

ACCESS TO JUSTICE THROUGH THE PRISM OF UNIFORMITY OF JUDICIAL PRACTICE IN UKRAINE

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Annotation. Different perception of relatively new concepts is one of the challenges of implementation of the new terminology in Ukraine. So, the purpose of this article is to study the interconnection of two concepts – the ‘access to justice’ and ‘uniformity of judicial practice’, – keeping in mind the European standards set in Rule of Law Report, CCEJ Opinion No. 20 and in ECtHR case law. Both concepts were in the focus of a number of studies during last decade, however, the interconnections between them was not considered specifically. Also, many publications confirmed that the critical approach to the past (both Soviet as well as pre-Soviet, meaning imperial Russian) was not predominant; examples of this is quoting the Rule of Law Report, Consultative Council of European Judges Opinion No. 20 (2017) and ECtHR jurisprudence alongside works of Russian imperial jurists thus many Ukrainian legal scholars were eager to find “deeper roots” in many modern concepts in the works of Russian scholars of XIX-XX century. Therefore, it is crucial that such concepts as ‘access to justice’ are used correctly. The findings show that the uniformity of judicial practice by ensuring stability and predictability, promotes access to justice, especially in so-called “classic” cases, regulated by longstanding legislation. However, modern world and life in it is quite dynamic, social relationships constantly develop and new legal disputes (due to technological progress or caused by the Russian armed aggression against Ukraine) arise for which there is no case law at all. After the full scale invasion an obvious question arises about how the judicial practice will develop to ensure access to justice in new category of cases, both civil (i.e. regarding compensation of damage caused to the real estate) and criminal, compared to those that were happened since 2014 and were classified as terrorist or general criminal, although some of them had signs of war crimes. In this context, the leadership role of the Supreme Court is important, given its mandate to ensure the uniformity of judicial practice and keeping in mind the dynamic character of the legal relations.

Key words: access to justice, uniformity of judicial practice, case law, Supreme Court.

1. Introduction.

«In a state governed by the rule of law, citizens justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that they can predict the legal effects of their acts or omissions» [1, para. 5]. This quote from the Consultative Council of European Judges Opinion No. 20 (2017) (hereinafter – CCEJ Opinion No. 20) might be seen as a cornerstone to describe the interlinks between access to justice and the uniform application of the law. Therefore, access to justice, which two key components under CoE and EU law are the right to a fair trial and the right to an effective remedy [2, p. 20], is largely influenced by the current judicial practice – its uniformity and stability.

It is worth mentioning, that the European Court of Human Rights (hereinafter – the ECtHR) has considered a number of cases to determine whether conflicting court decisions violate an applicants’ right to fair trial guaranteed by the Art. 6 of the European Convention of Human Rights. Some of these key cases are, i.e., *Nejdet Şahin and Perihan Şahin v. Turkey* [3, para.52-58] and *Lupeni Greek Catholic Parish and Others v Romania* [4, para. 116].

'Uniformity of judicial practice' (in Ukrainian *єдність судової практики*) is a relatively new term for Ukrainian legal scholars and practitioners. It was most likely introduced in the law as a consequence of the judicial dialogue within Europe in which Ukrainian judges took part. To understand the interlinks between access to justice, legal certainty as rule of law essential components, and role of the uniformity of judicial practice one can refer to important CCEJ Opinion No. 20 [1] and Venice Commission's Report on the Rule of Law (2011) [5].

2. Review of academic publications.

During last decade, a number of Ukrainian scholars and judges have studied the problems of the uniformity of judicial practice. For instance, for obtaining the degree of Ph.D. in law in Odesa Law Academy M. Demenchuk has chosen the topic of "*The role of the Supreme Court in ensuring the unity of judicial practice in Ukraine*" (2018) (title in English quoted from the M. Demenchuk's thesis summary) [6, p. 22] and published a book (2019) with a similar title [7]. She suggested to define the concept of 'unity of judicial practice' as the same (identical) approach of the courts of the relevant jurisdiction to the application of the norms of substantive and procedural law when considering specific cases, taking into account previous consideration of similar cases. [6, p. 9-10]. The author also identified the features of *de facto* ensuring the unity of judicial practice, namely: consistency (in Ukrainian *узгодженість*) in the application of legal norms by courts when deciding cases; coherence (in Ukrainian *послідовність*) in the application of legal norms; sameness (in Ukrainian *однаковість*) in the resolution of similar cases; high level of trust and respect of lower courts for higher courts, especially for the Supreme Court (hereinafter – the SC); a small number of appealed decisions to higher instances due to different application of substantive or procedural law; high level of public trust in the judiciary, especially in the Supreme Court [6, p. 10; 7, p. 52].

Two articles – one on the very similar topic "The Role of the Supreme Court in the mechanism of ensuring the sustainability and unity of judicial practice: some aspects" [8] and the other one titled "Legal means of procuring the unity application of the criminal procedure law" [9] – has been published by O. Shylo and N. Hlynska in 2020. The authors emphasized, that a number of legislative and organizational measures have been taken in Ukraine recently, in particular, reforming the judicial system, improving the legislation governing the procedural powers (*процесуальні повноваження*) of the court of cassation, etc. However, the problem of diametrically opposed judicial decisions on similar legal issues, unfortunately, is not resolved [9, p. 158], and they provided examples of conflicting (in O. Shylo and N. Hlynska wording – "opposite" [8, p. 134-135]) SC decisions (specifically, of the Criminal Court of Cassation within the SC) [8, p. 134-135]. Also, these publications confirmed that there was no critical approach to the past (both Soviet as well as pre-Soviet, meaning imperial Russian). This critical approach was not predominant for Ukrainian legal scholars; many of them, in particular representative of the Kharkiv or Odesa law schools, considered themselves as inheritors of the Russian tradition, and were eager to find "deeper roots" in many modern concepts in the works of Russian scholars of XIX-XX century. One of the many examples of this approach in works of legal scholars, is quoting the Rule of Law Report, CCEJ Opinion No. 20 and ECtHR jurisprudence alongside works of Russian imperial jurists M. Korkunov can be seen in O. Shylo and N. Hlynska article titled "Legal means of procuring the unity application of the criminal procedure law" [9, p. 160].

The problems of uniformity of judicial practice in administrative cases were studied by Ya. Bernaziuk and V. Bevzenko, both judges of the Supreme Court; in civil cases – by V. Krat, O. Kot, D. Luspennyk, Ya. Romaniuk, T. Tsuvina, and others.

In addition to various publications, it is worth noting several conferences dedicated to the problems of uniformity of judicial practice, held by the SC in cooperation with the CoE projects, two of which, held on 14-15 June 2019 [10] and on 20 November 2020 [11] were most noticeable; the conference materials for both events, including programs, video recordings and PPT presentations of the speakers are available on the website of the SC.

As can be seen from the program of the first conference "Uniformity of Judicial Practice: View of the European Court of Human Rights and the Supreme Court" (2019), in addition to the thematic

session 1 “Uniformity of judicial practice: Ukrainian legislation and institutions”; the other sessions demonstrate the variety of issues which can be discussed under the umbrella of the ‘uniformity of judicial practice’ such as crimes of corruption (day 1, session 2), the reopening of the case (day 1, session 3), independence of the judiciary (day 2, session 1), effectiveness of judicial decisions (day 2, session 2) [12]. Notwithstanding the diversity of issues discussed, the speakers of the conference were unanimous in agreeing that uniformity is needed, first of all, for trust and public confidence in the judicial system (and since trust in the SC was quite high at the time, ensuring uniformity was considered as necessary requirement for not losing the trust); secondly, for predictability – identical disputes should be resolved identically (or “like cases should be treated alike”) while different – differently; third, uniformity allows to ensure promptness – an established judicial practice in certain category of disputes allows to resolve them promptly enough.

It is also worth agreeing with prof. A. Miroshnychenko’s remark that the uniformity of judicial practice is not a goal in itself. Uniformity is a means (an instrument), and it should be balanced with the need to adapt the law to the current needs and the need to improve legal regulations [13, 1.27.48]. This echoed with the CCEJ Opinion No. 20 (para. 1) that “the uniform application of the law should not lead to its rigidity and unduly restrict the proper development of law”; therefore, it is not possible to prohibit judges of lower courts acting in good faith, to depart from the case law established on the superior level if the requirement to provide explicit reasons for such a departure is complied with. So, in order to ensure the uniformity of judicial practice, it is quite important that the ruling of the hierarchically superior courts and, above all, the SC, be very convincing with detailed justification and persuasive reasoning provided [13, 1.27.10-1.28.58].

The interconnections between the uniformity of judicial practice and access to justice was not considered by Ukrainian scholars specifically, however one particular publication, namely article by V. Komarov and T. Tsuvina [14], cannot be ignored. Underlying that the interpretation of the access to justice proposed in 2005 by Canadian R. Macdonald [15] (which is known as ‘Macdonald’s five ‘waves’ since that [16]) differs significantly from its original description and goes beyond civil justice, affecting a wider range of issues of legal practice and legal culture [14, p.201]. Therefore, the authors advocate a broad approach to the concept of access to justice, including access to justice, access to effective remedies and access to alternative dispute resolution [14, p. 198, 203], and then switching to the link between access to justice and civil procedural law. The authors conclude, that analysis of modern approaches to defining the concept of access to justice leads to the urgent need to rethink some classic postulates of the theory of civil procedural law, due to Ukraine’s desire to integrate into the European legal space and recognition of the rule of law as a fundamental principle of law in a democratic society [14, p. 206].

However, the ‘urgent need to rethink some classic postulates’, in my view, is not only limited to the theory of civil procedural law and goes far beyond. For instance, people-centered justice (which is the main approach for OECD access to justice framework) may also mean rethinking the institutions, rules and cultures of dispute resolution, starting from the perspective of a person (actual or potential user) [17, p. 6]. However, the desire to “rethink” does not offer a clear understanding of the basic foundations of a certain concept – including ‘access to justice’ – according to its established meaning. Different perception of concepts and categories is one of the challenges of implementation of the new terminology in Ukraine. “It would be difficult until we talk about the same thing in the same language,” says Judge of the ACC-SC V. Bevzenko [13, 1.48.02-2.02.20].

As R. Sackville noted, “[t]he attractiveness of “access to justice” as a catchphrase owes much to the powerful linguistic messages it conveys. These messages include both an ideal and an implicit promise that the ideal is attainable” [18, p. 86].

So, it is crucial that the concepts relatively new for Ukrainian lawyers are used correctly, and as much as access to justice is concerned – it’s primarily meaning is not only covering such issues as a number of vacancies in the courts or the constitutional aspects of the participation of international experts in the formation of judicial governance bodies (as it happened in the framework of the Ukrainian nationwide discussions “Access to justice: realities and prospects” (2020-2021) [19; 20]).

The abovementioned challenges frame the purpose of this article.

3. Research objectives.

The purpose of the article is to study the interconnection of such concepts as 'access to justice' and 'uniformity of judicial practice', taking into account constant development of social relations and the need for their legal regulation.

4. Analysis and discussion.

Over the past 20 years, three laws on the judiciary and the status of judges were in force in Ukraine: Law No. 3018-III (2002), Law No. 2453-VI (2010), which introduced the term 'uniformity of judicial practice'; and current Law No. 1402-VIII (2016) [21], which further developed this concept, as follows:

"Article 36. The Supreme Court is the Highest Court in the Judicial System of Ukraine

1. The Supreme Court is the highest court in the judicial system of Ukraine ensuring the constancy and uniformity of judicial practice in the manner determined by the procedural law".

The wording of Art. 36 of the Law No. 1402-VIII gives grounds to single out the *procedural* as well *non-procedural* ways / tools of ensuring the uniformity of judicial practice.

Procedural mechanism of ensuring the uniformity of judicial practice includes tools stipulated by the procedural codes. The main changes into the codes have been introduced by Law No. 2147-VIII [22] and entered into force on 15 December 2017 – the same day the SC of new composition started operating. Oversimplified, procedural mechanisms might be described as referral of the case during its review of cassation in the SC to the chamber of a court of cassation, united chamber of a court of cassation or GC SC. Each of the procedural codes in quite similar ways determine grounds and procedure for such referral. For the lower courts considering a case by a chamber, united chamber or the GC SC is a ground to stop proceedings in similar pending cases in waiting of the relevant SC judgment. However, if the case is decided and the SC judgment became available, the law stipulates that "conclusions on the application of the provisions of the law set forth in the decisions of the Supreme Court are taken into account by other courts when applying such provisions of the law" (Art. 13.6 of Law No. 1402-VIII) [21]. Therefore, it is crucial to determine what is a SC 'conclusion' that is subject to mandatory application by lower courts and what is not subject to mandatory application in view of different legal relations, as well as to determine whether the legal relations are similar or different. Judges' points of view may differ on whether the legal relations referred to the united chamber are similar; the same applies to motivation, when the court provides reasoning which is not the main one [13, 2.57.59-2.58.16].

Non-procedural tools of ensuring the uniformity of judicial practice usually include: digests and overviews of judicial practice issued by the GC SC and four courts of cassation within the SC; media and social media coverage of the most urgent or high-profile cases; participation SC judges in various educational and scientific events (conferences, round tables, webinars, trainings), etc.

In general, I want to reflect on the following: uniformity of judicial practice by ensuring stability and predictability, promotes access to justice because it helps individuals to protect themselves against infringements of their rights by choosing the preferable justice pathway and the best legal strategy according to the well-established case law. This mostly relates to so-called "classic" cases, especially regulated by longstanding legislation. If the current legislation has been in force for a long time, a person has a reasonable expectation that his or her case will be resolved in accordance with the uniform judicial practice.

However, modern world and life in it is quite dynamic, social relationships constantly develop and new legal disputes arise for which there is no case law at all. On the one hand, these might be a sort of "ordinary" disputes due to technological progress – for example, using the reproductive technologies, where a woman conceived a child after her husband death, and after the birth of the child initiated a dispute against the Pension Fund about the "the loss of a breadwinner" pension for

the child and for herself as a person providing childcare [23]. On the other hand, many new types of cases caused by the Russian armed aggression against Ukraine. Although the entire territory of Ukraine nowadays is subject to rocket attacks, it is still possible to distinguish conditionally rear areas, where the legal regime of martial law is nevertheless applied after the full-scale invasion, some regions where hostilities are taking place, and areas that have undergone occupation. The scale of war crimes committed on the Ukrainian territory turned out to be one of the biggest challenges.

It is necessary to recognize a paradigm shift in the legal qualification of many actions. As A. Maliar rightly pointed out, until 2014 the topic of aggressive war and war related crimes considered as irrelevant in Ukrainian legal discourse, therefore academicians did not pay attention to these crimes. As a result, Ukrainian legislation was not ready not only for the legal assessment of hybrid threats, but even for classic conventional war [24, p. 13]. Articles of the Criminal Code of Ukraine, which related to criminal offenses against peace, human security and international legal order (Chapter XX of the current Criminal Code of Ukraine) have never been not applied in practice, as there was no need to practice skills and approaches to investigating such crimes. Therefore, crimes committed in the east of Ukraine, starting from 2014 received a different qualification (for example, the creation of illegal military formations or commitment a terrorist act, a murder, rape, torture, etc.). On the basis of analysis of the judicial practice of Ukraine from 2014 to 2019 A. Maliar concluded that the vast majority of court decisions from 2014 to 2019 reflected the official position of the authorities regarding the legal assessment of events in the Donetsk and Luhansk regions (until February 24, 2018, hostilities in in the east of Ukraine had the legal status of an anti-terrorist operation – in Ukrainian ATO), and accordingly, crimes committed in the ATO zone were classified as terrorist or general criminal, although some of them had signs of war crimes and crimes against humanity [24, p. 13-14].

A similar picture can be seen in civil cases regarding compensation of damage caused to the real estate object in Eastern Ukraine. Without delving in this article into the arguments of the Supreme Court regarding the difference between non-residential and residential real estate objects (to compare, the so-called “the Mariupol store case” No. 265/6582/16-ц [25] and “Mar’yinka apartment case” No. 237/557/18-ц [26]), it is worth underlining that in both cases claimant asked for compensation for damage caused as a result of a terrorist act. In the first case, the store was damaged as a result of artillery shelling of the “Skhidnyy” micro-district of the city of Mariupol, as a result of which 30 people died, at least 119 people received bodily injuries of varying degrees of severity [25, para. 4.3]; in the second, the apartment was destroyed as a result of a direct hit by a projectile [26]. In both cases, the pre-trial investigation was conducted in criminal proceedings “based on the features of the crime” of Article 258 of the Criminal Code of Ukraine. However, it is clear that it was not just sporadic terrorist acts, but hostilities that occurred as a result of Russia’s military presence in eastern Ukraine – the conclusion made also by the ECtHR on the basis of the vast body of evidence that demonstrates beyond reasonable doubt the decisive degree of influence and control Russia enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities [27].

Explaining the reasons for the judgments and the applicable law, the Supreme Court concluded that neither the provisions of Art. 19 of the Law of Ukraine “On Combating Terrorism” nor Article 85 of the Code of Civilian Protection of Ukraine give rise to a legitimate expectation to compensation for damage caused by a terrorist act; the right to compensation for material losses to victims of emergency situations is carried out in accordance with “the procedure established by law”, and at that moment there were no such law, no appropriate provisions in the legislation of Ukraine regarding such compensation [26].

In the light of current events, after the full-scale military invasion against Ukraine, an obvious question arises about how the judicial practice will develop not only in this category of cases, but also in criminal proceedings that were classified as general criminal and not war crimes. In this context, the role of the Supreme Court is important, given its mandate to ensure the uniformity of judicial practice. Will the Supreme Court take on a leadership role? Will SC be able to effectively use the existing procedural mechanisms for ensuring the unity of judicial practice, or will it withdraw from this?

In many situations of a new category of cases, which might occur due to different reasons (there is no applicable legislation, or the law has been past recently, or there is no practice of its application, etc.) it is almost inevitable that court decisions in such new cases might differ. If the lower courts receive feedback delayed, they will not be able to correct their practice promptly; this can result not only in overturned decisions (for lower court judges), but also create barriers to access to justice, including wasted time and money. It is worth noting, however, that the perception of the outcome of the case as individually unfair is not considered an obstacle to access to justice. In the *Nejdet Şahin and Perihan Şahin v. Turkey*, [GC], no. 13279/05, 20 October 2011 the ECtHR acknowledged that two courts, each with its own area of jurisdiction, examining different cases may very well arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances [3, para. 86]. Therefore, even though the interpretation made by the Supreme Military Administrative Court of specific provision of law (section 21 of Law no. 3713) was unfavourable to the applicants, that interpretation, however unjust it might appear to them, compared with the solution adopted by the ordinary administrative courts, does not, in itself, constitute a violation of Art. 6 of the Convention [3, para. 90]. Nor can the applicants claim to have been denied justice as a result of the examination of their dispute by the Supreme Military Administrative Court, or the conclusion it reached. The decision adopted by the Supreme Military Administrative Court in the applicants' case fell within the bounds of its jurisdiction and there is nothing in it that, in itself, would warrant the intervention of the ECtHR [3, para. 92]. Thus, in accordance with the ECtHR jurisprudence, the applicant's perception of the court decision does not indicate a lack of access to justice, if the person participated in the proceedings, used all procedural guarantees and the court decision cannot be considered as arbitrary.

Describing the role that access to justice plays in the current transformations of the law, G. Palombella remarks its *dynamic* core [28, p. 121]. The dynamic power of access to justice is not just serving pre-existing substantive rights, granting them from effective remedies, but it can help open new scenarios of legal protection [28, p. 121-122]. It is fair to say that judicial practice is also characterized by dynamics as a feature. As acknowledged by the CCEJ Opinion No. 20, it is the primarily role of a supreme court to resolve contradictions in the case law [1, para. 20]. Therefore, since the Supreme Court has both procedural and non-procedural mechanisms for ensuring the uniformity of judicial practice, the efficient and timely response (the prompt feedback) from the Supreme Court, especially in the new types of cases, will contribute both to the uniform application of the and to access to justice, as it allows citizens to decide on the justice pathways they choose.

5. Conclusions.

In this research, the interconnection of such concepts as 'access to justice' and 'uniformity of judicial practice', is studied. uniformity of judicial practice is not a goal in itself. Uniformity of judicial practice is needed for trust and public confidence in the judicial system, for predictability ("like cases should be treated alike"), etc.; it also affects access to justice. However, uniformity of judicial practice is not a goal in itself, it is an instrument, and it should be balanced with the need to adapt the law to the current needs, and with the dynamic character of modern legal relations. Thus the law stipulates that "conclusions on the application of the provisions of the law set forth in the decisions of the Supreme Court are taken into account by other courts when applying such provisions of the law" (Art. 13.6 of Law No. 1402-VIII), and taking into account the new types of cases caused by the Russian armed aggression against Ukraine, a leadership role of the Supreme Court is crucial.

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