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Transitional justice model implementation's mechanisms' characteristics

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Abstract

Way of implementing transitional justice into national contexts is the parallel implementation of four conflict de-escalation strategies consisting of truth-seeking, judicial processes, reparations programs and institutional reforms. In this sense, the objective of this editorial is twofold, on the one hand, to present volume 41, number 78 of Political Questions and, on the other, to practical aspects of the transitional justice model implementation. The author substantiates that the process of transitional justice implementing is endowed with a certain ideological component serving the purpose of transitional justice implementing. The authors concept definition of “transitional justice model implementation” was proposed. It is noted that the mixed implementation mechanism of the studied model, combining domestic and international efforts in the field of peace building is the most acceptable for Ukraine. The author draws attention to the interdependence of the national context and the relevant mechanisms for the transitional justice implementation. The author concludes that implementation mechanisms are determined depending on the exigencies of the post-conflict society.

Key words: implementation, international legal standards, directions and principles, post-conflict development, transitional justice, social shock, Ukrainian context.

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Características de los mecanismos de implementación del modelo de justicia transicional

Resumen

La forma de implementar la justicia transicional en los contextos nacionales es la implementación paralela de cuatro estrategias de reducción de conflictos que consisten en búsqueda de la verdad, procesos judiciales, programas de reparación y reformas institucionales. En este sentido, el objetivo de este editorial es doble, por un lado, presentar el volumen 41, número 78 de Cuestiones Políticas y, por otro, los aspectos prácticos de la implementación del modelo de justicia transicional. El autor fundamenta que el proceso de implementación de la justicia transicional está dotado de cierto componente ideológico al servicio del propósito de la implementación de la justicia transicional. Se propuso la definición del concepto de los autores de “implementación del modelo de justicia transicional”. Se observa que el mecanismo de implementación mixto del modelo estudiado, que combina los esfuerzos nacionales e internacionales en el campo de la consolidación de la paz, es el más aceptable para Ucrania. El autor llama la atención sobre la interdependencia del contexto nacional y los mecanismos relevantes para la implementación de la justicia transicional. Concluye que los mecanismos de implementación se determinan en función de las exigencias de la sociedad posconflicto.

Palabras clave: implementación, estándares legales internacionales, direcciones y principios, desarrollo posconflicto, justicia transicional, choque social, contexto ucraniano.

Exordium

The issue of the transitional justice model implementation in the foreign scientists' papers has been investigated rather fragmentarily. In particular, the legal aspects of this process, as well as certain procedural issues, are not detailed. In our opinion, this is related to the impossibility of making a universal implementation mechanism that should be determined by the national context. Antonio Cassese notes that the transitional justice implementation scope is wider than the scope of international criminal law, which is considered as a form of criminal justice implementation along with other extrajudicial measures. The latter cover the restorative aspect not only from a legal point of view, but also from a political, social and economic perspective. Therefore, the transitional justice implementation represents the international community requirements' justification for the fulfillment by states of their international obligations. Practice shows that the implementation process is influenced by the political settlement

aim. That is, there is an exchange of justice for political stability and peace, which can lead to the new conflict emergence (Cassese, 2005).

In our opinion, this thesis limits the implementation process and reduces it to fulfilling of political obligations by states. This does not correspond to the realities of the post-conflict development within which the key role is assigned not to international but to national actors. The latter should show political will embodied into clear legal implementation mechanisms. That is, this process requires the combination of international efforts and national aspirations to build sustainable peace. Attention should be paid to the dependence of implementation mechanisms on social and political factors that can change the vector of justice and stability within the state.

1. The legal nature of the implementation mechanisms of the transitional justice model

Foreign scientists emphasize that the philosophy of the studied model implementation consists of separate legal technologies accompanying the process of social transition. These technologies contribute to the prevention of grosser human rights violations and also reduce the state's ability to commit illegal actions. Therefore, it is necessary to assess the potential sources of injustice in order to understand the benefits and risks during the development and implementation of transitional justice strategies (Combs, 2018). It should be clarified that the implementation process is not only a complex of legal technologies, because it is necessary to take into account political and social factors and the ideological component, being ultimately reflected in national legislation. However, it is necessary to agree that the implementation itself contributes to the improvement of the situation in the post-conflict state. That is, it performs a preventive role consisting in positioning the key ideas of transitional justice.

At the stage of the transitional justice model implementation, it is necessary to clearly understand the national context, expected results, transitional processes dynamics, as well as imagine a set of legal instruments that will be used at every stage of this process. This requires the use of regional efforts that take into account all these factors and ensure wider integration of transitional justice key actors (Ibekwe, 2022). However, there is an extra regularity: the dependence of implementation mechanisms on expected results. That is, implementation mechanisms are determined depending on the exigencies of the post-conflict society. It refers to a set of legal instruments to be used within a specific national context.

However, we also observe mutual dependence that was clearly outlined by Nina Gulzari in her scientific paper. She believes that the transitional justice implementation mechanisms significantly influence the national

context in which the relevant strategies will be implemented. This is stipulated by the fact that transitional processes are intertwined with the past, which can become an obstacle to the post-conflict development. On the other hand, the implementation process also affects the specific responses and mechanisms of transitional justice. Therefore, the implementation process cannot be transferred from one post-conflict situation to another, but should develop in accordance with the social and cultural dynamics of a particular society. Thus, the contextual approach to the transitional justice implementation makes it possible to choose renewal mechanisms (Gulzari, 2017).

It is obvious that the transitional justice implementation requires a strategic approach that is significant in several ways: first, it helps shape a proactive approach by identifying priorities, key audiences, messages and resources; secondly, it helps coordinate efforts by delimiting responsibilities and distributing tasks within the transition period (McConnachie, 2004). It is considered that the implementation process should be preceded by the national context detailed analysis, taking into account the legal traditions of specific states. Only under this condition it will be efficient and objective.

In this regard, emphasizes that the transitional justice implementing process should occur taking into account the legal traditions of the post-conflict states. Domestic legal traditions cover the nature of law and its implementation in states and are based on the stages of its historical and cultural development. Taking this into consideration, the congruent implementation mechanisms, providing for the coordination of post-conflict development directions with legal traditions and the national context, are of particular importance. Moreover, congruence ensures the long-term nature of the initiatives and gives hope that the conflict will not repeat in the future. In our opinion, the transitional justice implementation congruent mechanisms allow ensuring the uniqueness of the corresponding mechanisms, and, therefore, form the proper perception of international actors' efforts by society (Villasmil Espinoza *et al.*, 2022).

The argument in favor of this approach is the following thesis by Rowland Robin: the transitional justice model implementation can be ineffective if international actors apply a set of universal values, without taking into account the national context peculiarities. Therefore, it is necessary to ensure such an implementation process that will help the state make a linear transition from conflict to peace and democracy. It is about the narrative of the "future" that should dominate at the transitional stage, determining key changes in the legal system of the post-conflict states (Rowland, 2016). This thesis suggests that the implementation process is also endowed with a certain ideological component, which at a certain stage serves the purpose of transitional justice implementing.

The Working Group on Human Rights and Transnational Corporations and Other Enterprises Report dated July 13, 2022 notes that the transitional justice implementation requires taking certain caveats into account. In particular, post-conflict states should avoid adopting new economic agreements until they understand how their transition processes will affect business responsibility. In future, these agreements should be designed in such a way that they maximally protect the state's response to transitional justice and its obligations to victims of conflict. In turn, external actors are also obliged to avoid imposing economic agreements that would undermine the transitional justice implementation. This means that the transitional justice implementation requires taking into account certain caveats that are crucial in view of the further effectiveness of transitional processes. It is about the actions of international and national actors that can reduce the transitional strategies effectiveness (Matviichuk *et al.*, 2022).

The implementation of the studied model is important in view of the necessity to theorize innovative practices of post-conflict development. Transitional justice mechanisms will depend on this, and they can be either helpful or harmful depending on a number of factors. Thus, there are certain conditions that favor the success of various transitional justice mechanisms. Therefore, the implementation process should be timely and adapted to changing contexts, political attitudes and the environment (Magara, 2021). The stated thesis shows the dependence of implementation mechanisms on the time factor affecting the national context, as well as public opinion.

2. Practical implementation mechanisms of the transitional justice model

Ahmad Bastomi, basing on a comprehensive analysis, argues that the main way to implement transitional justice into national contexts is the parallel implementation of four conflict de-escalation strategies consisting of truth-seeking, judicial processes, reparations programs and institutional reforms. This method turned out to be not effective enough, because some of the strategies remain without due attention and do not receive further development. The reason for this is the excessive external intervention, as well as the insufficient level of the institutions' independence, involved into the implementation of the studied model. Among the shortcomings of this method, it is also worth including the lack of evaluating practice and the specified strategies revising, taking into account the existing limitations at each of the stages of transitional justice (Tylchuk *et al.*, 2022).

Thus, the transitional justice model implementation is a set of political and legal and organizational and legal measures aimed at implementing

the principles and directions of transitional justice of the post-conflict states into the national legislation that are implemented collectively and comprehensively within the framework of domestic and international mechanisms. That is, it is about the purposeful activity of the interested parties, the purpose of which is the transitional justice model implementation into the national context of the post-conflict state (Leheza *et al.*, 2022).

The domestic mechanism is a set of organizational and legal means and ways of implementing the transitional justice principles and directions by means of authorities' rule-making with mandatory interaction with the civil society. That is, it is about the transformation of legislation to meet the needs of the post-conflict development in order to resolve the legacy of the past, search for the truth and form national memory. The intrastate mechanism involves the use of the generalized historical experience of states that went through a transitional stage of development in due time.

The international mechanism is a set of political and legal means and ways of implementing the transitional justice model by integrating post-conflict states' international legal standards into the national legislation. That is, this mechanism is the result of the international community's efforts to implement the necessary standards of the rule law. Certainly, both implementation mechanisms are introduced taking into account national contexts. Thus, the difference between them is that the domestic mechanism involves the necessary legal instruments formation at the national level, and the international mechanism involves the implementation of ready-made standards contained in the relevant international legal acts (Zhukova *et al.*, 2023).

Among the signs of the transitional justice model implementation process, it is worth including: 1) dependence of the process on the national context; 2) systematic and comprehensive implementation and realization based on individual concepts; 3) dependence of the process on the time limits determining the beginning of the transition period; 4) combination of domestic and international mechanisms; 5) the ability to influence the national context by way of formation of transitional institutions; 6) the ability to have a preventive effect, i.e. prevention of gross violations of the conflict's victims' rights; 7) the uniqueness of the methodology of the process determined by the features of the post-conflict development of individual states; 8) dependence on the legal traditions of states being at the stage of social transition; 9) dependence on the mandate of national institutions that will implement the transitional justice strategy; 10) ability to dynamism, i.e. changes of individual mechanisms depending on changes in the national context. It should be noted that the mechanisms of transitional justice implementation can be implemented through separate strategies or in a complex, that is, in the form of a holistic strategy of social transition (Kobrusieva *et al.*, 2021).

The implementation of the transitional justice model requires taking into account certain problems that Ukraine has been currently facing. These problems are quite successfully systematized in the EU Action Plan on Human Rights and Democracy (2015). The document emphasizes that the problem of the implementation of transitional justice institutions in Ukraine is the protection of crime victims and access to justice. If this problem is detailed, then its following components can be identified: 1) lack of institutions providing services in the field of justice in territories not controlled by the government; 2) loss of case materials; 3) restriction of freedom of movement and notification of proceedings; 4) lack of legal assistance in territories not controlled by the government; 5) lack of resources; 6) inability to enforce court decisions in temporarily occupied territories (Filatov *et al.*, 2022). It should be recognized that these problems are of a systemic nature and have not lost their relevance since 2014. They have a negative impact on the transitional justice implementation mechanisms, which must take these factors into account.

The transitional justice model implementation into the national legislation of Ukraine covers the goals, tasks, principles and forms of convergence of international and domestic normative legal acts aimed at the legal regulation of post-conflict development. That is, implementation acts as a legal instrument for the embodiment of the generalized historical experience of peace building in the national context. In view of this, the goal of implementation covers the consistent improvement of the quality and conditions of the society recovery; social and political, cultural and spiritual spheres of its life development; protecting the rights and freedoms of the victims of the conflict, as well as overcoming the legacy of the past that caused the conflict. The tasks of the transitional justice implementation are: formation of a single regulatory and legal set of norms regarding post-conflict reconstruction; protection of the interests of the victims of the conflict, society and the state as a whole; fight against systemic violations of human rights (Kobrusieva *et al.*, 2021).

Conclusions

The process of the transitional justice model implementing is quite complex and lengthy. It has a number of features and caveats that should be taken into account to ensure further effectiveness of transition processes. For Ukraine, the mixed implementation mechanism of the studied model, combining domestic and international efforts in the field of peace building, is the most acceptable. Within the framework of this mechanism, it is expedient to implement the single Transitional Justice National Strategy including the implementation of the principles and directions of post-conflict reconstruction. Herewith, it is worth taking into account the impact

of the implementation mechanism on the national context and the ability of the latter to change the trajectory of the implementation process. It should be noted that the implementation process involves the dominant role of national actors in the transitional justice implementation. This prevents excessive interference of international actors in the affairs of the independent states. However, under certain conditions, the role of the latter can be strengthened, and is aimed at overcoming the resistance of the political elites responsible for the conflict and continue to influence public life.

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