

структур-медіатором у відносинах суб'єктивного і об'єктивного є онто-симулякр.

Отже, соціальне та всі його сфери – політична, економічна, культурна, виробнича, наукова, духовна володіє абстрактною «метрикою». Модифікація його параметрів умовна, однак вона здійснюється на рівні розуміння, часово-просторової герменевтики. Виробляючи щоразу нові підходи до життя, людина поступово звільнилася від утиску й залежності (раби від панів, жінки від чоловіків, науки від релігії). В царині міжнародних відносин також відбувається переоснащення. Кожна окрема держава є елементарною частинкою, що має індивідуальні характеристики, тобто з часом як структурний елемент глобальної політичної системи вона природним шляхом посяде відповідне їй місце.

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DEMOCRACY THROUGH LAW – EUROPEAN LEGAL FRAMEWORK OF EFFECTIVE JUDICIAL PROTECTION IN UKRAINE

The European Commission for Democracy through Law, known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters, whereas its activities particularly aim at providing legal advice to its member states and accompanying states wishing to build their legal and institutional structures in line with European standards and international experience in the fields of democracy, human rights and the rule of law. These international standards on judicial independence are to be found in a broad range of international instruments. Admittedly, the independence of the judiciary is a prerequisite for the right to a fair trial, which is protected by Article 6 of the European Convention on Human Rights (ECHR), the latter ratified by Ukraine on 11th of September 1997, providing that everyone is entitled to a fair and public hearing «[...] *by an independent and impartial tribunal established by law*». This right is further elaborated in the jurisprudence of the European Court of Human Rights (ECtHR), also recognizing the principle of irremovability of judges as a corollary of the independence of judges (e.g. *Urban and Urban v. Poland*) [17]. Similarly, also Article 14 of the International Covenant on Civil and Political Rights (ICCPR), provides, in the context of the right to a fair trial, that «*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*» [2]. Finally, the Charter of the Fundamental Rights of the European Union, enjoying primary law status in accordance with the provisions of Article 6 TUE, provides for the right to an effective remedy and to a fair trial in the provisions of its Article 47.

Moreover, in addition to these binding international obligations, a wide range of soft-law standards have been developed over the past decades, providing further guidance on their implementation, such as, *inter alia*, a number of UN reports and comments [1] [2] [3], recommendations of the Council of Europe, opinions of the Consultative Council of European Judges (CCJE), the European Charter on the Statute for Judges, as well as the OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (Kyiv Recommendations).

Having said this, it should be further noted that the ratification by Ukraine of the ECHR, as well as the commitment to comply with the standards defined by the OSCE member states in the human dimension, as well as these put forward by the UN, places on Ukraine the obligation to strictly adhere to these commitments [7, 4]. Consequently, it requires from Ukrainian State to structure its legal system in such way that it indeed ensures a real guarantee of the right to legal defense as well as creates equal conditions of access to justice for individuals [7, 4].

Against this backdrop, it certainly calls for praise that in recent years, Ukraine has engaged in a multitude of reforms with respect to its judiciary. It is, however, well known that, such a judicial reform constitutes a long-term process which, although having obviously a legislative component, also involves reform in practice, the latter including changes in the culture within the judiciary and the interaction between the judiciary and other branches of government [8, 4]. Admittedly, the provisions regarding the judicial system and the status of judges in Ukraine, as well as their implementing regulations, have been subject to both revision and extensive evaluation by international expert fora, including Office for Democratic Institutions and Human Rights (ODIHR) and the Venice Commission. It should be particularly underlined in this regard that most recently the Ukrainian Parliament began the general reform of the judicial system, having passed a number of laws mid of 2016, including the Law on Judicial System [4], the amendments to the Ukrainian Constitution regarding justice [5] and the Law on Enforcement of Judgments [6]. Moreover, a set of amendments to the Economic Procedure Code, the Civil Procedure Code, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts, has been signed by the Ukrainian President in the end of 2017, introducing new rules of litigation in civil, economic, administrative proceedings, as well as some changes in the rules of the criminal process, thus ensuring the completion of the judicial reform, the latter recognized as the most comprehensive reform of procedural legislation for the past 26 years.

Considering the foregoing, the aim of this piece at hand is to provide a brief overview of some legal solutions introduced by the abovementioned reform of the judicial system in Ukraine in regard to the right to a fair trial on the one hand and to assess their potential impact on effective judicial protection of individuals on the other.

In accordance with the ECtHR incessant jurisprudence, the provisions of Article 6 of the ECHR, addressing fair trial rights, include guarantees of procedural rights, the right of access to a court, the right to enforcement of judgments and the right to finality of court decisions, whereas the independence of the judicial body constitutes a prerequisite of the said rights. Finally, according to the standards of the ECHR, as enshrined in the case law of the ECtHR, the right to legal aid constitutes a part of the broader concept of access to justice rights.

Inevitably, the steps taken by the Ukrainian legislator are, overall, in line with international standards. In particular, the efforts at increasing transparency in the judiciary as well as its emphasis on streamlining the judicial system and ensuring the unity of jurisprudence in Ukraine should be emphasized in this regard [8, 4].

The Law on Judicial System aims, in general, at considerable improvement of the administration of justice in Ukraine, while significantly transforming the structure of judicial system, increasing the professional standards for judges and their compensation, introducing the effective responsibility of judges and improving the judicial self-government [11]. It reflects and further specifies the constitutional changes, and, consequently, clearly constitutes an important step towards the reform of the Ukrainian judiciary. It contains, among others, the provisions of Article 7, which guarantee to everyone the protection of his/her rights within a reasonable time by an «*independent, impartial and fair court*», an equal protection and access to court. Thereby, these provisions mirror some of the fair trial principles set out in both the Constitution and the provisions of Article 6 of the ECHR. Nonetheless, it appears at least questionable that the presumption of innocence, as set out within the provisions of Article 6 par 2 of the ECHR, and being mentioned specifically in the provisions of Article 62 of the Constitution, is not mentioned within the given provisions (of Article 7) of the said law. Furthermore, with regard to fair trial rights in general, the said law provides also for the right to legal assistance and the right to counsel of an individual's choice [8, 10]. Nonetheless, as it stipulates as a general rule in the provisions of Article 10 that the tasks of criminal defense and representation are performed by the members of the Bar, one could argue that such a solution does not entirely respect the relevant provisions of the ECHR, in particular its Article 6 par 3c. It should be, thus, mentioned in this context that the ECtHR has held in the case of *Artico v. Italy* [18] that a State «*cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes*», however, courts do need to take appropriate and required measures to prevent shortcomings of the right to an effective legal representation. Considering the Ukrainian provision on the legal assistance, as mentioned above, the Venice Commission has already recommended in its opinion that «*[...] in light of this jurisprudence of the ECtHR, it is recommended to state clearly that if the right to effective legal representation is found by a court to be jeopardized by the respective legal counsel, the court should take effective action to ensure that counsel performs their tasks effectively.*» [8,10]. This recommendation should be taken into account by the Ukrainian legislator, especially in the light of the conclusions provided by the OSCE in the report regarding respect of human rights within the criminal proceeding in Ukraine [7], emphasizing that there are frequent cases of violation of an individual's right to defense «*through the facts of the absence of a defense counsel to a detainee at the time of his detention, or not provision of a chosen by detainee defender.*» [7, 11].

As it has been already mentioned above, a prerequisite for the right to a fair is the independence of the judiciary, in accordance with the provisions of Article 6 ECHR. The point of departure for analyses of international standards with this regard is that a fundamental guarantee for the independence of judges lies, in principle, in their life-time appointment or until a specific retirement age and that once they have been so appointed, they are in principle irremovable. It should be clearly pointed out that the irremovability of judges is not a personal privilege, but a crucial prerequisite for judges to be able to fulfill their roles as guardians of the rights and freedoms of the individuals and of the rule of law [10,14]. Furthermore, this principle is likewise a fundamental guarantee of the right to a fair trial and of the separation of powers in a democratic state. At the same time, international standards also acknowledge that both the judiciary as a whole and individual judges, must be accountable for their actions [10, 14].

Against this backdrop, it was of crucial importance for Ukraine, within the framework of reforms concerning its judiciary, to ensure and to guarantee for every citizen the right to indeed an «*independent and impartial court*». Given the (geo)political circumstances, while undertaking the steps towards the reform of the judicial system, the independency and impartiality of the judiciary was in a nutshell, particularly due to the general lack of public trust in the courts within Ukrainian society on the one hand and a clear lack of judicial independence on the other hand. One could argue in this context that the resistance to lustration process «*was offered by the judges themselves, who have not used even «soft» forms of self-purification created by the legislator.*» [11]. In reaction to the very low credibility of judiciary the Ukrainian legislator introduced the Law on ensuring the right to a fair trial (2016), considered as a first step towards judicial reform indicated above and being subject to critical reviews of international organizations, such as, *inter alia*, Council of Europe and the Venice Commission. Although solving the problem not entirely, one of the important advantages of the said law constitutes undoubtedly the competitive selection for all judicial offices, including these within higher instances' courts as well as a regular evaluation of the previous activities of every judge, taken into account to assess the judicial career [10]. This increased transparency has been further strengthened by the relevant provisions of the Law on Judicial System, mentioned above.

Considering the foregoing, one can argue that the right to a fair trial as foreseen by the Ukrainian legislator, has been, at least formally, put in line with international and European standards. It goes without saying that an independent, impartial, and accountable judicial sector is fundamental to the protection of Ukrainians' fundamental rights, the fair resolution of disputes, and stable economic and political development [15]. Consequently, judicial reforms, especially with a view to strengthening individual and institutional independence and impartiality of the judiciary, updating provisions on access to the judicial system, modernizing the administration of the judiciary shall be, in general, appreciated. Given that the reform of the judicial system in Ukraine shall still be assessed as a relatively recent, the question as to whether the future application of this ambitious legal framework, undoubtedly in line with European standards, will follow the latter also in practice, remains open as of today. Inevitably, an implementation and application of both domestic legal provisions and relevant recommendations of international organizations in a way that would indeed enhance the independence and impartiality of judges on the one hand, and the efficiency of the system of administering justice on the other, should not remain solely wishful thinking, but rather practically provide that the European Union and Ukraine will share not only common border but also the values, particularly these related to the effective judicial protection of individuals.

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