GENDER SENSITIVE JUSTICE DURING WARTIME: TOWARDS PEOPLE-CENTRED APPROACH

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Annotation. The article highlights the challenges Ukrainian judges face during wartime via prism of gender sensitivity. The author pointed out that for the judiciary to become gender sensitive, judges should be able to recognize gender aspects of a particular case. Using *Carvalho Pinto* and *Airey* judgements the author not only focuses on certain ECtHR cases as gender-sensitive but also demonstrates the importance of statistics and research data used by the ECtHR while giving judicial reasoning. Based on the data available due to the 4th nationwide study "What Ukrainians Know and Think of Human Rights" (2016-2023) the author shows certain gender differences regarding the weight of specific human rights and manifestations of the violations. In particular, men more often than women had faced violations of the right to freedom and security of person and unjustified violence by the police while women were more likely than men to refer to violations of the right to social security. Also, women turned out to be more passive and less successful than men in protecting their rights. Besides, there is a difference in the legal needs of women and men according to the analysis of applications from clients who received free legal aid in 2023. Thus, during the war old challenges were exacerbated and new ones emerged. The author pointed out some gender-related disputes (cases) adjudicated recently. Since mobilization primarily concerns men of a certain age, therefore, in order to postpone military service (as the constitutional duty) a vast majority of men opted to care for their relatives, despite that caregiving work was an uncommon characteristic of Ukrainian male behavior. The author also emphasizes that traditionally data collection within Ukrainian courts is file-oriented instead of people-oriented. Therefore, the author suggested using an approach from the *OECD Recommendation on Access to Justice and People-Centred Justice Systems*, including the number of new concepts, previously unknown to domestic legal science and practice, such as "justice pathways", "legal and justice needs" or "people-centred justice data".

Key words: access to justice, gender sensitive justice, gender, people-centred approach, wartime.

1. Introduction.

Although the achievement of gender equality is one of the goals of the Council of Europe (CoE) [1] and the EU [2], and Gender Equality Strategies set out the objectives and key actions, including ending gender-based violence, ensuring equal access to justice, etc., the judiciary is rather slow in putting on gender lenses. An analysis of the European Court of Human Rights (hereinafter referred to as ECtHR) case law allows one to conclude that many violations of the ECHR could have been avoided if national courts had been able to recognize gender-sensitive situations when considering different categories of cases and respond to them appropriately [3]. *Factsheet on Gender Equality* published by the ECtHR Press Unit demonstrates that gender aspects are present in different categories of cases (i.e. family-allowance payments, calculation of a disability allowance, action for disavowal of paternity, parental leave and parental leave allowances, choice of family name and transmission of parents' surnames to their children, age of retirement, dismissal on grounds of gender, obligation imposed solely on men, domestic violence, immigration rules, etc.) are within the scope of many provisions (articles) of the ECHR taken alone or in conjunction with prohibition of discrimination [4].

Certainly, not all court cases are gender-based, however, it was not mistaken to presume that the vast majority of disputes involving a person have a gender component. In some cases, this component is not clearly expressed, in others it can be of key importance. Therefore, for the judiciary to become gender sensitive, as required by international standards, i.e. *CEDAW General recommendation on women's access to justice* (CEDAW/C/GC/33) [5], its representatives must, first and foremost, be able to recognize gender aspects of a particular case. In other words, they need to identify them – an ability/a skill, which most judges either do not possess or do not master enough. When solving a question of legal qualification, application of a law to actual circumstances of a case, judges quite often do not understand "where gender component is in disputes about compensation for damage or about property rights". It is especially noticeable in cases in which the term "gender" is not used, or the gender of a litigant is not highlighted. Considering the invisibility of the gender component, it is crucial to demonstrate it in the most diverse categories of cases.

2. Review of academic publications.

During the last decades, a lot of studies have been initiated and published on gender sensitive legislation [6] as well as on gender and justice [7]. A lot of scholars, among them Elisabeth Duban, Eleanor Gordon, Mary Jane Mossman, Ivana Radačić and others, were researching issues of gender sensitive justice. Special attention was paid to such areas as family law [8], work [9], business [10], effective criminal justice responses to gender-based violence against women and girls [11], as well as genders sensitive transitional justice [12]. However, these study do not fully address the issue and require more in-depth exploration.

3. Research objectives.

The purpose of the article is to demonstrate the gender component, which often remains invisible to judges, based on the analysis of judgements in different categories of cases, and the importance of using research data.

4. Analysis and discussion.

It is worth recalling that Latif Hüseynov, ECtHR judge in respect of Azerbaijan, used case *Carvalho Pinto de Sousa Morais v. Portugal* [13] for his presentation on relevant and sufficient judicial reasoning at the VIII International Forum on the Case-Law of the European Court of Human Rights (Lviv, November 22-23, 2019) [14]. The *Carvalho Pinto* case clearly demonstrates that the judge's gender stereotypes have a direct impact on his perception of the position of a litigant, as well as on the motives by which a judge is guided when evaluating evidence and deciding on a case. At the same time, it is very telling that the judge of the ECtHR used a gender-sensitive case to highlight the issue of judicial reasoning, which has crucial importance for judges.

Unlike *Carvalho Pinto*, in *Airey* judgement [15] words like "gender" or "gender equality" do not appear. The *Airey* case is well known as a classic example of a violation of Art. 6 of the ECHR because the applicant did not enjoy an effective right of access to the court, thus she was unable to find a solicitor willing to act on her behalf in judicial separation proceedings. The quote "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" from the *Airey* case became famous and was subsequently reproduced in thousands of ECtHR judgements. However, in what context was the question of access to the court considered by the ECtHR?

The case originated more than a half of a century ago – on 14 June 1973 – by an Irish national, Mrs. Johanna Airey. The procedure was "old" – the *Airey* case was referred to the Court by the European Commission of Human Rights, the judgment in the case was adopted on 9 October 1979 – more than four decades ahead of the Istanbul Convention [16]. Therefore, the *Airey* case provides additional arguments as to why the Istanbul Convention is important, thus it is the very case in which the ECtHR stated its famous quote "the Convention is intended to guarantee not rights that are theoretical or

illusory but rights that are practical and effective" (para 24 of the *Airey* judgement). The case initiated by a woman in penury endeavouring to obtain a decree of judicial separation from/with her alcoholic husband, previously convicted of assaulting her, alleged physical and mental cruelty to her and their children. In Ireland, divorce in the sense of dissolution of a marriage did not exist at the time being, and a decree of judicial separation, obtainable only in the High Court, required a legal aid and she had not been in a financial position to afford the costs involved, to find a solicitor willing to act for her.

The *Airey* case is also about the ability to present one's case effectively – the ECtHR assessed whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily. Therefore, the other quote from the *Airey* judgement, much less famous, is still important, is the following:

"The Court considers it most improbable that a person in Mrs. Airey's position can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer (see paragraph 11 above).

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 (art. 26)" [15, para 24].

So, does the *Airey* case have a gender component? Is the ECtHR judgement in this case gender-sensitive? Even though it does not even mention the word "gender" and does not talk about gender inequality and does not address the issue of discrimination as by four votes to three the Court holds that it is not necessary either to examine the case under Article 14 taken in conjunction with Article 6 para. 1 (art. 14+6-1).

Both *Carvalho Pinto* and *Airey* judgements demonstrate the importance of statistics and the ECtHR's use of research data. To draw well-reasoned conclusions, a court must have data, i.e. must maintain, summarize, and analyze statistics, which in some countries one has problems with. Traditionally, in Ukraine, the data collection within courts is file-oriented, which mean that the focus is on collection of any data linked not to a litigant, but rather to "cases and files" [17]. Statistics regarding people relates to criminal proceedings only, on convicted and detained persons [18], and starting from 2024 – on accused and victims of war crimes, while in civil or administrative cases there are no data on the number of plaintiffs by category of cases.

For example, *Analysis of the state of administration of justice by administrative courts in 2023* [19] includes the average number of cases and files received by one judge, considered by one judge, the number of judgements in favor of applicants, the number of district administrative court judgements that were overruled or changed, etc. At the same time, the data analysis contains no information about the litigants.

Also, there is no official data focused on people and their legal and justice needs. At the same time, there are other studies that, although conducted for a different purpose, show that there are certain gender differences regarding the weight of specific human rights. The 4th nationwide study *"What Ukrainians Know and Think of Human Rights" (2016-2023)* [20] indicates that women also emphasized the importance of security and morality slightly more often than men [20, p. 16] and paid more attention to the right to marry and to equal rights during marriage (19.5 percent against 14.5 percent) and the right to work and the right to just and favourable conditions of work (50 percent and 45 percent) – which is understandable, since during the wartime women have new economic opportunities and are recruited to replace the men who are mobilized to the military and take up professions and positions that were relatively recently prohibited for women. Men mentioned the importance of the right to liberty and security of person more often than women (68 percent against 63 percent).

Women were more likely than men to refer to violations of the right to social security (12.4 percent and 8 percent respectively) [20, p. 35]. It is well known that the importance of the right to social

security correlates with levels of income. Thus, the right to social security is a priority for almost 65 percent of those below the medium income level, and for 46 percent with higher prosperity [20, p. 23]. Therefore, if this right is a higher priority for women, it can be concluded that the level of women's income is lower than that of men. If statistical data on plaintiffs were available, especially disaggregated by gender, it could be compared to gender ratio of plaintiffs in pension disputes.

Meanwhile, men were more likely to mention violations of the right to freedom and security of person (14.4 percent compared to 8.8 percent) and freedom of movement and choice of place of residence (15.3 percent and 11.1 percent). Moreover, when asked about specific manifestations of the violations, men stated slightly more often than women that they or persons close to them had faced violations of the right to freedom and security of person (15.6 percent and 10.2 percent respectively). Men were also more likely to mention unjustified violence by the police (8.1 percent against 4.9 percent) and violation of rights during mobilization (14.6 percent and 10.7 percent) [20, p. 35].

There are no material differences by respondents' gender in their ideas of effective ways to protect their rights, but certain peculiarities have been observed. Men believe slightly more than women in the effectiveness of the Prosecutor's Office (18 percent against 14.5 percent) and the ECtHR (16.5 percent against 11.5 percent) [20, p. 50]. Women turned out to be more passive and less successful than men in protecting their rights, as less than half of the female respondents did try to protect their rights, but only 15.8 percent of the surveyed succeeded. Survey data once again recorded the tendency that the effectiveness of protection of rights depends primarily on two factors: educational attainment and financial position. Wealthier respondents and those with higher educational attainment succeeded in protecting their rights more often [20, p. 54].

Women demonstrate slightly less awareness than men of their possibility to use of free legal aid services. Thus, only 22.1 percent of female respondents knew where to receive aid (compared to 25.7 percent of men) while 36.3 percent knew nothing of the free legal aid (compared to 34.4 percent of men) [20, p. 60].

However, according to the analysis of applications from clients who received free legal aid (hereinafter referred to as FLA) in 2023 [21], among the applicant registered in the special software of the information and analytical system 344,117 (61 percent) were women and 219,537 (31 percent) – men. 73 percent of applicants on family law issues, that is, three out of four, are women. The situation is almost the same with inheritance law (69 percent), tax law (69 percent), housing law (66 percent) and social security issues (66 percent), as well as with issues related to armed aggression (71 percent): searching for missing persons, reporting a war crime, forced deportation to the Russian Federation, receiving humanitarian aid, identifying the deceased, etc. At the same time, the largest number of applications from men was registered on issues of administrative offenses (69 percent) and criminal law (57 percent).

During 2023, 55,527 applications for free secondary legal aid were registered in the information and analytical system, of which: 30,927 (55.7 percent) were from women and 24,600 (44.3 percent) from men. By type of services received, women most often needed assistance in representing their interests (60 percent), while men were more often provided with defense in cases of administrative offenses and in criminal proceedings (74 percent) [21].

Thus, there is a difference in the legal needs of women and men, and taking into account the gender aspect/perspective is, first of all, "understanding the differences in the status, power, roles and needs of women and men, as well as understanding how gender stereotypes and gender inequality can affect people, their experiences and the ability to interact, including with the justice system" [22].

During the war, old challenges were exacerbated, and new ones emerged. As to new challenges caused by the war and concerning the duty to protect the independence and territorial integrity of the state, it must be admitted, that this constitutional duty is attributed to male gender roles – the author had the opportunity to express her view on this issue in the earlier publication [23]. Since mobilization primarily concerns men of a certain age, the postponement of the fulfillment of the constitutional duty gave rise to a wide range of social relations and disputes. And Ukraine witnessed

a surge – and was amazed by its scale – of adult education of men who entered universities or other higher education institutions to obtain the second or third bachelor, master or postgraduate degree, as this delayed/postponed mobilization.

Men also showed remarkable caregiving abilities and skills. Before the full-scale invasion, men took parental leave predominantly in 2 situations: either they were freelancers and wanted to give their wives or partners the opportunity to pursue careers as well – as described in *"Dad on maternity leave"* (in Ukrainian – *Tato v dekreti*) by Artem Chapai [24], or they were public servicemen who used this opportunity to avoid disciplinary liability or other negative consequences. However, caregiving work was uncommon characteristic of Ukrainian male behavior. Therefore, a desire of thousands of men to care for their relatives, whose health condition has also deteriorated sharply, during the mobilization period should have some explanation.

Back in 2018, during the qualification assessment, a judge interpreted certain provision of the anti-corruption law to justify her non-indication a person in her declaration by saying that "an uncle's wife is not an aunt". Among judgements in new categories of cases caused by martial law legal regime, one can find a case of a serviceman trying to resign from the Armed Forces of Ukraine due to the need to care for his newly-acquired stepfather [25]. The desire of a middle-aged man to care for another man, whom his mother recently married, is touching. This is just one of many examples of new, previously uncharacteristic manifestations of gender behaviour.

After the start of the full-scale war, Ukraine ratified the Istanbul Convention, the Rome Statute of the International Criminal Court, and submitted applications for accession to the EU as well as the Organization for Economic Cooperation and Development (hereinafter referred to as OECD). In October 2022, the OECD recognized Ukraine as a potential member. Some of the requirements for membership in the OECD coincide with those for membership in the EU, therefore, studying the achievements and experience of the OECD is quite timely.

The OECD has developed a series of policy tools, including the *Recommendation on Access to Justice and People-Centred Justice Systems* (hereinafter referred to as "the OECD Recommendation") [26] and the *Framework and Good Practice Principles for People-Centred Justice* [27]. To facilitate the implementation of these policy tools, the OECD also provides technical support through country reviews and organizes Global Roundtables on Equal Access to Justice for the mutual exchange of good practices and lessons learnt among countries.

The notion of the term "people-centricity" in publications of Ukrainian scholars has been understood quite differently than in the OECD Recommendation. While Ukrainian scholars and lawyers consider people-centricity through so-called "normative lenses", primarily, the Art. 3 of the Constitution of Ukraine [28] the OECD Recommendation refers to a human-centred approach that adopts the perspective of people as a starting point and places people at the core when designing, delivering, implementing and evaluating public policies, services and legal procedures within and beyond the justice system; it takes into account the perspectives and needs of specific communities, including marginalised, underserved ones and groups in vulnerable situations (e.g. women, children, indigenous groups, elderly and people with disabilities) [26].

Among the concepts used in this document, there is a number of new ones, previously unknown to domestic legal science and practice, such as "justice pathways", "legal and justice needs" or "people-centred justice data". For example, people-centred justice data refers to data that are collected in line with data protection standards directly from people, businesses and communities, and which relate to the justice problems they face, the impact these problems have, the justice they want and need, their decisions about resolving their justice problems, their experiences with justice services and their ability to obtain a fair outcome [26].

New categories of cases related to war, i.e. war crimes, crimes against national security, civil cases related to compensation for damage caused as a result of the Russian armed aggression, as well as "classic" private-law or public-law disputes under martial law should be studied not only from the point of view of interpreting the legal norms, as done by the Supreme Court [29] but also via gender lenses.

The OECD discussion paper *"Grasping the Justice Gap"* [30], co-produced with Pathfinders and the World Justice Project, proposed three data priorities to strengthen people-centred justice: understand the scope, nature and impact of justice problems; design and deliver people-centred justice systems and services; measure what works, then learn and adapt [30, p. 10-11]. First, to advance access to justice for all, justice actors need to understand who has justice needs, what those needs are, where and when they are experienced, their underlying causes, and their impacts and costs. Second encompasses data that can inform the design and delivery of policies and services to strengthen legal capability, prevent justice problems, and correct systemic bias and injustices. The third envisages that justice sector lags behind other social sectors (including health and education) in evaluating what works to deliver better outcomes for people. Effective and appropriate evaluation of access to justice initiatives is key to adapting strategies, allocating resources and achieving justice for all [30, p. 11].

Access to everything (education, transport, banking, etc.) is not gender neutral – the same is true for access to justice. However, it is important to make the invisible visible through a better collection of gender-disaggregated, gender-relevant and intersectional data and indicators [31, p. 11].

5. Conclusions.

A lot of disputes involving a person have a gender component, which in some cases might be crucial. Therefore, the ability to recognize gender aspects of a particular case becomes a quite important skill for every judge, especially when the term "gender" is not used, or gender component remains invisible since it is not highlighted by a litigant. ECtHR case law such as *Carvalho Pinto* and *Airey* judgements not only helps to master judicial skills to recognize gender-sensitive scenarios and dealing with gender stereotypes but also demonstrates the importance of using statistics and research data while giving judicial reasoning. During the war new types of disputes emerged, some of which highlighted gender-related issues, however the scope of the problem is difficult to understand due to a lack of data. In Ukraine there is no official data on legal and justice needs, however, there are other studies – in particular, nationwide study *"What Ukrainians Know and Think of Human Rights" (2016-2023)* – that, although conducted for a different purpose, show that there are certain gender differences. Considering that since 2022, Ukraine is recognized as a potential member of the OECD, and some of the requirements for membership in the OECD coincide with those for membership in the EU, therefore, it might be suggested to implement an approach from the *OECD Recommendation on Access to Justice and People-Centred Justice Systems*, including such new concepts as "justice pathways", "legal and justice needs" or "people-centred justice data" in order to make Ukrainian judiciary more people-centred as well as gender sensitive.

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