

Research Article

THE ROLE OF LEGAL CERTAINTY PRINCIPLE IN PROVISION OF ACCESS TO JUSTICE IN UKRAINE IN WARTIME

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Summary: 1. Introduction. – 2. Access to justice and access to court: challenges caused by war. – 3. Approaches to the principle of legal certainty. – 4. Views of Ukrainian scholars on the principle of legal certainty. – 5. Coordination of legal certainty and access to justice. – 5.1 *Access to justice as an element of the rule of law along with legal certainty.* – 5.2 *Access to justice as a way of ensuring legal certainty.* – 5.3 *Access to justice and the influence of legal certainty requirements.* – 6. Conclusion.

Keywords: legal certainty, rule of law, access to justice, access to court, legitimate expectations.

ABSTRACT

Background: *The paper offers the analysis of implementation of legal certainty principle and access to justice in Ukraine. Both are regarded in connection to the rule of law principle; their coordination is shown in cases when the application of rule of law is required to patch the holes of imperfect judicial system facing the challenges of the ongoing war.*

Methods: *The methods of legal reasoning and analysis are used to present the main approaches to legal certainty principle as well as to the access to justice. Additionally, with the help of*

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comparative method their meaning and influence on the legal practice are established. The method of analogy is used to predict the possible solutions in order to improve access to justice in Ukraine.

Results and Conclusions: Legal certainty is an element of the rule of law, it provides predictability in legal regulation, the clarity of legal norms, and demands the appropriate way of legal acts enforcement as well as prohibits retroactivity. It challenges respect to the legitimate expectations and provides stability in legal regulation. The improvement in the application of the right to access to justice is beneficial for the legal certainty and vice versa. When legal certainty is violated due to the gap in legislation, unclarity of legal norms or controversy of legislative provisions and violated rights of the claimant could be restored, if the right of access to court is fully guaranteed. It is stated that *res judicata*, a requirement for legal certainty is a demand that is also common to access to justice.

1 INTRODUCTION

Nowadays, legal principles and concepts have got not only particularly legal but also some social and philosophical sense. Being established mostly after wars or as a result of fighting for the rights of the social group, evaluated within years of application, these concepts turned into values the democratic society acknowledges. Access to justice has been contingent historically upon gender, race, disability, class and sexual identity² and still has an impact of inequity caused by delays in court procedures, significant costs and ineffectiveness³. This affects as well the rule of law, especially during the war, when inequity of social groups is evident due to their location, income, physical disability and implementation of the legal principles that requires additional efforts from the government.

The principle of legal certainty is under the pressure too. The common reasons for this are the necessity to set out legal acts in short terms as well as a problem of making it available to all the citizens, who sometimes do not have even access to media and public information, makes requirement of legal certainty sometimes frustrating. It is evident, that stability and reliability produced by legal regulation are harmed, so in these circumstances the attention should be paid to proper precision and clarity of legal provisions, stability of legal regulation to raise the confidence in the law within the society and to support the economic and entrepreneurial planning with respect to legitimate expectations.

Being proclaimed and recognized, the legal principles need to be practically applied which requires from each country their own legal framework, administration in the practical sphere, especially by the authorities. One of the rights that are in danger during the period of war in Ukraine now is the right to access to court, that forms the part of the broader concept of access to justice. Due to the occupation of some territories and inability to administer justice there, the Supreme Court changed the jurisdiction of almost 100 courts⁴. Although the application can be made to the court electronically, the delays in trials are strengthened by the raise of the cases on the adjacent territories. Parties of the trial, in case of being called for military service, can not participate, as the result the delays can be significant.

2 C Backhouse 'What Is Access to Justice?' (2005) J Bass, WA Bogart and F H Zemans, eds. Access to Justice for a New Century: The Way Forward Toronto: Law Society of Upper Canada (2005) 113-146, 126

3 MS Galanter, K Jayanth, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55 Hastings Law Journal 789

4 AY Gerich 'Access to administrative justice in the times of war' (2022) 5 Electronical scientific edition 'Analytical comparative jurisprudence' 227-232, 229

Legal certainty requires in these circumstances norms to be clearly set out on how to observe the rights equally to those, to those having diverse needs. Amendments introduced to separate acts enacted for the period of war, that are applied together with a legal act on one hand, made judicial system function despite the threats, but on the other hand, it caused some controversies, unclarity and could be harmful for legitimate expectations. Evidently, these acts were set out during a short period of time and the practice of their application in regard to the basic rights and principles will be a question to examine further. The Act of the Council of The Judges of Ukraine set out the regulations on judgment during the war several times, that are applied by the courts together with the procedural codes and other legislation⁵.

Obviously, the wartime creates more threats to the legal order than peaceful times do, so the challenges for the judicial system are multiplied and vary from the danger to the judge's life and safety to the problems with informing parties about the hearing and relying on the evidence that are hard to get direct access to.

Despite a significant difference of elements which forms the right to access to justice and access to court, the requirements of international and European law oblige the states to guarantee the access to justice in any circumstances. And the rule of law and legal certainty requires remain unchangeable, even though during the war their fulfilment needs more efforts.

The adoption of democratic principles and their connection with the Ukrainian legal reality is an extremely difficult task. The concept of the access to justice was formed in the 1970s; the legal certainty principle was recognized earlier, while Ukraine was still under the rule of Soviet regulatory regime with a normativistic approach to understanding the legal phenomena. That prevented Ukrainian society to fully understand the democratic concepts straight away, as their significant meaning was hidden in a rather "condensed" formulation. Therefore, the reception of these complex and broad principles is not a complete process in Ukraine, because their understanding requires not only an analysis of the normative legal act, in which the name of the principle is noted, but also an understanding of the value that constitutes the essence of legal regulation, as well as contributes to the establishment of justice. It is important in this process to understand the origin of the principle, its functional role and place among the other principles of law.

As noted by M. V. Tertishnik,

“with the implementation of the civilizational choice the idea of the rule of law, the system of ideological ideas related to the principles of law is at the stage of development, incorporating the legal positions defined in international legal acts and decisions of the European Court of Human Rights, as well as embodying the ideas of natural law and current ideological ideas of legal science.”⁶

The attempt to finding the hidden meaning of these concepts through the analysis of the term itself did not justify itself. As a result, the understanding of the content of these concepts continues to be discussed in scientific circles for years. Decisive for understanding of these concepts was the practice of the ECHR, which began to be applied in resolving court cases in Ukraine, where such principles were given a deep and comprehensive explanation.

5 The Act of the Council of The Judges of Ukraine №23 05.08.2022 <https://zakon.rada.gov.ua/rada/show/v0023414-22#Text>; The Act of the Council of The Judges of Ukraine №10 14.03.2022 <https://zakon.rada.gov.ua/rada/show/v0010414-22#n3>; Recommendations of the Head of the Supreme Court of Ukraine № 6/0/9-22 13.03.2022

6 MV Tertishnik 'Principles of law and strategy and tactics of judicial and legal reform' (2016) 6 *Pravo y suspilstvo* 20-26, 21

2 ACCESS TO JUSTICE AND ACCESS TO COURT: CHALLENGES CAUSED BY WAR

Being in the weak position compared to the authority powers that sets out and exercises legal acts, a person has an access to justice to counterbalance and to getting protection against the violation of their his rights. Simply the proclamation of this right is not enough to achieve such a balance, as due to the diversity caused by economy, territorial and educational criteria people have different needs to fulfil this right. The ancestors of the access to justice underlined its “effectiveness” as a main criterion and the right to access to justice “the most basic human right of a system which purports to guarantee legal rights”⁷. Effectiveness shows how successfully the state acts to provide a way to overlap the existing barriers formed by social inequity to bring the dispute to the court. As pointed out, the access to justice that is commonly regarded similarly to access to court has been determined as having broader meaning⁸. Evidently, the democratic standards that are accepted by different countries equally, form the need to guarantee the access to justice despite social and economic difficulties that distinguish them.

According to the number of applications to the ECHR⁹ Ukraine was not successful in achieving a good level of this effectiveness, obviously, in the times of war the diversity and challenges to get equal access to justice increased. The huge number of damages that occurred during the past year of war form an intense pressure on the judicial system and on government to find the effective mechanism to cope with it. Legal aid, costs to cover the expertise of the damages and to assist the trial procedure could be a challenge for many of those who lost their property and were injured. Deoccupied territories suffer from the lack of military servants to make records of violation. Even though the access to justice is recognized and the access to court proclaimed, it is still a challenge to get the renewal of rights in court. The terms of the consideration of cases, effectiveness of the court decisions and their execution, primary legal aid and court fees are the most vulnerable components among those the access to justice in a war-time encloses.

The standards in a democratic state governed by the rule of law put forward the same requirements for compliance with the right of access to justice and link it with other legal rights and principles, one of them – the legal certainty principle will be the subject of consideration in the article. When the cases of ECHR are analyzed there usually appear more than one principle violated in addition to the access to justice, so we will concentrate on the practice when access to justice and legal certainty are put together and will find out what are the frequent circumstances when both of them are violated and will propose solutions on how to avoid this in future.

3 APPROACHES TO THE PRINCIPLE OF LEGAL CERTAINTY

The theory of legal certainty is controversial. On one hand, we regard law as a certain established rule from the very beginning of its history. Even in ancient times the legal rules were set out in a clear way and were made available to the public in advance to understand and execute. These simple rules were not enough to achieve the goals of rule of law, so a

7 M Cappelletti, B Garth, N Trocker ‘Access to justice: Comparative General Report’ *The Rabel Journal of Comparative and International Private Law* (1976) 40. Jahrg., H. 3/4, Der Schutz Des Schwächeren in Recht 669-717, 672-673

8 E Hurter ‘Access to justice: to dream an impossible dream’ (2011) 44 3 *The Comparative and International Law Journal of South Africa* 408-427, 408

9 A Kovalchuk, Yu Kotsubinska ‘Access to justice: modern problems and perspectives’ (2020) <http://ispp.org.ua/wp-content/uploads/2021/02/kr-stil_theses_2020_12_10.pdf#page=72> accessed 01 March 2023

wider concept of legal certainty including respect to legitimate expectations, prohibition of the retroactivity, *res judicata* were included.

Today the concept of legal certainty includes two blocks of criteria 1) the rules set out by the state should be clear, precise and predictable, foreseeable, uncontroversial, when applied; 2) it is an umbrella for legitimate expectations, vested rights and non-retroactivity¹⁰. The other approach to dividing the demands of legal certainty into groups is to distinguish its formal and substantive aspect. Formal approach requires clarity, stability of legal norms, predictability of its implementation, so that the result of applying the norm will be foreseeable and the person can predict the outcome of her legal actions with the desired certainty. Substantive legal certainty requires that judicial decisions and legal rules form the predictability and are accepted by the community¹¹. The criteria of the substantive approach are mentioned as *res judicata*, respect to legitimate expectations and stability of legal regulations.

Legal certainty refers to both, law itself and judicial decisions, that are made on case-by-case method applying the law to a particular situation. The idea in the society of how law is executed in practice is formed by its application by authorities and judges, that becomes a litmus test for the person to what the consequences of their actions in the same circumstances would be. This formed the practice when legal certainty was derived from the judgements of Ukrainian and internationally recognized courts. In procedural doctrine the legal certainty principle is regarded from the procedural perspective, that limits its scope.

Legal certainty is frequently shown as a procedural principle, the prominent position of this principle is pointed out for the international civil procedure¹², in regard of uniformity of decisions¹³, newly discovered circumstances¹⁴. Therefore the legal certainty principle is of high importance for the procedural law, we can not deny its global impact and limit the use of this principle just to the procedural aspect. Even though it is applied for the procedural purposes it has a strong connection with the substantive law. "In case of litigation the substantive law can only be realised and concretised by the judgement, which is the result of civil proceedings"¹⁵.

The key idea of legal certainty is predictability based on the legal provisions, that is achieved by the demands to the quality of legal acts on one hand and the consistency of executing legal acts by authorities and their application by the court on the other. The way the legal provision is interpreted in the society together with the judgments and practice forms the stability for both a single person and an authority. Furthermore, the latter presupposes the application of a rather unique interpretation in terms of qualifying the action as legal or illegal one. If the person is removed from the application process, and their position and understanding of legal provisions is meaningless, the power not only to execute but to interpret the rule will remain the privilege of the authority. The legitimate expectations that are formed as a result of legal practise should be respected. The obligation not to break

- 10 J van Meerbeek 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 *European Law Review* 274-288, 280
- 11 E Paunio, 'Beyond Predictability – reflections on Legal Certainty and the Discourse Theory of Law in the Eu Legal Order' (2009) 11 (10) *German Law Journal* 1469-1493 1471
- 12 G Biagioni, 'Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children`s Fundamental Rights' (2019) 4 (1) 285-295 <<https://www.europeanpapers.eu/es/europeanforum/jurisdiction-parental-responsibility-between-legal-certainty-and-childrens-rights>>
- 13 C Gabarini Lages, LA Chamon Junior, 'On legal certainty and uniformity decisions in the new civil procedure code in the light of Brazilian constitutional process model' (2017) 7 *Braz. J. PP* 286
- 14 H Urazova, V Yanishen, L Baranova, 'Who is the owner? Newly discovered circumstances and the principle of legal certainty in a single case study' (2022 February) *Access to Justice in Eastern Europe* 193- 202
- 15 WJ Habscheid 'The fundamental principles of the law of civil procedure' (1984) 17(1) *The Comparative and International Law Journal of South Africa* 1-31, 8

the constancy in applying legal norms in the similar circumstances forms the measures for the authorities, especially in the cases they obtain a discretion. Benefits of the predictability formed on the basis of legal certainty in a better investment environment and reliability, as a person or entity could act and make business with less risk and expected results. “Legal certainty should operate mainly for the benefit of the individual and not for the powers”¹⁶ which shows its direct link to the rule of law principle.

4 VIEWS OF UKRAINIAN SCHOLARS ON THE PRINCIPLE OF LEGAL CERTAINTY

The legal certainty principle appeared in Ukrainian legal doctrine as a part of researches of rule of law and implementation of democratic standards into Ukrainian legislation. S. Pogrebnyak points out that

“under the rule of law, legal norms and their sources (regulatory acts, etc.) must comply with the principle of legal certainty. This principle, sometimes is referred to as “legal security”, or legal stability (Rechtssicherheit in German) is a broad concept based on predictability.”¹⁷

Although it is hard to reach an absolute certainty, due to a number of circumstances, the clarity can be achieved for a particular situation with the judicial practice¹⁸. Clarity refers not only to a particular legal provision or article, it is the quality of the regulation itself – absence of controversial positions, gaps in legal regulation, uncertain and doubtful meaning of the words incorporated in law. Frequent changes to the regulation can cause uncertainty in their application for a long-termed contracts. The low level of clarity results in the situation when a person acting bona fide can not clearly understand how to act and what decisions comply with legal provisions. So, access to justice and the possibility of bringing the case to the court could obtain legal certainty in such circumstances.

Although the legal certainty principle is not enshrined in the Constituent treaties, it is recognized as one of the general principles of European law. The same approach is shown by Ukrainian researchers – despite the fact that legal certainty is not directly formulated, it is widely applied by the courts in Ukraine that had inherited the standards of the ECHR.

Ukrainian legal positions on legal certainty can be divided into two groups. The first one demonstrates a general approach, regarding legal certainty as a theoretical principle in connection and coordination with other principles that together have an aim to achieve high democratic standards and provide the rule of law. The second one is presented by branch law studies regarding how legal certainty is applied within a particular legal sphere. The second approach is usually narrow, as the scope of these studies is much more limited and precise, so it covers just some aspects of legal certainty. That can cause a confusion for the reader to equalize legal certainty to one of several aspects of it. To avoid this misunderstanding it is recommended to provide a meaning of the principle of legal certainty together with its components and to underline that just some of them are regarded in particular. For example, *res judicata* is a key element of legal certainty that is of special importance for the civil process, but it is mentioned together with other elements – clarity of legal norms, accessibility of court decisions, stability of legal acts, consistency

16 J van Meerbeeck ‘The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust’ (2016) 2 European Law Review 274-288, 276

17 S Pogrebnyak ‘The principle of legal certainty as a general principle of law’ (2010) Lviv Galitsky drukar p 490-491

18 MI Kozyubra ‘The rule of law and Ukraine’ (2012) 1-2 Pravo Ukrainy 49

of legal provisions, legitimate expectations, principle of *nullum crimen sine lege*, *nullum poena sine lege* and *res judicata*.¹⁹

5 COORDINATION OF LEGAL CERTAINTY AND ACCESS TO JUSTICE

It would be necessary to mention that both of the concepts do not have a fixed meaning, as they embody a status to achieve and a number of elements to use for this purpose. The choice of which element to use depends on the obstacles that prevent from establishing access to justice and legal certainty. Sometimes they can work together to get the necessary result and it will be shown how this coordination takes place and how it can be beneficial in achieving the purposes of both principles.

Access to justice is mentioned in its procedural (more narrow) and substantive (broader) ways. The procedural aspect requires the existence of the procedural means for securing vested rights which are commonly embodied in the right to access to court and bringing the dispute to it. Substantive justice requires direct and indirect acts to be made, the first one refers to individuals, the second one – to the system itself. This means that substantive access to justice for an individual can appear in access to court, seeking the outcome that results in judicial procedure – to protect their rights. In this aspect access to justice is connected with the fair trial and access to court and judicial protection. The substantive justice in its indirect meaning requires actions to improve access to justice by setting out new legislation, improving the procedure, overlapping the difficulties existing for the system, for example attempts to shorten the duration of the process²⁰.

Regarding the components of access to justice M. Savchyn determines the following: access to legal aid and reasonable court fees, pre-trial procedures and mediation, the duration of the trial, appeal of the court decisions, effectiveness of execution of the court decisions. To show the connection of access to justice with legal certainty the scholar underlines that application of the *res judicata* is derived from the legitimacy of public powers and legal certainty.²¹

Occasionally, the principles of access to justice and legal certainty are regarded together in the court decisions of ECHR. In the case *Kunert v. Poland* both principles access to court (right to appeal which is the component of the access to justice) and the principle of legal certainty are applied. The applicant faced difficulties in proper filling the appeal application because at this time he was imprisoned and could not get the copy of his primary demands. To his mind, that prevented him from appealing the court decision which violated his right to fair trial, to access to court; in addition to it, he was not given legal aid on that stage of the trial to formulate his appeal application. Although, the court ruled in favour of Poland it was mentioned that “the rules governing the formal steps are to be taken and the time-

19 T Tzuvina, 'Res judicata principle for the civil procedure'(2019) 1 *Pidpriyemnistvo, gospodarstvo y parvo*38-44, 38

20 JH Gerards, LR Glas, 'Access to justice in the European Convention on Human Rights System' (2017) 35(1) *Netherlands Quarterly of human Rights* 11-30 14

21 M Savchyn 'Dirrect effect of the Constitution of Ukraine in the focus of access to justice and judicial control on execution of court decisions' (2022) *Naukoviy Visvyk Uzgorodskogo Nazionalnogo Universitetu (Pravo)* 146-155 148

limits are to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty”²².

The other case, we found reasonable to mention, is the case of *Kurochenko and Zolotuchin v. Ukraine*. The applicants were previously sentenced to punishment but all the materials of the trial appeared to be left on the occupied territories, that prevented the appeal court from possibility of hearing the case due to the absence of the necessary documents. Although ECHR refused to recognize violation of the Article 5, it recognized that the efforts of the state to fulfil the requirements of the Article 6 were not enough. The uncertainty referred to the legal status of the applicant as he remained accused, in the absence of the clear instructions to the court and prosecutor’s office on how to act in the case of the occupation and loss of documents that followed. Due to these circumstances of the case, the terms of the duration of the trial were violated significantly.

These examples show the access to justice in procedural and substantive aspects. The procedural part is evident, and means the necessary and adequate actions to provide the right to bring the dispute to court, the right to legal aid and reasonable terms of the duration of the trial. However, the last example shows that in the times of war with the number of court buildings burned and destroyed and with the occupied territories that caused the absence of normal legal cooperation for the purposes of judicial procedures, Ukraine will continue to face the similar problems in access to justice as it has been shown in the last case. Even though the courts are relocated and functioning and the direct access to court is guaranteed, the absence of the access to evidence, the inability to conduct the expertise of the evidence remained on the occupied territory, inability to inform interested parties of the trial due to their location on the occupied territory will cause difficulties for both legal certainty and access to justice. Consequently, there is a need to focus on their interaction, which is represented by the following levels:

- access to justice is seen as an element of the rule of law together with legal certainty;
- access to justice as a way of ensuring legal certainty;
- access to justice and the influence of legal certainty requirements.

5.1 Access to justice as an element of the rule of law along with legal certainty

The rule of law is a broad concept, the content of which is usually revealed through a set of elements, according to R. Leal-Arcas they are the following: access to justice and judicial review; legal certainty; proportionality; equality and non-discrimination; and transparency²³.

As constituent elements, they are mutually consistent and interact, ensuring the operation of the rule of law. Thus, they are united by a single goal and their application is carried out with this goal in mind. As the author further states, the application of the above principles enables fair and just societies, irrespective of their history or background. These principles are universal and therefore valid for any society at any given time²⁴. References to these values can be seen in judicial practice, given this understanding of the purpose of application, and should be applied overcoming excessive rigidity and formalism.

22 *Kunert v. Poland* App no 8981/14 (ECtHR, 04 July 2019)
< <https://hudoc.echr.coe.int/eng?i=001-192076> >

23 R Leal-Arcas, ‘Essential Elements of the Rule of Law Concept in the EU’ (2014) <<http://ssrn.com/abstract=2483749>> 1-2

24 Ibid 5

The rule of law in relations between a citizen and the state means that the state influences the freedom of a citizen through legal mechanisms, and citizens are given the opportunity to legally protect themselves from illegal interference and violation of their rights by other persons. The right to access to justice and legal certainty provide citizens with such mechanisms.

Access to justice is mentioned as an element of the rule of law by the Council of Europe in the legal doctrine in Ukraine. The Ukrainian authors that support this idea are mentioning that 1) access to justice is not equal to access to court as an element of the right to fair trial (R. Moskal)²⁵ and that execution of court decisions and *res judicata* are mentioned as elements of the access to justice ; 2) access to justice in its broad idea is the possibility to avoid the violation of vested rights and an effective mechanism against violation (Yu. Sverba)²⁶ 3) access to justice should, according to the rule of law principle, be presented with independent courts, that have the powers in administrative procedures (S. Golovaty)²⁷.

The comparison in the meanings of legal certainty and the access to justice shows several similarities. Firstly, both of them include *res judicata* as their element and requires the actual execution of the court decision as the required ending of the trial that serves the implementation of legal certainty and access to justice. Secondly, they both take into account the temporary factor and set the rule of the court decision to be announced within the time limits established in procedural code. Thirdly, when access to justice and legal certainty are provided to a high level standard, they achieve predictability that forms a favourable climate for economic growth and stability.

The war raises new challenges for implementing both of these elements of the rule of law. The frequency of legal changes increased, that results in less stability and predictability that could be achieved in normal circumstances. The status of the occupied territories causes uncertainty first of all in regard to the temporal factor, as it is uncertain whether the full access to this territories will be obtained back. The massive violation of human rights requires from the state accurate and adequate system of access to justice for those who are in the vulnerable position in getting legal aid, renewing the lost documents and mostly to exercising the judicial decisions made in favour of victims. These are a serious challenges for rule of law in Ukraine, particularly to the principles of legal certainty and access to justice.

5.2 Access to justice as a way of ensuring legal certainty

Being widely recognized, legal certainty is not easy to be achieved and a minor level of uncertainty is always present in the legal regulation. Obviously, there is a lack of certainty when referring to some new spheres of legal regulation such as technology development, biomedicine and artificial intelligence, because there is no clear understanding on how the law should regulate those issues. The other example of uncertainty is the frequent legal changes in Ukraine caused by war. This additional temporal legislation is applied together with all the existing legal provisions and due to its high level of changeability it is relatively uncertain and sometimes controversial. The durable period of occupation caused another problem for legal certainty, the legal status sometimes is hard to prove in the court. Applying for the compensation for damage afflicted to the real property, one neither has evidence to

25 R Moskal, 'Requirements of the Rule of Law concerning Access to Justice' (2020) 2 (115) *Naukovij Vysnik Nacionalnoi Akademii Vnutrisnih Sprav* 36-49, 43

26 Yu Sverba, 'Access to Justice as an Element of Rule of Law' (2019) 10 *Almanach Prava* 236-240, 239

27 S Golovaty, 'The Rule of Law, how it is interpreted by Venecian Commition' (2011) 10 *Pravo Ukraini* 154-184, 177

prove the factual condition of the property, nor can estimate and calculate the losses; there is uncertainty concerning the way one can get the compensation from the defendant and prove who has caused the losses. In other words, there is a lack of certainty in how to file such applications, thus the number of the cases is expected to be extremely large.

Legal certainty, among other elements, contains requirements for limiting the discretionary powers of officials of a public authority, taking into account the prevention of arbitrariness and discrimination or inequality in ensuring the rights of some citizens before others, as well as considering the inadmissibility of refusing to ensure recognized rights and freedoms of citizens. However, the existence of discretionary powers always carries the risk of violation by state authorities of the rights and freedoms of citizens, if such a fact occurs, the only legitimate way of protection is through the court hearing.

Discretionary powers are the tribute to flexibility of law and require legal certainty and proportionality in order to obtain it. None of those, nor the discretionary powers, neither the rights of people are executed without the established measures. The role of legal certainty principle here is prominent. Discretionary powers give the authority a choice, sometimes mutually exclusive, on how to execute legal provisions in particular individual situation. The authority powers usually include mutually exclusive options. For example, the custom officer has a possibility to allow the load to go through customs or to suspend customs clearance of goods; the tax agent has the powers to check the tax payments and to issue a tax penalty decision; applying for the permission for visa one could be given a visa or refused in obtaining it by the decision of the same authority. Another frequent example that causes disputes is accrual of the pension which is seen to be among the most numerous disputes brought before the administrative court in Ukraine.

Legitimate expectations:

‘requires not only congruence between law and its application (whereby the authorities must not “ignore” the law) but also that the authorities consider the individuals’ expectations formed on the basis of the apparent law, at least when the latter is attributable to the public authorities. It is important to underline that “taking into account” does not automatically mean concretizing these expectations, since other legitimate interests may be at stake and may prevail’²⁸.

For the abovementioned disputes to be solved an access to justice should be guaranteed as court remains the final authority ready to restore the violated rights. The respect to legitimate expectations touches upon access to justice mostly in the substantive meaning. By forming consistent judicial practice through access to justice legal certainty could be obtained.

The other example of establishing the rule of law when there is lack of certainty is shown by T. Furley²⁹. She argues that a huge number of legal norms on housing law remains unchanged for thirty years already. It is easy to agree with the author that these norms are in opposition to legal certainty, as the principles incorporated in legal regulation have changed significantly. Furthermore, legislation in Ukraine on house violation, freedom of assembly, housing law suffers from outdated norms. This causes damages to access to justice and legal certainty, until the new legislation is set out, only the court is entitled to solve the dispute applying the internationally recognized principles. So, obtaining legal certainty requires access to justice.

28 J van Meerbeeck, ‘The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust’ (2016) 2 *European Law Review* 274-288, 287

29 T Fuley, ‘Application of the Outdated Legislation by the Courts as a Prevention for Access to Justice’ (2021) 2 *Pidriyemnitstvo, Gospodarstvo y Parvo* 185-193

5.3 Access to justice and the influence of legal certainty requirements

Access to justice is a positive procedural right, that gives a person an opportunity to bring the dispute to the court and to get an effective protection. It's the obligation of the state to provide this procedure and make it available. Being of a high importance in connection to the establishment of rule of law, this right is the base for protection of all the other rights and freedoms that could be somehow violated.³⁰ Obviously, access to justice meets numerous challenges to achieve its aims that are diverse and vary within the states. Although the acceptance of the democratic standards necessitate the mitigating of these challenges. Legal certainty, as a principle that together with access to justice contributes to the establishment of rule of law, could be beneficial in overlapping the threats to access to justice.

Difficulties occurred in Ukraine recently that were mentioned above require application of legal certainty.

1) the democratic institutions together with the governmental legal aid can improve the situation with legal assistant to those that are in need. The procedures of declaration of the death, recognition of the person being constantly absent, the official establishment of the act of loss of the property, inheritance cases usually require a set of the standard documentation. The support of non-governmental organizations in coping with the huge number of similar cases could be significant and important to unburden the police. The cooperation in this sphere should be set out in order to achieve efficiency.

2) the authorities and courts should meet the terms of the trial procedure in any case. As J. Van Meerbeeck noted,

«it is interesting to observe the strong relationship between time and legal certainty. Time is indeed at the heart of most requirements of legal certainty (predictability, non-retroactivity, transitional measures, and so on)³¹.

The rule of law requires restoration regardless of when the offense was committed, but it should be taken into account that over time, the restoration of the violated right can have a negative impact on bona fide participants in legal relations, so the time factor is used as a certain limit, the passage of which closes the possibility of reviewing the decision. This also applies to the statute of limitations and the terms of review of court decisions. In cases where the review of a decision is significantly removed in time from the moment of occurrence of a dispute or a court decision of the first instance, it is not an easy task for legal certainty to weigh between the need to restore the violated right and taking into account the impact of such a decision on other interested parties, primarily bona fide participants. Legal certainty in this case provides the efficiency for access to justice.

3) international cooperation in prosecution of the guilty should be improved. Legal certainty is required for the authorities who will be executing the court decision on how to act if the accused and his assets are situated on the territory of the country aggressor. This situation is easy to foresee and the regulations and algorithm of the acts of the authorities should be given in order to meet the criteria of proper performance of the duty of the state. Clear and understandable regulations should be set out.

30 T Tzuvina Principle of rule of law in civil judicial procedure: practical and theoretical research (2010) Kharkiv 254, 47

31 J van Meerbeeck, 'The Principle of legal certainty in the Case Law of the European Court of Justice: from Certainty to Trust' (2016) 2 European Law Review 274-288, 287

4) predictability in how to act at the situation of absence of documents of the court hearings to guarantee the fair trial should be established. By analyzing the number of cases that already took place and displayed this problem, the government should provide organizational and legal procedures to avoid the damages this absence can cause. Both – the citizens and the authorities should be given strict and direct instructions what could be done to fulfil access to justice requirements.

6 CONCLUSIONS

The evolution of access to justice has passed three waves – the first one aimed to protect the poor people and make the access to justice available to them; the second – aimed to protect the collective rights of consumers and in the sphere of ecology; the third one – aimed to make the procedure of the trial faster and to give alternative ways of solving the disputes. There are reasonable expectations that in Ukraine the fourth way is ready to emerge. It will be concentrated on solving the problems of people that unexpectedly and suddenly appeared to be in the difficult situation due to the complete loss of their property and death of many of their relatives (sometimes whole families) with irreversibly destroyed documents that leave a wide number of evidence to protect their rights in the court. The judicial authorities together with the prosecutor office have no direct access to the occupied territories and are unable to restore the documentation themselves. The absence of the accused and inability of the occupied state to execute the court decision would be a tough problem for Ukraine to provide the access to justice and guarantee the rule of law. Taking into account legal certainty regulations, it would be easier to overlap the difficulties. In this regard, some of the recommendations are given.

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