

Модель перехідного правосуддя: теорія та практика миробудування

Монографія присвячена дослідженню теорії та практики застосування моделі перехідного правосуддя. Розкрито поняття, сутність, історію розвитку й передумови застосування цієї моделі в постконфліктних (поставторитарних) країнах.

Окреслено методологію аналізу зазначеної моделі та стан розробки теоретико-прикладних проблем її реалізації в теорії міжнародного права. Проаналізовано глобальний і регіональний рівні міжнародно-правового регулювання моделі перехідного правосуддя й на основі узагальнення досвіду зарубіжних країн досліджено практику її імплементації в національний контекст.

Схарактеризовано виклики й загрози застосування в Україні моделі перехідного правосуддя. Систематизовано та детально розглянуто принципи й напрями перехідного правосуддя, а також окремі правові форми участі міжнародних інституцій у забезпеченні миробудування в постконфліктних (поставторитарних) країнах.

Для науковців, викладачів, студентів і слухачів юридичних факультетів ЗВО, а також посадових осіб органів виконавчої влади та місцевого самоврядування.

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SUMMARY

The urgency of the monograph is stipulated by the necessity to implement the transitional justice model in Ukraine and develop of a holistic scientific concept of legal support for the transition period, as well as the justification of proposals to bring the Ukrainian legislation into compliance with the international legal standards of post-conflict development.

Chapter 1 of the monograph “Theoretical and methodological basis of the transitional justice model study” consists of four subsections in which the methodology of the transitional justice model study is outlined, the state of development of the transitional justice’s theoretical and applied problems in the international law theory is analyzed, the history of the transitional justice concept development in international and law doctrine is studied, and the philosophical and analytical nature of the transitional justice model is described.

Chapter 2 of the monograph “International and legal regulation of the transitional justice model at the global level” consists of four subsections, determining the role of international law in the field of human rights, international criminal law, international refugee law in the transitional justice concept, as well as considered international legal forms of work of the UN in the field of post-conflict development.

Chapter 3 of the monograph “International and legal regulation of the transitional justice model at the European institutions level” consists of four subsections, analyzing the rule-making and legal forms of work of European institutions in the field of transitional justice, in particular of the EU, the Council of Europe and the OSCE.

Chapter 4 of the monograph “Directions and forms of the transitional justice model implementation into the legislation of Ukraine” consists of three subsections, in which the experience of the transitional justice model

implementation in certain foreign states is analyzed, the mechanisms of the transitional justice model implementation into the national legislation of Ukraine are investigated, as well as the analysis of the experience and challenges of its implementation in Ukraine is carried out.

The main conclusions of the monograph can be formulated as follows:

It has been established that objective and subjective factors influence the formation of the transitional justice model research methodology. Objective factors include the following: lack of a clearly defined conceptual apparatus of transitional justice in the theory of international law; the ramifications of international legal acts in the field of transitional justice; multi-subject nature of the rule-making process at the international legal level; lack of a single law enforcement practice. The following factors are proposed to include as the subjective ones: limitation of scientific research by domestic law; politicization and ideologization of research of international and legal phenomena; limitations of the transitional justice by the national context.

It is proved that the historical development of the transitional period model continued within the framework of the following historical stages: pre-classic (the idea of the transitional justice model making is comprehended); classic (maximum meaningful content of the transitional justice concept and its individual principles' and directions' testing); post-classic (improvement of views on the prerequisites for the application of the transitional justice model and revision of certain theoretical aspects of its nature and social purpose).

The existence of three main approaches to defining the philosophical and analytical nature of the transitional justice model is substantiated: 1) subject-centered approach (participants in the conflict determine the content of the national context, fill it ideologically, and also determine the range of mechanisms and tools used in each individual case; 2) object-centered approach (the model of transitional justice with its philosophical origins addresses the causes and preconditions of the conflict, forming the subject composition and influence the development of the scenario); 3) law-centered approach (the necessity of the transitional justice arises only where there are systemic violations of human rights, i.e., the model arose as a special law-restoring mechanism).

It was found that international law in the field of human rights serves as the foundation of the transitional justice model, since its norms outline the fundamental rights of an individual as a subject of international law. The application of the transitional justice specific mechanisms is stipulated for inability of the international law mechanisms in the field of human rights to perform their functions in post-conflict conditions. It is justified that the constitutional and legal level is crucial for transitional justice exclusively for establishing interconnections between the state's domestic legislation and its international obligations.

It has been proven that criminal prosecution is not an independent direction in the transitional justice concept; therefore it is not able to shape the post-conflict development narratives. It only solves certain fundamental tasks: searching and punishing those guilty of conflicts. It is noted that by means of the international criminal law judicial institutions victims receive satisfaction in the form of punishment of guilty persons who, in their opinion, provoked the conflict and played a key role in it. It is argued that the key challenge of the international criminal law application at the transitional stages of development is the transfer of emphasis from revenge and retribution to establishing the truth, that is, the purpose of criminal prosecution is to promote reconciliation, and does not involve a public act of revenge for international criminal crimes.

It is suggested that justice should be understood as the subjective vision by the victims of the conflict on both sides of the nature of the violation of their rights, the persons guilty of this, who are obliged to compensate for the damage caused to them, as well as to bear the appropriate criminal punishment. By historical memory the author of the study understands the generalized historical experience of the victims about the facts of human rights violations in the conditions of the conflict revealing the nature of social tension, demonstrate the differences of social and political narratives, and are also used in the transitional justice framework as a basis for the non-repetition of violence in the future and the national identity formation.

It is substantiated that the transitional justice direction is a relatively independent type of purposeful, normatively regulated activity, which is carried out on a systemic basis within the framework of the transitional justice model implementation, and comprehensively contributes to the

development of peace in post-conflict and post-authoritarian states. The following characteristics of the transitional justice directions are systematized: clear connection with the fundamental principles of transitional justice; direct connection with the relevant spheres of international and legal regulation that are applied at the transitional stage; interdependence among themselves; interdependence at the level of transitional processes' mandatory complexity application, simultaneity and effectiveness.

It was established that, within the transitional justice framework, the return of refugees and internally displaced persons (IDPs) requires the implementation of a set of post-conflict changes in the state allowing stop the violence and restore the proper level of human rights protection. It is suggested that return should be understood as the process of moving refugees and IDPs to the place of their previous residence into a state that has experienced social upheavals and as a result of social transition was able to eliminate or minimize the risks of human rights violations, as well as radically change the forms of political communities.

Under the national context of transitional justice the author proposes to understand the individualized starting conditions for the application of the directions of transitional justice, determined by the nature and duration of the conflict determining the peace building algorithm, i.e., characterize a set of tools and directions of activity in the conditions of social transition for reconciliation and non-repetition of social upheaval. It was found out that the national context is formed by the following factors: political, religious and ideological disputes between certain groups of society; social inequality and standards of living; the level of the rule of law and legality ensuring; the judicial and law enforcement systems' effectiveness; the status of the parties to the conflict (the presence of third parties supporting one of the parties); the policy of the state (states) regarding the international legal institutions' and acts' status' recognition.

The following legal forms of UN work within the transitional justice framework were systematized and researched: UN tribunals in post-conflict states making; assistance in concluding peace agreements by the parties to the conflict; field representation to assist states in developing transition strategies; ensuring the right to compensation; protection

of certain categories of conflict victims; temporary UN administrations making; assistance in the reintegration of alienated members of communities; assistance in documenting human rights violations and violence in post-conflict states.

It is suggested that the post-conflict period should be understood as the period in the history of the state's development from the moment of the conflict active phase's end to reconciliation and sustainable development, during which the development of new institutional boundaries of the rule of law and the modernization of the law enforcement system and the justice system take place. The author suggests that the post-authoritarian period should be understood as the period in the state's development history from the moment of the previous criminal political regime overthrow to a new political infrastructure formation that is the result of institutional reforms and social dialogue. The conflict period is defined as a period of time during which there is an active confrontation between the parties accompanied by armed aggression, the displacement of certain communities, numerous destructions of peaceful infrastructure, as well as visualization of the categories of conflict victims, and is caused by the presence of systemic problems within society.

It was cleared up that the key shortcoming of the legal forms of work of the Council of Europe in the field of transitional justice is their politicization, stipulated by the aspirations of strengthening and expanding the EU itself. The identified shortcoming may lead to changing the goal of social transition, in particular, from reconciliation and the search for historical truth to the European integration of the post-conflict state. It is argued that a positive aspect of the legal forms of the EC's work is the possibility of adaptation to the national context, which makes it possible to harmoniously implement the transitional justice principles and directions into the post-conflict states' legislation.

It was determined that the transitional justice strategy range represents the scope of its coverage with the social relations provisions, within which long-term post-conflict transformations are planned in the process of the transitional justice model implementing. It is proven that the strategy range shows how much society and the government is interested in achieving the goals of the transitional period, and also reflects the effectiveness

of implementing the transitional justice directions. It is suggested that the transitional justice strategy should be understood as a coordinated, comprehensive, purposeful plan for the post-conflict development of political and legal and social and economic spheres of public life, based on the principle of liberalization, has a long-term nature and is formed taking into account legal culture peculiarities of the state that has experienced social upheavals.

It was established that the participation of the OSCE in the field of transitional justice is carried out in the following directions: 1) assistance in the processes of institutional reforms' implementation; 2) assistance in returning displaced persons and resolving their property issues; 3) promotion of interstate cooperation in the field of criminal prosecution of guilty persons; 4) monitoring the human rights protection, in particular the national minorities' rights; 5) assistance in the fight against organized crime and corruption; 6) assistance in demilitarization and destruction of small arms and light weapons; 7) promotion of cross-border and regional cooperation and initiatives; 8) participation in the inter-community relations' reconstruction and development.

It was ascertained that at the level of EU institutions there is a problem of visualizing the transitional justice categories, connected with misunderstanding the integrity of the model itself and its key goals. This problem negatively affects the promotion of transitional justice mechanisms at the regional level, but can be leveled as the result of the global level, where a holistic vision of transitional justice mechanisms is formed. It was established that at the regional level there is an imbalance between the practical and normative components of EU policy, that is, the functional capabilities of European institutions are much wider than the actual actions within the transitional justice strategies framework. A similar situation arose as a result of the politicization of reconciliation processes and the search for historical truth. It has been proven that hyperpoliticization occurs as a result of the uncertainty at the EU regulatory level of the clear limits of the European institutions' participation in transitional justice strategies.

Under the transitional justice principles it is proposed to understand the system of formalized international and national basic foundations

for the transitional period policy development and implementation of its individual directions revealing the ideological and practical issues of the transitional justice concept and embodying the combination of generalized historical experience and the national context. The following transitional justice principles were systematized and considered: 1) ending impunity and ensuring criminal prosecution of the guilty; 2) ensuring victim-centrism and the right to satisfaction; 3) search for the root causes of the conflict and historical truth; 4) the rule of law and national transitional justice mechanisms strengthening; 5) promotion of reconciliation, non-repetition and historical memory preservation; 6) consideration of political context in the process of transitional justice implementation; 7) institutional reforms' introduction and civil society's development; 8) combination of traditional and religious approaches to transitional justice; 9) restoration of trust in the authorities and confirmation of social values. The specified principles are divided into two groups: ideological principles (relate to the philosophical and legal basis of the transitional justice model and outline the basic principles of the post-conflict development policy's building up) and practical principles (reflect the content of the transitional justice model and determine the basic principles for the transitional justice directions' implementation).

The transitional justice national principles' system existing collaterally with international ones and having a direct connection with the national context is proposed. Among them there are the following: 1) international law norms' primacy; 2) interaction with civil society within the framework of the transitional justice strategy implementation; 3) social dialogue between the parties to the conflict development; 4) post-conflict rule-making intensification; 5) mandatory involvement of the international community in transitional processes.

It is suggested that amnesty should be understood as the direction of transitional justice providing for the release from legal responsibility of persons guilty of the conflict by the governments of post-conflict states that is implemented on the basis of a special law and is a stabilizing element of the transitional period policy, aimed at long-term peace by way of the forgiveness of certain categories of crimes.

It is suggested that institutional reforms in transitional justice should be understood as the transitional justice separate direction consisting in the implementation of systemic reforms in the post-conflict state, aimed at renewing political power, building civil society, and restoring institutional boundaries destroyed as a result of systematic violations of human rights and violence that became the cause of the society division and further social upheavals.

It is suggested that victims of the conflict should be understood as participants in the transition process who have been harmed as a result of social upheavals and who acquire a special international and legal and national status that guarantees a number of additional rights and guarantees, including the right to the truth, return and compensation. It was cleared up that in the transitional justice context harm should be understood as moral or property damage, forced relocation or deportation, damage to human health, inability to use one's property, damage caused by systematic violations of human rights (discrimination, illegal persecution, restrictions on constitutional rights and freedoms).

It is proposed to understand the transitional justice model implementation as a set of political and legal and organizational and legal measures aimed at implementing the principles and directions of transitional justice into the national legislation of post-conflict states that are implemented collectively and comprehensively within the framework of domestic and international mechanisms. The domestic mechanism is a set of organizational and legal means and ways of implementing the principles and directions of transitional justice by means of rule-making by authorities and with mandatory interaction with civil society. The international mechanism is a set of political and legal means and ways of implementing the transitional justice model by integrating international legal standards into the national legislation of post-conflict states. The necessity of using a mixed mechanism of implementation in Ukraine, i.e. a combination of international and domestic mechanisms, which should be implemented through the transitional justice single strategy, is substantiated.

It is proposed to understand the generalized historical experience as the systematized positive practices of post-conflict and post-authoritarian development of the states that at different times faced social upheavals

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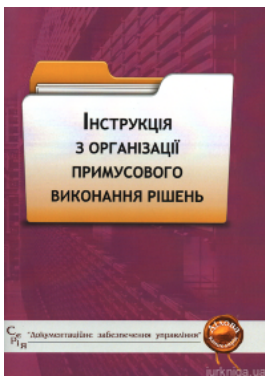
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