Vilnius University Press

Contents lists available at Vilnius University Press

Teisė
2023, vol. 128, pp. 158–170

ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2023.128.11

Teisės aktualijos / Problems of Law

Access to Justice through the Prism of Judicial Practice and Legal Theory

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This article discusses the access to justice, perceived as a human right. It is argued that this fundamental right is now part of today's *jus cogens*. The idea of *jus cogens* can be a highly beneficial tool for sanctifying the existence of a normative hierarchy in the international arena, which is traditionally viewed as a set of purely horizontal relations between states. As soon as a norm or a principle acquires the character of *jus cogens*, it obliges the entire international community, requiring states to adapt their laws and legal practice.
Keywords: access to justice, judicial authorities, court practice, jus cogens, judicial system.

Teisingumo prieinamumas per teismų praktikos ir teisės teorijos prizmę

Šiame straipsnyje aptariama teisė kreiptis į teismą, suvokiama kaip žmogaus teisė. Teigiama, kad ši pagrindinė teisė dabar yra šių dienų *jus cogens* dalis. *Jus cogens* idėja gali būti labai naudinga priemonė pagrįsti normatyvinės hierarchijos egzistavimą tarptautinėje arenoje, kuri tradiciškai vertinama kaip grynai horizontalių valstybių santykių visuma. Kai tik norma ar principas įgauna *jus cogens* pobūdį, jie įpareigoja visą tarptautinę bendruomenę, reikalaujama, kad valstybės pritaikytų savo įstatymus ir teisinę praktiką.
Pagrindiniai žodžiai: teisė kreiptis į teismą, teisminės institucijos, teismų praktika, *jus cogens*, teismų sistema.

Received: 24/05/2023. **Accepted:** 05/07/2023

Introduction

Access to justice is defined as the ability for individuals and legal entities to seek and obtain fair resolutions to their legal issues through a wide range of legal and court services. These legal services include information, consultation and representation before official (e.g., courts) and alternative dispute resolution mechanisms and enforcement mechanisms. The rule of Law requires impartial and non-discriminatory justice. Without equal access to legal and court services, a significant portion of the population would be excluded and vulnerable.

During the COVID-19 pandemic, many legal aid services that effectively guided users of the justice system were impacted by quarantine measures. The providers of these services were not always equipped to work 'virtually' during the pandemic. However, many countries were able to transition to digital technologies. For example, Greece, Italy, Ireland, Israel, Latvia, Portugal, Slovenia, Switzerland, Romania, Spain, Poland, the United Kingdom, and the United States, among others, conducted fully virtual court proceedings, while Canadian and Mexican mediators used video conferencing software for professional and civil mediation (OCDE, 2020).

Estonia has the most digitized judicial system, which has allowed the country to continue operating even during the COVID-19 pandemic. For example, the Judicial Administration Council, a non-permanent, judge-majority body that plays an important role in the management of the judiciary, issued recommendations to enhance the digitalization of the judiciary during the public health emergency (European Commission, 2020). Other countries have also issued decrees and regulations to facilitate the digitalization of their judicial systems during quarantine. For example, in Spain, Royal Decree 16/2020 favors digital tools for litigation.

While the concern for the access to law and justice is not new or limited to certain geographical or academic boundaries, it is also not unrelated to other politically similar approaches. Despite its specificity, the issue of access to the judiciary and the Law bears close resemblance to other issues of democratization.

1. The concept and properties of 'access to justice'

The access to justice is a fundamental principle of the organization and activity of the courts and the judiciary for every individual. Its foundations are laid out in the provisions of the Constitution of Ukraine: the right to seek protection of human and citizen rights and freedoms directly on the basis of the Constitution of Ukraine is guaranteed (Article 8); the jurisdiction of the courts extends to all legal relations arising in the State (Part 2 of Article 124).

The access to justice is a multi-faceted concept, with its main aspects being organizational-legal and procedural. The accessibility of justice is primarily ensured by an optimal organization of the judicial system, including territorial proximity to the population, clear determination of the court's jurisdiction, the competence of judges, and the stability of the judicial system. Organizational-legal guarantees of the access to justice include: the inadmissibility of courts' refusal to consider cases within their jurisdiction; compliance by courts with reasonable time limits for hearing cases; non-burdening of the court procedure with unnecessary formalities; availability of legal assistance to citizens; accessibility of citizens to court decisions, the obligation to enforce them after they have acquired legal force.

An important component of accessibility to justice is the mechanism of appeal and cassation of court decisions, the right to which is enshrined in Paragraph 8 of Part 3 of Article 129 of the Constitution of Ukraine, with a clear definition of the jurisdiction of the appellate and cassation courts.

Reflecting on the access to justice through the prism of 'procedural filters', one can also consider the requirement provided for in Paragraph 4 of Part 1 of Article 21 of the Law of Ukraine *On Advocacy and Advocacy Activities*, according to which, an advocate is obliged to enhance their professional level while practicing advocacy (Law of Ukraine dated 07/05/2012).

UN General Assembly Resolution 60/147 of 16 December 2005, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, considers accessibility as a necessary characteristic of judicial and administrative mechanisms for the protection of human rights. The above-mentioned Resolution directly points out the need to ensure the fulfillment of international obligations arising from both the right to the access to justice and the right to a fair and impartial trial (Recommendation № R (81)7).

Council of Europe Recommendation № R (81)7 on ways of facilitating the access to justice (May 1981) enshrines the concept of the access to justice and provides measures aimed at facilitating the access to the court, namely: informing the public about the procedure for applying to the court and protecting their interests during the trial; simplification of the process; acceleration of the proceedings; reduction of court costs; creation of special procedures for claims for small amounts and family disputes.

When analyzing the content of the Council of Europe's general recommendation, it can be concluded that the right to the access to justice encompasses various aspects. Among the main ones are: the physical accessibility of courts; the possibility of participating in the proceedings; the access of citizens to legal aid; the access of citizens to information systems and modern technologies; the financial accessibility of judicial procedures; the reasonableness of the time frame for case consideration; the clarity of the language used in judicial proceedings; and the application of procedures that facilitate the access to justice.

Within the axiological understanding of the access to justice, it is not limited to the access to the judiciary and its institutions, but rather to the order of values and basic human rights, without being restricted to procedural legal systems.

Katsuo Watanabe approaches this issue with great decency, stating that "the problem of access to justice cannot be studied within the narrow confines of existing judicial bodies. It is not only about ensuring access to justice as a state institution, but also about ensuring access to a fair legal system" (Watanabe Kazuo, 1988).

The term 'access to justice' is admittedly difficult to define, but it serves to identify the two main purposes of a legal system – by which people can assert their rights and/or resolve their disputes under the auspices of the State, which, above all, must be truly accessible to everyone (Capelletti Mauro, Garth Bryant, 1998).

However, a simple declaration of a right in a legal text is insufficient for it to be implemented, and a citizen must have the confidence and security that they can use it, and that they will have at their disposal mechanisms capable of enforcing and submitting to the legal order, all those who unjustifiably try to obstruct their exercise of rights and guarantees, such mechanisms, in turn, are embodied in the access to justice (Avalcante Tatiana Maria Náufel, 2018).

The rights and guarantees of the access to justice, enshrined in modern constitutions and treaties, have developed as basic rights and guarantees. As well as the right to citizenship, they were imposed through political and social movements in the West (Oliveira Nirlene da Consolação, 2018).

The right of the access to court, or the right to a legal remedy, or, finally, the right to a judge, can be defined as "the right of any physical or legal person, French or foreign, to access justice to defend their rights" (Louis Favoreu et Thierry-Serge Renoux, 1992).

One of the factors that hinder the effective access to justice is the high cost of the process. This problem affects primarily the less privileged segments of the population, since the sums spent on expert fees, lawyers' fees, court expenses, evidence production, and witness testimony significantly impede the outcome of the process (Oliveira Nirlene da Consolação, 2018).

The cost of legal proceedings is further exacerbated in systems that force the loser to bear the burden of submission. "In this case, if a potential plaintiff does not necessarily win – which is an extremely rare fact given the normal uncertainty of the process – he or she must face an even greater risk than that encountered in the United States" (Capelletti Mauro, Garth Bryant. 1998).

Another factor related to economic issues is the dismantling of the judicial system, as material inadequacy implies a loss of quality in the work of its officials. Liberalism and capitalism brought the idea that time is money, so productivity of activity is measured by how quickly it is realized. Thus, a judicial protection organized in a bureaucratic and formalistic structure cannot respond with the desired speed expected by the society.

Therefore, it appears that, in order to make the access to justice effective, many obstacles need to be overcome, and these obstacles are linked to the lack of financial resources, bureaucratization of the process, intimidation of people, and disillusionment with judicial decisions.

In the second half of the 20th century, specifically, in the 1970s, the famous work *Access to Justice* was published, the first volume of which corresponds to the report and general introduction of the research conducted in the so-called Florentine project (Capelletti Mauro, Garth Bryant, 1998). It was already noted there that social justice, in the way that the modern society desires, presupposes effective access. The social dimension of the process was confirmed, thereby indicating the obstacles that need to be overcome, as well as the solutions to the problems identified through the famous waves of renewal.

As for the access to justice, another example that can be cited occurred in the case involving the indigenous inhabitants of Larangeiras do Nhandeara, who, since they did not understand and could not follow the process in the electronic environment, requested the right to see federal judges physically gather at a plenary session, so that their leaders would be allowed to be present in the court process in the city of São Paulo, which led to the Public Defender's Office intervening in the case, as the costs of vulnerability were high, and the request (for the intervention and suspension of the hearing) was accepted by the Federal Regional Court of the Third Region (case No. 5029327-50.2018.4.03.0000) (Gonçalves Filho, 2020).

As for its mandatory (jus cogens) nature of the right to the access to justice, we see that unanimity has not yet been reached. Although ECtHR hesitated to recognize this character in its decision in the Al-Dulimi case, the Inter-American system for the protection of human rights explicitly recognized this character. We have also mentioned that prominent authors have also expressed themselves on this matter. The fact that the right to the access to justice is considered jus cogens means that there are erga omnes obligations that bind all states before the international community, which consists of guaranteeing the access to justice.

The right to an effective legal remedy is enshrined in Article 47 of the Charter, which provides that, in the event of a breach of rights guaranteed by the EU Law, a person may bring an action before a court seeking to have their rights respected.

The Charter of Fundamental Rights of the European Union also states that, in all judicial proceedings relating to the Union Law, everyone is entitled to a fair and public hearing by an independent and impartial tribunal: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

On the other hand, the proposed definition of the right to the access to justice also implies that the voice of justice should be given importance not only to the access to the judicial institution and courts, as the judge's accessibility must be present in all of its aspects. For example, the lack of resources cannot be an obstacle or hindrance. Thus, systems of free legal aid are the main guarantees of this right, especially at times of economic crisis, similar to those we are currently experiencing, in which, without the existence of these guarantees, large groups of people would be deprived of the access to institutions and judicial processes.

In conclusion, we again emphasize the importance of the doctrine devoting time to the theoretical and practical research of the right to the access to justice and that the idea that the right to the access to justice is not only a human right, but that it is part of jus cogens, and that it plays a crucial role in achieving the restoration of rights and justice.

The access to justice generally refers to the process of bringing a case to court, but it can also be obtained or facilitated through such mechanisms as national human rights institutions, equality bodies, ombudsman institutions, and at the EU level, the European Ombudsman (EU-MIDIS Data in Focus Report 5). FRA research shows that the access to justice is problematic in several EU member states due to various factors, including the inadequate awareness of rights and available mechanisms for accessing justice. The Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy and the access to a fair trial, including the right to legal aid for those who lack sufficient resources. The access to justice is also a right that allows individuals to defend their rights and seek redress if they believe that their rights have been violated.

2. The judicial practice of the European Court of Human Rights and national courts

Respect for fundamental rights in the EU must be effective, which means that when a person's rights are violated, they have the right to an effective legal remedy in court. The practice of the ECHR shows that the right to the access to justice includes the right to a decision on the case.

The concept of the 'right to a fair trial' also includes the mandatory and final nature of a court decision, namely: the obligation of the Contracting States to ensure the finality of judicial decisions is understood in the sense that it means that the right of higher courts to review judicial decisions should be used to correct the committed errors, and *not* to conduct new hearings.

The principle of fairness in judicial proceedings is interpreted in certain ECHR decisions as the proper conduct of justice, the right to the access to justice, the equality of the parties, the adversarial nature of the judicial proceedings, and reasoned judicial decisions.

As for the principle of publicity, it is an important element of the right to a fair trial. Article 6 of the Convention provides for the right of every person to have their case heard in public. The public nature of the hearing is aimed at protecting the individual from secret, unaccountable justice. On the other hand, publicity is an important tool which contributes to strengthening trust in the activities of the judicial system. The requirement of publicity applies both to the hearing process and to the pronouncement of the court decision.

On 21 June 2016, the European Court of Human Rights issued its decision in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*. In its ober dictum, the Strasbourg Court referred to the right of the access to justice and its connection to jus cogens (Al-Dulimi and Montana Management Inc. v. Switzerland, 2016).

The events that led to the case began with a series of United Nations Security Council resolutions, which called on states to confiscate property and economic resources located outside of Iraq that belonged to or were linked to the Hussein regime. In August 1990, in compliance with this recommendation, Switzerland (a member of the UN since 2002) confiscated certain real estate assets belonging to al-Dulimi and the company Montana Management Inc., of which it was a part. After the overthrow of the Hussein regime, the head of the UN Security Council adopted Resolution № 1483 (2003), which ordered the international community to confiscate all property associated with the former Iraqi regime. Following this resolution, in 2006, the Swiss government confiscated the seized property belonging to al-Dulimi.

In its decision, the ECtHR ruled that, despite the fact that the Security Council resolution is mandatory, states cannot exempt themselves from guaranteeing the right of access to justice. Thus, the Court held that Switzerland did not take necessary measures for this, and therefore violated Article 6.1 of the ECHR. Accompanying this decision, Portuguese Judge Paulo Pinto de Albuquerque stated in his joint opinion that Article 6.1 of the ECHR is violated when it is shown that there are no adequate alternatives to the access to justice for the protection of rights guaranteed by international human rights instruments (Application № 5809/08, 2016).

Despite the fact that, with this decision, the Strasbourg Court protected the right to the access to justice enshrined in the European Convention on Human Rights, in its ober dictum, it explicitly established that:

"Neither procedural guarantees nor the right to an effective legal remedy contained in Articles 6 and 13 of the ECHR and Article 14 of the ECHR Protocol No. 12 are themselves peremptory norms of international law (jus cogens)."

The availability of the right of appeal in connection with the missed deadline has repeatedly been the subject of consideration by the European Court of Human Rights. Thus, in its decision in the case of *Skoryk v. Ukraine*, the Court noted that, under Article 6 Para. 1 of the Convention, if there is an appellate procedure in the national legal system, the State must ensure that persons within its jurisdiction have the right to appeal with basic guarantees provided by the Convention. The peculiarities of the proceedings under consideration should be taken into account in accordance with the national legal system, as well as the role of the appellate court in them. In the case of *Zubak v. Croatia*, the European Court of Human Rights, considering the general principles regarding the access to higher court and the limitation of ratione valoris (competence based on the value of the subject matter), concluded that Article 6 of the Convention does not require Contracting States to establish appellate or cassation courts, but if such courts exist, the guarantees provided by Article 6 must be respected, including the part where it guarantees the parties to the court process an effective right of the access to court.

Economic barriers to the access to justice may be related to either excessive bail or the inability to obtain legal aid in a procedure that justifies it. In the latter case, although the right to free legal aid is only explicitly guaranteed in criminal cases (Article 3(6)), the European Court considers that the inability to obtain free legal aid in a 'civil' proceeding violates the right to a fair trial if the complexity of the procedure or case makes such aid indispensable, or when the Law provides for the representation by a lawyer (Aerts c/Belgique, 1998), especially as the absence of legal aid may lead to a breach of the equality of arms (Bertuzzi c/France, 2003), particularly when the opponent has significant financial resources to ensure their defense (Steel et Morris c/R.-U., 2005).

Interesting in this regard is the ECHR case *Humenyuk and others v. Ukraine* which concerns the judges of the Supreme Court of Ukraine who complained about the unlawful interference with their judicial functions as a result of the judicial reform and changes to legislation in 2016 (Humenyuk and others v. Ukraine, 2021). In this connection, the applicants complained under Article 6(1) of the Con-

vention regarding a violation of their right to access to a court and under Article 8 of the Convention of a violation of their right to respect for private life.

The traditional approach of the Court to determine whether a 'right' exists to which Article 6 of the Convention applies. This is based on distinguishing between the substantive content of the right in question and the possible procedural obstacles to obtaining judicial protection of that right (see the *Roche v. the United Kingdom* judgment, Paragraph 119). The availability of a person to bring a claim at the national level may depend not only on the substance of the relevant civil law right recognized by national legislation, but also on the existence of procedural barriers that hinder or restrict the possibilities of bringing potential claims before a court (see the *Lupeni Greek Catholic Parish and others v. Romania* judgment, application No. 76943/11, Paragraph 87, of 29 November 2016). The first paragraph of Article 6 of the Convention may be applicable to cases falling within this last category of cases (see the *Petko Petkov v. Bulgaria* judgment, application No. 2834/06, Paragraph 26, of 19 February 2013, with further reference to the *Al-Adsani v. the United Kingdom* [GC] judgment, application No. 35763/97, Paragraph 47, ECHR 2001-XII).

In determining whether there was a 'right' within the meaning of Paragraph 1 of Article 6 of the Convention, the Court should only ascertain whether the arguments of the applicants were sufficiently substantiated and not whether they would necessarily have succeeded had they had the access to a court (see, inter alia, *Neves e Silva v. Portugal*, judgment of 27 April 1989, Series A No. 153-A, Paragraph 37). In doing so, the Court must take into account the wording of the relevant provisions of the domestic law and their interpretation by national courts, if such exist(s) (see *Yanakiev v. Bulgaria*, application No. 40476/98, Paragraph 58, 10 August 2006). Nevertheless, the concept of 'civil rights and obligations' is an autonomous concept arising from the Convention, and it cannot be interpreted solely by reference to the national law of the respondent State (see *Naït-Liman v. Switzerland* [GC], No. 51357/07, Paragraph 106, 15 March 2018). Accordingly, in assessing whether there was a 'right' on which the applicant could legitimately rely, the Court considers the provisions of the national law only as a starting point (see, among many other authorities, *Denisov v. Ukraine*, Paragraph 45) and may refer to international norms for the assessment or better interpretation of the existence of a right (see, for example, *Enea v. Italy*, No. 74912/01, Paragraph 101, ECHR 2009; *Boulois v. Luxembourg*, No. 37575/04, Paragraph 102, ECHR 2012, and *Naït-Liman v. Switzerland*, cited above, Paragraph 108).

When assessing whether the denial of the access to justice was based on objective grounds in the interests of the State, it is not sufficient to establish that the relevant state official exercises powers in the sphere of the State authority, or that there exists a "special duty of loyalty and trust" between the state official and the State as an employer. Rather, it is the State that must prove that the subject matter of the dispute is related to the exercise of State authority, or that it calls into question the special duty of loyalty and trust" between the state official and the State as an employer (see the above mentioned decision in the case of *Vilho Eskelinen and others v. Finland*, Paragraph 62).

The court reiterates that the right of the access to a court is not absolute and may be subject to limitations which, however, must not restrict or reduce the access afforded to an individual in such a way or to such an extent that the very essence of the right is impaired. Moreover, a limitation will not be compatible with Article 6 § 1 of the Convention if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Markovic and others v. Italy* [GC], No. 1398/03, § 99, ECHR 2006-XIV, and *Stanev v. Bulgaria* [GC], No. 36760/06, § 230, ECHR 2012, and the aforementioned case of *Baka v. Hungary*, § 120). The Court considers that the right of the access to a court is one of the fundamental procedural rights for the protection of members of the judiciary and that, in principle,

the applicants should have had direct access to a court in connection with their allegations of unlawful interference with their judicial functions. In this respect, the possibility of instituting an institutional action, similar to that taken by the Plenum of the Supreme Court of Ukraine in this case, could have been an additional guarantee, but it could not substitute the right of a member of the judiciary to bring an action before a court as a natural person.

In the case of *Markovic and others v. Italy*, the applicants complained that they had been deprived of the access to court (Markovic and others v. Italy, 2006). They argued about a violation of Article 6 of the Convention (right to a fair trial) in conjunction with Article 1 of the Convention (obligation to respect human rights). The Government contended that the applicants had not exhausted domestic remedies as they had not brought proceedings against NATO. The Court found the Government's position unconvincing, as no successful examples were cited of such proceedings having been brought against NATO. Therefore, it was unlikely that the applicants would have better prospects of success in proceedings against NATO than those brought against Italy. The fact that the applicants' claims had been admissible in Italian courts showed, in the Court's view, a 'jurisdictional link' in the sense of Article 1 of the Convention, which ensured the application of Article 6 of the Convention.

The Court reminded that it is the competence of domestic authorities to apply and interpret the provisions of the domestic law. This means that such authorities are empowered to decide which international provisions the relevant national legislation refers to – customary international law or specific international agreements. Therefore, the Court's powers in such cases are limited to assessing whether the consequences of the relevant domestic interpretation are in line with the provisions of the Convention.

The court noted that the comments made by the appellate court on specific international treaties cited by the claimants were not erroneous. Furthermore, provisions of national legislation provided for the possibility of prior resolution of the jurisdictional issue. Therefore, as a result of the interpretation of the relevant provisions of the national law and the application of the corresponding provisions of international treaties by the appellate court, a specific legal position was formulated. The court noted that this position did not lead to the conclusion that the domestic law granted the claimants the right to compensation in this case.

According to the court, the decision of the appellate court regarding jurisdiction does not indicate its recognition of state immunity. This decision can be regarded as the determination of the boundaries of the courts' powers in considering matters of a State's foreign policy, including decisions regarding war.

Therefore, the court concluded that the claimants' complaints were justifiably considered in the light of the domestic legal principles and norms regarding liability for damages. The claimants were initially granted access to the court. However, this access was later restricted in that they were not provided with a decision on the substance of the case.

Given the above, the Court ruled that there was no violation of Article 6 of the Convention.

In the case of *Bertuzzi v. France*, despite the State recognizing the applicant's right to free legal aid, three consecutive lawyers appointed to the case refused to provide legal assistance due to personal connections with the respondent, who was also a lawyer, which led to the impossibility of the applicant accessing the court (Bertuzzi v. France, 2003). In the case of *Saoud v. France*, a violation of the right of access to court was found when free legal aid was provided only in the court of cassation after the deadline for filing pleadings on the merits of the case had expired, which made it impossible for the applicant's interests to be effectively represented (Saoud v. France, 2007).

The Constitutional Court of Ukraine has repeatedly investigated the issue of 'access to justice' in its practice. Thus, the right to judicial protection does not deprive legal entities of the possibility of pre-trial settlement of disputes. This can be provided for by a civil law contract, when the parties vol-

untarily choose a means of protecting their rights. Pre-trial settlement of a dispute may also take place at the request of any of the participants in the legal relationship and in the absence of reservations in the contract regarding such a settlement (Decision of the Constitutional Court of Ukraine dated July 9, 2002 No. 15-рп/2002). The provision of Part 2 of Article 124 of the Constitution of Ukraine regarding the extension of the jurisdiction of courts to all legal relationships arising in the State, in the aspect of a constitutional appeal, should be understood so that the right of a person (a citizen of Ukraine, a foreigner, a stateless person, a legal entity) to apply to a court for the settlement of a dispute cannot be limited by Law or other legal acts. The establishment of the pre-trial settlement of a dispute by Law or contract at the will of the parties to the legal relationship does not restrict the jurisdiction of the courts and the right to judicial protection.

The right of a person to judicial protection can also be realized by means of appealing the decisions of first instance courts, since their review in this manner guarantees the restoration of violated human and citizen rights. Therefore, the right to appeal court decisions in the context of the first and second parts of Article 55 and Clause 8 of the third part of Article 129 of the Constitution of Ukraine is an integral part of the right of everyone to appeal to any court in accordance with the Law (Decision of the Constitutional Court of Ukraine dated July 8, 2010 No. 18-rp/2010). No one can be restricted in the right to the access to justice, which includes the possibility for a person to initiate a judicial proceeding and to take direct part in the court process, or be deprived of such a right.

The realization of the right to judicial protection is inevitably associated with the time limits within which the plaintiff can apply to the court for the protection of their violated right (Decision of the Constitutional Court of Ukraine dated October 15, 2013 No. 8-рп/2013). The main regulatory act that regulates the time limits for applying to the court for the resolution of disputes in the civil procedure is the Civil Code of Ukraine (hereinafter – CC of Ukraine) which establishes the institution of prescription and contains provisions regarding the time limits within which a person can apply to the court with a claim for the protection of their right or interest.

Upon studying the practice of the European Court of Human Rights, the Constitutional Court of Ukraine concluded that the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 would be illusory if the legal system of the State allowed for final and binding court decisions not to be enforced to the detriment of one of the parties. It is the responsibility of the State to create a system for the enforcement of court decisions that is effective both in theory and in practice, and which guarantees their implementation without undue delay. Effective access to justice includes the right to have court decisions executed without unjustified delays. The State and its organs are responsible for the complete and timely execution of court decisions rendered against them (Paragraph 11 of Subsection 2.1 of Point 2 of the reasoning section of Decision No. 2-r(II)/2019 of May 15, 2019).

In Decision No. 652 of December 15, 2022, the Constitutional Court of Romania examined the issue of the access to justice. The author of the decision, in justifying the exception to unconstitutionality, essentially asserts that the criticized legal provisions establishing special administrative jurisdiction obstruct free access to justice for the beneficiary of European funds, to whom a financial correction has been applied through the submission of a report on the identification of irregularities and the establishment of budgetary requirements, with regard to their ability to seek annulment of this report in court immediately and within an optimal and foreseeable period after filing an objection to its cancellation, to the authority that issued the act, but received no response within the 30-day period provided for in Paragraph 50 of Article 1 of Government Emergency Ordinance No. 2011/<>.

The Supreme Court of Cassation – administrative-fiscal section – believes that there are no limitations on the principle of free access to justice in the criticized text. The appellant's goal, in fact, is to exclude unconstitutionality so that the Constitutional Court can interpret the legal provisions in the desired sense. The administrative procedure preceding the court's investiture does not violate the right to free access to justice because it establishes a way to remedy the possible illegality of the disputed administrative act by reviewing it by the body that issues the debt document that can cancel its act, thereby allowing the injured party to protect their right or legitimate interest administratively, while avoiding recourse to court. According to Decision № 452 of the Constitutional Court of December 2, 2003, free access to justice means that any person may submit a case to court if he/she believes that their rights, freedoms, or legitimate interests have been violated and not that such access cannot be conditioned. The fact that the legislative body established that only decisions regulating the challenge of the title of the claim may be appealed to the tax administrative court does not violate the right to defense or the right to a fair trial since only the legislative body must establish the procedures developed in general. To ensure faster resolution of individual categories of disputes, overload of courts with cases that can be resolved in this way, while avoiding court costs, and the legislator may establish, by taking into account special situations, special procedural rules, the principle of the free access to justice which provides unlimited possibilities for the interested parties to use these procedures in the forms and ways established by Law. At the same time, in Paragraphs 20 and 21 of Decision № 19 of January 21, 2020, the Court ruled that the establishment of a prior administrative procedure, such as the one regulated by the provisions of the contested law, was also considered in its case law, through which it established that this does not constitute a violation of the right to the access to justice.

Conclusions

Judicial protection of human rights and freedoms should be considered as a form of State protection of human rights and freedoms, and it is the State that takes on this responsibility. The right to judicial protection entails specific guarantees for effective restoration of rights through the administration of justice. The constitutional right to judicial protection is inalienable and inviolable. Every person, including those accused in criminal cases, has the right to justice that meets the requirements of fairness.

Therefore, according to the international and European human rights Law, the concept of the access to justice obliges states to ensure the right of every person to seek recourse to a court (or an alternative dispute resolution body under certain circumstances) so that to obtain legal protection in case their rights have been violated.

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Access to Justice through the Prism of Judicial Practice and Legal Theory

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S u m m a r y

The relevance of the issue of accessibility to justice is due to its high significance, as well as the importance of the effective resolution of legal disputes arising between various subjects of procedural relations. Activists of the movement for the access to justice, who, despite not being associated with any common organization are in a unified form, are seeking to build a more humane legal and procedural system. They are continuing to study, research, and promote new means of accessibility to justice.

Only the standardization of procedures, the creation of 'alternative' spaces for conflict resolution, an increase of the popularity of legal consulting bureaus, among many other achievements, have not overcome the terrible economic, cultural, and psychological limitations to which the vast majority of the population is subjected, despite their reductions.

The fight for effective access to human rights goes far beyond the legal framework. Only joint and progressive actions, guided by pluralism and logic, can face and perhaps overcome the ever-increasing and complex challenges that arise in the field of citizenship in the 'postmodern' era.

This article discusses the access to justice conceived as a human right. It is argued that this fundamental right is now part of today's *jus cogens*. The idea of *jus cogens* can be a highly useful tool for sanctifying the existence of a normative hierarchy in the international arena, which is traditionally viewed as a set of purely horizontal relations between states. As soon as a norm or a principle has acquired the character of *jus cogens*, it obliges the entire international community, thus requiring states to adapt their laws and legal practices.

On the other hand, the undeniable relationship between the access to justice and the practical protection of human rights exists, since the realization of these fundamental rights depends on such an access to justice. Although the national and international court practices in recent years have strengthened the content of the right to the access to justice, they have not yet finally expressed their position on this issue. The access to justice, given the interdisciplinary nature of the problem, requires, first of all, a thorough analysis of legal literature related to the study of the accessibility of justice. Various aspects of the content of the access to justice in the conditions of improving the organizational and legal forms of the state and legal institutions are the subject of analysis by both foreign and domestic scholars.

Teisingumo prieinamumas per teismų praktikos ir teisės teorijos prizmę

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S a n t r a u k a

Teisingumo prieinamumo klausimo aktualumą lemia didelė jo reikšmė, taip pat efektyvaus teisinių ginčų, kylančių tarp įvairių procesinių santykių subjektų, sprendimo svarba. Judėjimo už teisę kreiptis į teismą aktyvistai, kurie, nors ir nėra susiję su jokia bendra organizacija, vieningai siekia sukurti humaniškesnę teisinę ir procedūrinę sistemą, toliau studijuoja, tyrinėja, skatina naujas teisingumo prieinamumo priemones.

Tik procedūrų standartizavimas, „alternatyvių" konfliktų sprendimo erdvių kūrimas, teisinių konsultacijų biurų populiarumo didinimas, be daugelio kitų laimėjimų, neįveikė esminių ekonominių, kultūrinių ir psichologinių apribojimų, kuriems turi paklusti didžioji dauguma gyventojų, nors tų apribojimų skaičius sumažėjo.

Kova už veiksmingą prieigą prie žmogaus teisių peržengia teisinės sistemos ribas. Tik bendri ir progresyvūs veiksmai, vadovaujami pliuralizmo ir logikos, gali susidurti ir galbūt įveikti vis didėjančius ir sudėtingus iššūkius, kylančius pilietiškumo srityje „postmodernizmo" epochoje.

Šiame straipsnyje aptariama teisė kreiptis į teismą, suvokiama kaip žmogaus teisė. Teigiama, kad ši pagrindinė teisė dabar yra šių dienų *jus cogens* dalis. *Jus cogens* idėja gali būti labai naudinga priemonė pagrįsti normatyvinės hierarchijos

egzistavimą tarptautinėje arenoje, kuri tradiciškai vertinama kaip grynai horizontalių valstybių santykių visuma. Kai tik norma ar principas įgauna *jus cogens* pobūdį, jie įpareigoja visą tarptautinę bendruomenę, reikalaujama, kad valstybės pritaikytų savo įstatymus ir teisinę praktiką.

Kita vertus, egzistuoja neginčijamas ryšys tarp teisės kreiptis į teismą ir praktinės žmogaus teisių apsaugos, nes nuo tokios galimybės kreiptis į teismą priklauso šių pagrindinių teisių įgyvendinimas. Nors pastarųjų metų nacionalinė ir tarptautinė teismų praktika sustiprino teisės kreiptis į teismą turinį, jie dar nėra galutinai išsakę savo pozicijos šiuo klausimu. Galimybė kreiptis į teismą, atsižvelgiant į tarpdisciplininį problemos pobūdį, pirmiausia reikalauja nuodugnios teisinės literatūros, susijusios su teisingumo prieinamumo tyrimu, analizės. Įvairūs teisės kreiptis į teismą turinio aspektai valstybės ir teisinių institucijų organizacinių ir teisinių formų tobulinimo sąlygomis yra tiek užsienio, tiek šalies mokslininkų analizės objektas.

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