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TRANSITIONAL JUSTICE IN UKRAINE: CHALLENGES AND OPPORTUNITIES

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SUMMARY

The article is devoted to the overview of implementation transitional justice measures in modern Ukraine. Resort to the concept of transitional justice in Ukrainian legal discourse was unavoidable in the light of Euromaidan Revolution (Revolution of Dignity), annexation of Crimea by the Russian Federation and Russian armed intervention in Eastern Ukraine. The author step-by-step assessed the progress which has been made by Ukraine on the path to realizing main components of the transitional justice.

Key words: violations of human rights, armed conflict, transitional justice, criminal prosecutions, reparations for victims, truth-telling, institutional reforms

ПРАВОСУДИЕ ПЕРЕХОДНОГО ПЕРИОДА В УКРАИНЕ: ВЫЗОВЫ И ВОЗМОЖНОСТИ

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АННОТАЦИЯ

Статья посвящена обзору реализации мер правосудия переходного периода в современной Украине. Обращение к концепции правосудия переходного периода в украинском юридическом дискурсе было неизбежным в свете революции Евромайдана (Революции Достоинства), аннексии Крыма Российской Федерацией и вооруженной интервенции России в Восточной Украине. Автор шаг за шагом оценивает прогресс, достигнутый Украиной на пути реализации основных компонентов правосудия переходного периода.

Ключевые слова: нарушения прав человека, вооруженный конфликт, правосудие переходного периода, уголовные преследования, возмещение ущерба жертвам, установление истины, институциональные реформы.

Introduction. The term “transitional justice” is completely new for Ukrainian legal discourse. Attention to this concept is conceivable in the light of events in modern Ukrainian history. Dramatic Euromaidan Revolution (Revolution of Dignity), villainous annexation of Crimea by the Russian Federation and overt Russian armed intervention in Eastern Ukraine generated multiple challenges for Ukrainian legal system, one of which is the need to regulate consequences of armed conflict and change of political regime. Therefore resort to the concept of transitional justice was unavoidable.

Joanna R. Quinn said, that “societies have talked and written [about questions of transition from war to peace and from one

political regime to another] since at least 500 BC; in The Oresteia, for example, Aeschylus himself grappled with these age-old questions, with a fierce debate about what sort of punishment Orestes should face for his role in the cyclical violence that had occurred. Elster traces the origins to the transition to democracy in ancient Athens in 411 and 403 BC” [1, p. 12]. But “[t]he term ‘transitional justice’ appears to have been coined by American scholars in the early 1990s” [2, p. 563]. R. Teitel called this period of time as part II in genealogy of transitional justice, which “is associated with a period of accelerated democratization and political fragmentation” due to “the collapse and disintegration of the Soviet Union” [3, p. 71].



Report of the Secretary General of the United Nations “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616) contains modern understanding of transitional justice. This document has defined transitional justice as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (para. 8). It should be noted, that this definition is not unique. For example, R. Kerr and E. Mobekk said, that transitional justice is “the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law”. This definition lay special emphasis on legal nature of past abuses by calling them as “abuses of human rights and/or violations of international humanitarian law” [4, p. 3]. O. Plotnikov, in turn, believes, that conflict-based approach to define transitional justice is inherently constrained, because it consisted of a simplification of social realities and because of limited legal capabilities of the UN: “Normative definitions given within the UN system are thus doomed to be inaccurate, as they attempt to reduce the variety of real-life situations to one strict formula. It can be assumed, that since an international legal definition of transitional justice cannot encompass the entire field, it should be limited by instrumental capabilities of the UN... It relies on the more or less developed legal terms of conflict and human rights violations. In contrast, the regime change and social transition are not legal terms at all. Combined with the need for respect of state sovereignty, this makes it impossible to include them into the UN definition” [5, p. 61].

While above mentioned definitions describe transitional justice as the range of legal measures, mechanisms and processes, it is noteworthy to mention that they are determined by set of legal obligations. In particular, four tenets of international human rights law have framed transitional justice and the fight against impunity: (a) the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations

of international humanitarian law, including sexual violence, and to punish those found guilty; (b) the right to know the truth about past abuses and the fate of disappeared persons; (c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and (d) the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future [6].

Also, some authors believe, that term “transitional justice” includes only transition from non-democratic to democratic political regime, while transition from war to peace should be covered by the term “jus post bellum”: “Transitional justice concerns the moral and legal considerations that pertain to situations where a new, normally more democratic, regime is being formed after mass atrocity or oppressive conditions have been stopped. Jus post bellum concerns the moral and legal considerations that pertain to situations where a war or armed conflict has come to an end. In both cases justice considerations pertain to situations where a just peace is being established or reestablished... Transitional justice differs from jus post bellum in that the focus of transitional justice is on the processes that lead to a democratic or at least a less repressive regime whereas jus post bellum is focused on the achieving of peace. So the goals are different in that peace of course can be achieved outside of democratic political processes” [7, p. 25]. However in this article transitional justice is understood in the broad sense.

It appears from the above that it is not easy to create some abstract definition of transitional justice. Nevertheless consensus on the elements of transitional justice is much more clear. Consequently this concept could be defined by listing all its elements. In March 2010, the United Nations Secretary-General released his “Guidance Note on the United Nations Approach to Transitional Justice”. This document asserted, that “[t]ransitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof” [8]. Such holistic (multidimensional) approach describes very well heterogeneous

aims of transitional justice: “a) rebuild the ruined or dysfunctional judicial infrastructure through the reestablishment of the rule of law b) deal with the crimes committed by the agents of the former regime by trials or truth commissions and c) address “the structural and systemic injustices that led to conflict” through reparation and compensation” [9, p. 60].

The purpose of the article is to overview the progress which has been made by Ukraine on the path to realizing main components of the transitional justice: criminal prosecutions for gross violations of human rights; reparations for victims of such violations; full disclosure of truth regarding the reasons, progress and consequences of widespread violations; reforms that prevent similar violations in a country.

The main part. It is worth noting that events of the Euromaidan Revolution (Revolution of Dignity) and situations in Eastern Ukraine and in Crimea vary widely. Therefore the analysis of measures of transitional justice in Ukraine should include two separate modules.

Euromaidan Revolution (Revolution of Dignity). Among the three above mentioned situations, implementation of transitional justice measures seems the most realistic with regards to the events of the Revolution or Revolution of Dignity. Perhaps the only challenge is impossibility to prosecute some high-level ex-officials, which hiding on the territory of Russian Federation.

Criminal prosecutions. First of all, it must be noted, that on 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. The aim of this move was to prevent impunity of perpetrators and accomplices of systematic violations of human rights, which had occurred during the Revolution of Dignity. On April 9, 2014, the Prosecutor of the International Criminal Court opened a preliminary examination of the situation in Ukraine, but the perspective of this preliminary examination is uncertain. In its Report on Preliminary Examination Activities in 2015, the Office of the the Prosecutor of the International Criminal Court provided its preliminary analysis of the crimes allegedly committed during the Maidan pro-



test events. The Office found that while the acts of violence allegedly committed by the Ukrainian authorities between November 30, 2013 and February 20, 2014 could constitute an “attack directed against a civilian population” under article 7(2)(a) of the Statute, the information available did not provide a reasonable basis to believe that the attack was systematic or widespread under the terms of article 7 of the Statute. The Office however noted that serious human rights abuses had occurred in the context of the Maidan events, and expressed its willingness to reassess its preliminary analysis in the light of any new information.

The criminal prosecutions at the national level complicated by the gaps in Ukrainian legislation. Particularly it lacks an autonomous criminalization of crimes against humanity. Therefore, Ukrainian government prosecute serious human rights abuses had occurred, which had occurred during the Revolution of Dignity, as terrorist acts, excess of power, crimes against administration of justice.

Reparations for victims. On February 21, 2014 Verkhovna Rada of Ukraine adopted the Law of Ukraine “On state assistance to victims of mass protest actions and their families”. Thus, appropriate legislative measures has been taken by Ukrainian government in this sphere. However, Ukrainian human rights activists maintained, that its practical implementation leaves much to be desired [10].

Truth-telling. This aspect of transitional justice seems like a *terra incognita* for Ukrainian government. The issue of establishing of truth commissions for “documenting violation facts; documentary events recovery; declassification of archives; investigation on disappeared and missing persons; establishment of victims and perpetrators; ensuring the availability and security of documents on rights violations” [11, p. 22] was not even discussed at governmental level.

Institutional reforms. With regards to the aims of transitional justice institutional reforms should prevent future violations of human rights. It should be recognized, that Ukrainian government had initiated such reforms.

Firstly, “[a]fter the Revolution of Dignity largely instigated by endemic corruption, Ukraine adopted a comprehensive anti-corruption package of laws and established new specialised institu-

tions: NABU, SAPO, NACP and ARMA. Ukraine also achieved unprecedented level of transparency, inter alia, by introducing the electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format...[Nevertheless] [d]espite the achievements, the level of corruption remains very high. Anti-corruption enforcement, particularly against the high-level officials, is stalling and meets enormous resistance and the public trust to the Government has further decreased in recent years” [12].

Secondly, on September 16, 2014 Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Government Cleansing”. Lustration (vetting, purging) is a traditional measure of transitional justice, “a form of administrative justice and institutional reform” [13, p. 44]. Contemporary practices of post-conflict justice developed some appropriate margins of lustration. Unfortunately Ukrainian version of lustration appeared to be too radical. In particular Venice Commission drew attention to a number of shortcomings of the Law “On Government Cleansing”: a) “[t]he exclusion based of the Law on Government Cleansing must not be disproportionate to the sanction of the deprivation of the right to occupy certain positions that may be imposed under the Criminal Code; b) “[t]he ban on access to public positions does not prevent individuals from standing as candidates to any position”; c) “[t]he administrative review must not serve as a substitute to judicial review, which shall be made operative as soon as possible” [14].

Eastern Ukraine and Crimea. The main challenge to the implementation of transitional justice with regards to this regions of Ukraine is lack of control over some Ukrainian territories, which occupied be Russian Federation. Consequently, at the moment Ukrainian government is objectively limited in its ability to provide measures of post-conflict justice.

Criminal prosecutions. On September 8, 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date. Consequently, the Office of the the Prosecutor of the International Criminal Court decided to extend the tem-

poral scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards. The perspective of prosecution of crimes committed in Eastern Ukraine and Crimea seems realistic but at the same time long-term.

National practice of war crimes prosecutions committed in above mentioned regions is limited and hampered by a shortcomings of Ukrainian criminal legislation [15]. It is necessary “to ensure comprehensive implementation of international law provisions on war crimes (key reference point – Article 8 of the Rome Statute)” [16].

Reparations for victims. Unfortunately, “Ukraine is not applying sufficient effort to implement paragraph 24 of the UN General Assembly Resolution “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” (A/RES/60/147 adopted on 16 December 2005) regarding the development of means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines” [16]. For example, T. Antsupova said, that “[t]he legal act regarding the procedure of compensation for the value of the damaged property is still under consideration in the Parliament. Four different draft laws were proposed. Two of them (No 4301 and 4301-1) were rejected and withdrawn from consideration” [17, p. 35].

Truth-telling and institutional reforms. This aspects of transitional justice are way off appropriate implementation. On the on hand, because of lack of governmental activity, on another – because of political reasons. Truth-telling and institutional reforms are closely connected to the Minsk peace process, which is far from over, and to the end of the occupation of Crimea.

Conclusion. In summary, it should be noted that implementation of transitional justice measures in Ukraine is complicated by numerous challenges, some of which are objective by its nature and some are frankly subjective. It seems



that the key challenge is a lack of strategic thinking and governmental strategy with regards to the post-conflict justice.

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