Application of the Constitution in a Transitional Justice Process: Considerations and Ukrainian Realities

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There is no legally binding instrument at the international level that would regulate the issues related to transition periods and to transitional justice. The concept of transitional justice is nonetheless well-established internationally. The United Nations (UN) has been the most active in this area.

- ✓ Recent years have seen an increased focus on questions of **transitional justice and the rule of law in conflict and post-conflict societies.** Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice.
- ✓ Main role of internationals is not to build international substitutes for national structures, but to help **build domestic justice capacities.**
- ✓ The heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to **the imperative of restoration of the rule of law.**

Concepts such **as justice, the rule of law and transitional justice** are essential to understanding the international community efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict.

The **"rule of law"** refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent **with international human rights norms and standards**.

It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The normative foundation for advancing the rule of law is the Charter of the United Nations, European Convention on Human Rights together with the four pillars of the modern international legal system: **international human rights law; international humanitarian law; international criminal law; and international refugee law.**

From international actors perspective, **"justice"** is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.

The notion of **"transitional justice"** comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 4, U.N. Doc. S/2004/616 (23 August 2004).

Core principles of transitional justice:

accountability, reparations and guarantees of non-repetition, as essential parts of effective remedy.

Main components of transitional justice:

a) prosecution initiatives, aimed at ensuring that those responsible for committing crimes, including gross violations of international human rights law and serious violations of international humanitarian law, will be held accountable *(directly refers to judiciary)*;

b) initiatives in respect of the right to truth, which assist transitional societies to establish truth about past events, including gross violations of international human rights law and serious violations of international humanitarian law;

c) initiatives related to reparation, which focus on victims and seek to provide them with remedy in compliance of the 2005 Basic Principles *(directly refers to judiciary)*;

d) institutional reforms, which seek to transform public institutions in such a way to make them sustain peace, protect human rights and foster a culture ***of respect for the rule of law;***

e) national consultations, which involve all segments of the population in the discussion about the future of the country.

Filling a rule of law vacuum

- In post-conflict settings (**in case of Ukraine – on temporary occupied territories to be reoccupied and reintegrated**), legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards.
- **Emergency laws and executive decrees** are often the order of the day. Where adequate laws are on the books, they may be unknown to the general public and official actors may have neither the capacity nor the tools to implement them. National judicial, police and corrections systems have typically been stripped of the human, financial and material resources necessary for their proper functioning. They often lack legitimacy, having been transformed by conflict and abuse into instruments of repression.
- Such situations are invariably marked by an abundance of arms, rampant gender and sexually based violence, the exploitation of children, the persecution of minorities and vulnerable groups, organized crime, smuggling, trafficking in human beings and other criminal activities.
- In such situations, organized criminal groups are often better resourced than local government and better armed than local law enforcement. Restoring the capacity and legitimacy of national institutions is a long-term undertaking. However, urgent action to restore human security, human rights and the rule of law cannot be deferred.

In case of Ukraine reformed national judiciary is called upon

to fill this rule of law vacuum

Since **transitional constitutionalism** usually challenges the constitutional canons and can essentially change basic constitutional principles, it is essential that the **main elements of the canon and the basic traditional constitutional principles** are known to both the state actors and the addressees of their actions and are observed.

When discussing the distinct constitutional and legal approaches of transitional justice, **it is important to ensure respect to rule of law principles,** it provides more effective tools of reconciliation of formerly authoritarian societies and of consolidation of constitutional democracy.

Major types of democratic transitions and approaches to transitional justice in Eastern and Central Europe after 1989–90:

- **A rupture** occurs when the authoritarian regime weakens to the point of collapse, at which time the opposition seizes power.
- **A negotiated transition**, the regime and opposition negotiate arrangements for a democratic transition.

East Germany, Czechoslovakia and its successor states represent the 'rupture-type' transition with an immediate constitution-making approach, while ***Poland and Hungary*** represent the "negotiated transitions" with a "post-sovereign" constitution-making process.

- **A transformation**, in which the incumbent authoritarian leaders try to transform their regime into a democracy inaugurating and directing the process of democratization, slowly guiding political change that culminates in free elections. In this type of transition, members of the old elite remain politically powerful even after democracy is introduced, as happened in Bulgaria. Very few efforts of transitional justice occurred here.

- In the view of constitutional theory, the most interesting transitional justice measures are criminal prosecutions and the retroactive application of criminal law, since these are closely related to the principle of **the rule of law, emphasized in the texts of new transitional constitutions**
- Crimes committed under the old systems included some of the worst violations of human rights, but these were not prosecuted before the democratic transition. Except for grave crimes of international law, which are punishable without statute of limitation, the statute of limitations had already elapsed by the time of the transition. The main question was whether the new authorities still could hold the perpetrators accountable for their deeds.
- In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes, particularly those committed to supress dissent in 1956 and 1968 respectively, had not been prosecuted for wholly political reasons, it was legitimate to hold that **the statute of limitations** had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly.
- In both countries, the matter was put to the newly created constitutional court for review. Each court handed down a decision which eloquently addressed the need to view the question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On this basis—with plainly similar fact patterns—**the Czech constitutional court upheld the tolling of the statute of limitations for the crimes of the old regime as a requirement of justice, while the Hungarian court struck down the measure for violating the principle of the rule of law.**

Draft LAW OF UKRAINE *On the Principles of the State Policy of Transition Period*

On 8 August 2021, the draft law was submitted to the Verkhovna Rada8 (the national Parliament) where it was registered on 9 August as governmental draft law # 5844.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

OPINION ON THE DRAFT LAW "ON THE PRINCIPLES OF STATE POLICY OF THE TRANSITION PERIOD", adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021, CDL-AD(2021)038)

- Several provisions directly regulate concepts known from public international law, such as“transitional period” and “transitional justice”, responsibility of States (in the present case, the Russian Federation) for internationally wrongful acts and occupied territories. While it is certainly legitimate for States to have their own position on the interpretation of such concepts, it must be stressed that international law is an autonomous legal order, and that individual States may not alter the meaning of its concepts unilaterally. Definitions of these concepts should be removed, or it should be made clear that that they reflect the Ukrainian understanding of international law.
- *Постанова ВС від 09 червня 2021 року. Категорія справи № 265/7703/19: Цивільні справи; Справи позовного провадження; Справи у спорах про недоговірні зобов’язання, з них; про відшкодування шкоди.*
- *Постанова ВС від 01 вересня 2021 р. Категорія справи № 754/10080/19: Цивільні справи; Справи позовного провадження; Справи у спорах про недоговірні зобов’язання, про відшкодування шкоди.*

Lustration (or vetting) consists in the removal from civil service and State functions of individuals or groups of individuals too closely related to the previous undemocratic regime to be considered trustworthy.

The criteria for lawful lustration were defined in the Resolution of the Parliamentary Assembly 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems. The criteria are the following:

- guilt, being individual, rather than collective, must be proven in each individual case;
- the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;
- the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i.e. punishing people presumed guilty, have to be observed;
- lustration has to have strict limits of time in both the period of its enforcement and the period to be screened.

The criteria are explained in more detail in the report attached to Resolution 1096 (1996), which contains guidelines to ensure that lustration laws and similar administrative measures **comply with the requirements of a State based on the rule of law.**

The criteria of lawful lustration have also been extensively discussed in the case-law of the European Court of Human Rights

VC recommends to amend the provisions of Article 10 on disqualification/lustration in line with international standards to ensure inter alia that lustration is limited to the most important positions within the State, that it does not apply to elective offices, that it is properly administered by an independent body and subject to procedural guarantees including individualised liability, protection of personal data and availability of adequate judicial review (See in details para. 55-61 on the Venice Commission Opinion)

- Article 23 of the draft law **prohibits the production, distribution and public use of symbols and awards of the occupying forces and occupation administration** and establishes exceptions to this prohibition (for documentary, educational, scientific and other similar purposes).
- Symbols fall within the scope of application of the right to freedom of expression as guaranteed inter alia by Article 10 ECHR. The case-law of the European Court of Human Rights indicates that "utmost care must be observed in applying any restrictions" (*Fáber v. Hungary, Application No. 40721/08, 24 July 2012)*
- The Venice Commission has previously had an opportunity to consider the **Ukrainian legislation on the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols**. It stressed that States might resort to prohibiting and even criminalising the use of certain symbols. When they do so, however, they have to operate within the limits set by the ECHR and other human rights instruments and respect the principles of:
- legality (the regulation is prescribed by law),
- legitimacy (the regulation pursues a legitimate aim)
- necessity (the regulation responds to a pressing social need and is proportionate to the legitimate aim).
- the relevant legislation needs to specify clearly and exhaustively what the prohibited symbols actually are,
- the sanctions entailed in the violation of the prohibition (if any) shall reflect the seriousness of the offence.

- *It is especially surprising that the victims' right to remedy and reparation is not elaborated upon in any detail either in Section II or in Sections IV-VI. While the introduction of some general provisions in Articles 3 and 7 is already a step ahead as compared to previous versions of the draft law, and while precise regulations on that matter may be developed in separate legislation, at least* ***some basic principles should be included in the draft law itself.*** *In line with the requirements set by the UN standards referred to above, it should be made clear that* ***victims of violations of international human rights law and international humanitarian law are guaranteed equal and effective access to justice, adequate, effective, and prompt reparation for any harm suffered and access to relevant information concerning violations and reparation.*** *Reparation should be ensured for any harm occurred in connection with the conflict (not only that caused by the Russian Federation), and the draft law should provide for more details on the extent of the compensation and the way in which it will be determined.*
- Ukraine shall formulate the provisions of Article 13 on convalidation more clearly and in line with international standards, notably to provide for adequate administrative procedures for registration of civil status acts which were fulfilled in the temporarily occupied territories and review the restrictive approach concerning the recognition of academic certificates, degrees and titles issued in those territories.
- *Постанова ВС від 04 березня 2020 року. Категорія справи № 237/557/18: Цивільні справи; Позовне провадження; Спори про недоговірні зобов`язання; Спори про відшкодування шкоди.*

Responsibility of the State for non-compliance with its positive obligations to establish national legal framework to protect property rights of conflict-effected people

CONCLUSION

- The Venice Commission underlines the importance of ensuring consistency of the draft law and any future implementing legislation with **the existing legal framework, the Constitution and international law.** Moreover, the creation of a legal vacuum due to the revocation of existing legal acts – in particular those concerning the Autonomous Republic of Crimea and the city of Sevastopol – must be avoided.
- The Venice Commission understands the efforts by the Ukrainian authorities to create a uniform and comprehensive legal framework applicable to the transition period. It notes that this framework is, to a large extent, based **on well-established principles of international law, including the rule of law and respect for human rights and for the principle of non-discrimination,** and that it takes into account the needs of vulnerable groups within the society.

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47 ÉTATS MEMBRES

47 member Sates

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225 indigenous languages

324 MPs

200 000 local and regional authorities

Over 200 treaties

11 monitoring mechanisms