of harmful consequences resulting from this and the connection between its action and the consequences that have occurred, the fault of the harm-doer is supposed to be in accordance with the norms of civil law. Therefore, the plaintiff is exempted from the obligation to prove the fault of the causer of harm. The causer of harm in his own interests can prove that the harm was caused not through his fault (Chapter 47 of the Civil Code); 2) presumption of guilt of a person who did not fulfill the obligation or performed it improperly while carrying out entrepreneurial activities. The entrepreneur is liable for property if he does not prove that proper execution was impossible due to force majeure, that is, extraordinary circumstances that are unavoidable under the given circumstances (natural phenomena, military actions, etc.). Such circumstances do not apply, in particular, the absence on the market of goods, works or services necessary for execution. If a civil obligation is violated, the offender is generally presumed guilty and can be held accountable. The absence of guilt is proved by the person who violated the obligation. The intruder is obliged to prove that he is not guilty of violation, i.e. Took all measures that could be taken to prevent violation (Article 359 of the Civil Code) [11, p.313].

Unlike the criminal process in which the presumption (assumption) of innocence is in effect, by virtue of which the duty of proving the guilt of the accused lies with the prosecutor, the presumption of non-liability in the civil process is in effect, by virtue of which the obligation to prove the facts indicative of the offense committed by the defendant lies on the plaintiff [12, p. 249]. According to Article 148 of the Civil Procedure Code of the Republic of Kazakhstan, if the claimant fails to provide evidence that confirms his claims, the judge must refuse to accept the statement of claim in accordance with Article 151 of the Civil Procedure Code of the Republic of Kazakhstan [6].

When we consider the evidence of evidentiary presumptions, it should be noted that these presumptions should always be fixed by special procedural norms of the law. Such norms are contained both in the Civil Procedure Law and in the substantive acts of substantive law, but this

does not change their nature: since these norms distribute the burden of proof, they are procedural norms.

One of the innovations in the duty of proof is that the parties must assert and challenge the facts, present evidence in support of their facts and refute the facts claimed by the other party. This rule is new and indicates the parties as the subjects of evidence who deal with matters of fact, and the court is relieved of collecting evidence and resolves issues of law. Thus, for example, in accordance with Part 2 of Article 46 of the Civil Procedure Code of the Republic of Kazakhstan, the persons participating in the case are required to declare the court in full and truthfully the facts of the case in full and truthfully, to express or present to the court written documents refuting the facts approved by the other party. Also, the plaintiff in his application must indicate the circumstances on which he bases his demands, as well as the content of evidence supporting these circumstances [Subparagraph 5 of Part 2 of Article 148 of the Civil Procedure Code of the Republic of Kazakhstan]. And the respondent, in turn, in the recall must indicate the arguments on the merits of the claims, with reference to the evidence that justifies them [6].

The next innovation is the time that the court establishes to perform actions to prove it. The judge shall fix the time period for submission by the respondent: - withdrawal (objection) to the statement of claim in the consideration of the case by way of simplified (written) proceedings (part three of Article 146 of the Civil Procedure Code of the Republic of Kazakhstan); - a written response to the plaintiff claims (paragraph 1) of Article 165 of the RK CPC); - a written response to the statement of claim, if the defendant did not submit it by the due date or provided a response not according to all the requirements and grounds for the claim (part five of Article 172 of the Civil Procedure Code of the Republic of Kazakhstan), etc [13, p.153-154].

The parties must perform actions to protect their rights in the terms established by law. Such terms, for example, are established to carry out the administrative actions of the parties and other persons participating in the case (articles 169, 170, 171 of the CCP), the submission of evidence (Article 73 of the CCP), etc. Failure to comply with the statutory deadlines for performing procedural actions may also lead to negative Consequences for the persons participating in the case, for example, the restriction of certain additional conditions for the right to present evidence at the trial stage to the court of first instance or to the court of appeal (part one Sports Articles 73 GIC) [13, p.154].

Another rule introduced in an article about the burden of proof - conscientious management process and facilitate production. This requirement follows from Article 46 of the Civil Procedure Code of the Republic of Kazakhstan, which indicates that the persons participating in the case must conscientiously use all procedural rights owned by them without abusing the rights of others without violating their interests and preventing the deliberate delaying of the time for consideration and resolution of the case [6].

The duty to prove the parties and other persons participating in the case is to collect, present and investigate the evidence in order to justify its legal position in the case. In our legislation, there is no institution for the allocation of responsibilities for proving, and this does not allow us to fully reveal the potential of this concept. It is necessary to single out this institution in civil procedural law, because it is one of the main components of civil proceedings. Baulin O.V., the Russian process scientist, named the following reasons for fixing the institution of distribution of evidentiary duties in procedural legislation: First, the institution performs the function of an incentive, encouraging participants of material legal relationships to take care of preparation for a possible dispute, follow the instructions of the law on proper registration of relations, Availability of reliable written and other evidence.

Secondly, the rules of distribution of the evidentiary burden act as the driving principle of the process as a whole and proving in particular. Initially, the court refers to versions of the evidence and the lack of evidence of the facts sought as equally probable. Such an attitude may persist indefinitely, if one of the participants in procedural relations does not take action to establish the circumstances of the subject of proof. Who and what actions should take - this question is answered by the provisions of the institution in question.

Thirdly, the establishment of the duties of proof is also aimed at eliminating the uncertainty that arises in legal relationships in the event that it is impossible to reliably ascertain the circumstances that are relevant to the case. [14, p.53-54]. Thus, the emergence of the institution of distribution of responsibilities for proving will allow the participants of material legal relations to prepare for the future possible dispute and to fulfill the requirements for appropriate registration of their relations, thereby ensuring the availability of reliable and admissible evidence.

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