

Restoration of criminal justice and introduction of transitional justice in the conditions of restoration of territorial integrity of Ukraine and reintegration of Donbas

Відновлення кримінальної юстиції та запровадження перехідної справедливості в умовах відновлення територіальної цілісності України та реінтеграції Донбасу

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Abstract

Description. The purpose of the article is to determine the most optimal mechanisms for restoration of Ukrainian criminal justice in certain areas of Donetsk and Luhansk regions as part of the implementation of transitional justice in the mentioned territories. Methodology. The system-structural method and the method of formal and logical analysis have been applied to determine the main steps to the restoration of criminal justice in some areas of Donetsk and Luhansk regions. The comparative and legal method was used to analyze the foreign legal practice of resolving armed conflicts and adapting best practices to Ukrainian realities. As a result of the research it has been found that the main steps to the restoration of criminal justice in the reintegrated territories are: adaptation of the criminal and criminal procedural legislation of Ukraine in accordance with international agreements on the reintegration of the Donbas; renewal of criminal proceedings for crimes which, for various reasons, have not been completed and left in the temporarily occupied territories; identifying and organizing

Анотація

Опис. Метою статті є визначення найоптимальніших механізмів відновлення української кримінальної юстиції в окремих районах Донецької та Луганської областей в рамках запровадження на названих територіях перехідного правосуддя. Методологія. Застосовано системно-структурний та формально-логічний аналіз для визначення основних кроків до відновлення кримінальної юстиції в окремих районах Донецької та Луганської областей. Порівняльно-правовий метод був застосований для аналізу зарубіжної правової практики урегулювання збройних конфліктів та адаптації найкращих практик до українських реалій. В результаті дослідження встановлено, що основними кроками до відновлення кримінальної юстиції на реінтегрованих територіях є: адаптація кримінального та кримінального процесуального законодавства України відповідно до міжнародних домовленостей щодо реінтеграції Донбасу; поновлення кримінальних проваджень за злочинами, які в силу різних причин не були закінчені та

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information on the offences that fall under the jurisdiction of the International Criminal Court; organization of investigation of crimes committed during the occupation; investigations into the causes of death of persons, who died in temporarily occupied territories. Practical implications. The main aspects of implementation of transitional criminal justice as one of the measures aimed at returning temporarily occupied certain areas of Donetsk and Luhansk regions to the Ukrainian legal field were examined and analyzed. Value / originality. Restoration of criminal justice in certain areas of Donetsk and Luhansk regions is the most difficult aspect of the issue of returning the reintegrated territories to the legal field of Ukraine, so the authors proposed the most effective ways to accomplish this task.

Keywords: certain areas of Donetsk and Luhansk regions, temporarily occupied territories, transitional justice, restoration of criminal justice, criminal proceedings, pre-trial investigation.

Introduction

In light of the fact that in September 2019 the so-called “Shtanmaier Formula” was signed by the Tripartite Contact Group in Minsk, the political processes have been intensified in Ukraine to de-escalate the armed conflict and reintegrate certain areas of Donetsk and Luhansk regions. Therefore, the issue of returning these territories to the legal field of Ukraine remains relevant.

In this regard, the issue of introducing the concept of transitional justice in certain areas of Donetsk and Luhansk regions is actively discussed both in Ukraine and in the international arena. This concept (approach) envisages simultaneous activity of the State in four directions: effective activity of criminal justice, compensation of losses to victims, institutional reforms that make it impossible to repeat the past and official acknowledgment of historical truth (Case of *Mozer v. the republic of Moldova and Russia*). Among these directions, in our opinion, the most difficult is the restoration of criminal justice in the reintegrated territories, which have been outside the legal system of Ukraine for a long time. The authors aim to consider the best steps and practices to accomplish this task.

Literature review

A number of works of foreign and domestic scientists are devoted to the issue of transitional

залишені на тимчасово окупованих територіях; виявлення та систематизація інформації про злочини, які підпадають під юрисдикцію міжнародного кримінального суду; організація розслідування злочинів, що вчинилися у період окупації; проведення перевірок щодо причин смерті людей, померлих на тимчасово непідконтрольних Україні територіях.

Ключові слова: окремі райони Донецької та Луганської областей, тимчасово окуповані території, перехідне правосуддя, відновлення кримінальної юстиції, кримінальне провадження, досудове розслідування.

justice. The discourse, practice and ideas of transitional justice became the key element of the emerging vision of global development and the changing base for human rights and the rights of victims, which began to develop in the international system in the 1990s. The concept of transitional justice came into use in 1995, when it was published in the Compendium “Transitional Justice: How Emerging Democracies Reckon with Former Regimes” (Kritz, 1995).

Leebaw B. A. (2008) states that the basic element of transitional justice is, as a rule, the criminal prosecution of persons guilty of human rights abuses under the previous regime or during the armed conflict. Criminal proceedings may be carried out either by national or international or mixed judicial authorities, acting on a permanent or ad hoc basis. Both domestic and international law may serve as a basis for bringing to justice. The obligation to investigate gross violations of human rights and to prosecute those responsible for their perpetration is set out in a number of international treaties.

According to the view of the Professor of New York Law School R. Taitel (2003), transitional justice is “an idea of justice associated with the periods of political changes, the distinctive

feature of which is the legal response to the violations of the previous repressive regimes". Studying the motives and incentives of transitional justice, Eric Posner (2003) concludes that its key priority is to improve the quality of judicial institutions – through their reformation or complete replacement.

The implementation of transitional justice should be done with a clear understanding of the applicable law and due recognition of the experience of trial management, as well as commitment to the due process (Chenhych, 2015).

However, the issue of introduction of transitional justice in the conditions of restoration of territorial integrity of Ukraine and reintegration of Donbas is a more specific topic, so in this article we tried to determine the best options for its implementing under the circumstances.

Materials and Methods

The empirical basis for the study is the statistics of the Prosecutor's Office of Ukraine on criminal proceedings which, for various reasons, were not completed and left in the temporarily occupied territories; the practice of the European Court of Human Rights and of the Ukrainian national courts on the use of "Namibian exemptions"; Draft laws and regulations, which are adopting in Ukraine on the reintegration of Donbas. The authors applied system-structural and formal-logical analysis to determine the main steps for the resumption of criminal justice in certain areas of Donetsk and Luhansk regions. The comparative and legal method was used to analyze the foreign legal practice of resolving armed conflicts and adapting best practices to Ukrainian realities.

Results

The steps regarding the implementation of transitional justice mechanisms in certain areas of Donetsk and Luhansk regions are being actively discussed on the initiative of the Ministry of Internal Affairs of Ukraine at Luhansk State University of Internal Affairs named after E. O. Didorenko in compliance with the Plan of action for informing the society on the Draft Strategy for restoration of the integrity of Ukraine and the de-occupation of Donbas, which is called "The Mechanism of small steps". The current legislation of Ukraine in general has the potential to successfully address the issue of restoring sovereignty and territorial integrity of Ukraine. However, there are a number of

unresolved potentially important issues regarding the organizational and methodological support for the implementation of transitional justice in a post-conflict period.

We propose effective mechanisms for adapting Ukrainian legislation in the post-conflict environment of certain areas of Donetsk and Lugansk regions to determine the best options for implementing transitional justice in the context of restoring Ukraine's territorial integrity and reintegrating the Donbas in the course of our study.

Discussion

The implementation of transitional justice in the area of criminal justice should focus primarily on the protection of rights, freedoms and legitimate interests of an individual, society and State against criminal offenses, ensuring prompt, full and impartial investigation and trial, so that anyone, who commits a criminal offense, will be held responsible, would bear, no innocent will be charged or convicted and every party to criminal proceedings will be subject to due process of law. The system of Ukrainian criminal justice includes the activities of agencies and institutions dealing with criminal cases, the institute of state prosecutors (Prosecutor's Office), agencies empowered to conduct pre-trial investigations, agencies and institutions for the execution of penal sanctions, the bar (Case of Mozer v. the republic of Moldova and Russia). Taking into account the fact that since the beginning of 2014 the legitimate activity of all named institutions of the Ukrainian authorities has been ceased in certain areas of Donetsk and Luhansk regions, it is necessary to discuss the mechanism of renewing the work of these institutions through the introduction of transitional justice.

The first measure aimed at restoring criminal justice in the reintegrated territories is to improve and harmonize criminal and criminal procedural legislation of Ukraine in accordance with international agreements on the reintegration of Donbas. Such legislative changes can be prepared even before the direct reintegration of certain areas of Donetsk and Luhansk regions. At the same time, it is important to realize that the use of emotionally charged terms in legal acts can lead to increased emotional tensions in society and provoke the rejection of government initiatives. One should gradually reduce the level of emotional tension in society, avoiding emotional concepts and expressions at least in official discourse, in the transition from war to peace. Even legally correct terms such as

“amnesty”, “collaborators” are perceived as stereotypes inherent in the “hostile population”. Therefore, the appropriate terminology when drafting bills on transitional justice should be used with care. We propose to use more neutral names of Laws, for example, “On the Restoration of the Territorial Integrity of Ukraine” or “On the Restoration of National Unity” instead of the names of the Laws “On amnesty” or “On collaborators”.

The resumption of criminal proceedings for crimes, which for various reasons have not been completed and left in the premises seized by terrorists at the beginning of the armed conflict, is one of the main tasks in order to introduce a legal regime in the reintegrated territories. The number of such criminal proceedings reached 29,134 as of 2017, with suspicion being reported in 770 cases. The facts of thefts account for almost half of these proceedings – 16 740. A significant amount is made by criminal proceedings on: fraud – 2639, intentional light bodily injury – 1522, robberies – 963. Besides, the materials of 76 criminal offenses, in which there were announcements of suspicion of committing serious and particularly grave crimes against life and health of the person, were left in the uncontrolled territories. 1452 unsolved premeditated murder, the materials on which still remain in the occupied territories, are of particular concern (Kalinin, 2017).

There has been a heated debate around this issue in academic settings. In particular, on October 1, 2019, the Ukrainian Helsinki Human Rights Union (UHHRU), supported by the United States Agency for International Development (USAID), presented a Draft Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine as to the Features of Pre-trial Investigation and Proceedings in Cases, in which the Proceedings are Inaccessible or Destroyed in Temporarily Occupied Territories” (The Supreme Court of Ukraine, 2018).

We consider it necessary to establish organizational support for the activities of law enforcement agencies that should work in transitional justice in addition to the legislative settlement of these problems. Special property surveys, which would consist of the officials of the Public Prosecutor’s Office (procedural heads), heads of pre-trial investigation agencies (their deputies), staff members, regime-secret units, representatives of military-civilian administrations, should be established in the liberated territories of Donbas after restoration of full work of the State institutes and law

enforcement agencies of Ukraine. Participation of employees of the representatives of monitoring missions of international organizations in such surveys is not excluded. After the creation of the said surveys, the procedure, terms, form and date of the inventory of all those proceedings, which will be detected by law enforcement agencies, should be established immediately.

The further work of these surveys should be carried out in accordance with the previously drafted rules of organization of accounting and movement of criminal proceedings, which provide a uniform procedure for the systematization, storage, issuance and inventory of these materials. It is necessary to check the presence of criminal proceedings according to the relevant registers and lists kept by law enforcement agencies during the work of the property surveys. The investigations into the restored proceedings will be carried out by the agencies designated by the Prosecutor General’s Office of Ukraine if territorial jurisdiction cannot be identified.

Identification and systematization of information on crimes that fall under the jurisdiction of an International Criminal Court (genocide crimes, crimes against humanity, war crimes, and crimes of aggression) is no less important issue in dealing with criminal proceedings remaining in the occupied territories. The said court is a permanent body empowered to exercise jurisdiction over those responsible for the most serious crimes of concern to the international community. The process of preparing the ratification of the Rome Statute for the full recognition of the jurisdiction of the International Criminal Court defined by the Rome Statute of the ICC has been continued for years. It is also worth noting that Article 8 of the Association Agreement between the European Union and Ukraine stipulates that the parties cooperate in order to strengthen peace and international justice by ratifying and implementing the Rome Statute of the ICC and related instruments. In view of this, the Verkhovna Rada of Ukraine adopted the corresponding amendments to the wording of Part 6, Article 124 of the Constitution of Ukraine, which came into force on June 30, 2019. Thus, Ukraine may recognize the jurisdiction of the International Criminal Court on the terms set out in the Rome Statute of the International Criminal Court.

Another important issue of introduction of transitional justice and returning Ukrainian legal system in the liberated territories is the

restoration of the violated rights of citizens and ensuring the principle of the inevitability of punishment. Firstly, it is investigation of crimes committed during the occupation period. And here, in our opinion, we should be prepared for the fact that a huge array of forensically important information will be contained in the acts (documents), which were compiled by the so-called “law enforcement agencies” of the occupying authorities in certain areas of Donetsk and Luhansk regions.

In order to properly organize the work in this area, firstly it is advisable to create specialized (interagency) tracking units (from among the officers of the Prosecutor’s Office, the National Police of Ukraine, the Security Service of Ukraine, as well as from experts in international law), who should provide information and analytical work in this area. In the event that circumstances indicating the criminal offenses set out in the Criminal Code of Ukraine are found in the documents of the occupational authorities, investigators or prosecutors (preferably from the members of these surveys) will be obliged to arrange appropriate materials for the initiation of pre-trial investigation.

Undoubtedly, all such material should be properly removed, systematized and thoroughly researched. However, the question arises as to what is their evidential importance and whether these materials can be used in pre-trial investigation? In our view, this is a fundamental and most debatable point in using such information as evidential information obtained from the proceedings gathered by law enforcement agencies of occupational authorities.

Considering these aspects, we believe that it is advisable to turn to international practice. Thus, in 1971, the United Nations International Court of Justice formed the so-called “Namibian Exemptions”, from which it follows that the documents issued by the occupational authorities should be recognized if their non-recognition results in serious violations or restrictions of the rights of citizens (Advisory Opinion, 1971 I.C.J. 16 (June 21) states that in general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the

registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory (paragraph 125).

In addition, the case-law of the European Court of Human Rights (hereinafter referred to as ECHR) also supported this standard. In particular, in cases *Cyprus v. Turkey* of April 10, 2001 and *Mozer v. The Republic of Moldova and Russia* of February 23, 2016, the ECHR has drawn attention to the analysis of this opinion and further international practice. The court stated that life should be made more tolerant and protected by actual power for people living in the occupied territory.

In view of this approach, the High Specialized Court of Ukraine for Civil and Criminal Cases (Information Letter of April 11, 2017 No. 9-697 / 0 / 4-17) appealed to the heads of the Courts of Appeal of the regions, the Court of Appeal of the City of Kyiv on the recommendation to admit proper and admissible evidence to confirm the birth or death of a person in the temporarily occupied territory of Ukraine. However this document notes that when marking the place of occurrence of a certain fact, there are no grounds to use such wording as “Donetsk Peoples Republic” (territory, which is not under control of State power of Ukraine), “Donetsk Peoples Republic, which is a temporarily occupied territory”, “Self-proclaimed Donetsk Peoples Republic” etc. That is, the resume part of the relevant decisions must state the correct name of the locality (village, settlement, city; district; region), taking into account the requirements of the Constitution.

The Government of Ukraine has contributed to development of the so-called “Namibian Exemptions” – it introduced the mechanism to confirm the authenticity of medical certificates issued in the temporarily occupied territories of Donetsk and Luhansk regions by the relevant health care and forensic institutions. The issue of ascertaining the facts of birth and death in the areas, in which State authorities temporarily do not exercise their powers, will be considered by a specially created Commission. It will have the power to ascertain the true circumstances of the case and issue an appropriate conclusion, which will serve as a basis for registration the facts of birth or death by the State registration authority for every application received (Ministry of Justice of Ukraine, 2019).

In view of the above, we can conclude that there are unique precedents in the case law (in

particular in criminal proceedings) when the courts applied Namibian exceptions (as of September 09, 2019 58 court orders and 5 judgments were rendered according to the Unified State Register of Court Decisions). Using these rules, Ukrainian courts take into account the documents issued by the occupational authority, in particular: the certificates of release from prisons, located in temporary occupied territories; acts confirming the facts of birth or death; documents certifying the state of health, etc.

Thus, when applying “Namibian Exemptions” in the criminal proceedings of Ukraine, it should be kept in mind that the parties to the criminal proceedings may take into account documents drawn up by the authorities and institutions under the control of the occupational power. However, such acts should be assessed together with and in relation to other evidence. It follows that all these documents should be supported by the results of the procedural measures carried out in accordance with the current legislation of Ukraine. In deciding whether such evidence is admissible, it should be kept in mind that these acts should have been issued without violating of the principles of fair trial, human rights and fundamental freedoms. In our view, such a position should be considered first and foremost in the context of protecting the rights of the residents of the temporarily occupied territory, and in no way as legalizing the pseudo republics (Nesterovych, 2017)).

Therefore, the mechanisms to obtain, to verify and to evaluate evidence obtained by an investigator or prosecutor from the sources listed above must be clearly established at the legislative or at least subordinate level in order to incorporate these standards into practice.

Another urgent issue of the restoration of criminal justice is to carry out cause-of-death certification of people who died in temporarily uncontrolled territories of Ukraine. Special commissions or investigative teams should be established in the process of reintegration of Donbas to check the circumstances of the violent deaths of persons who died during the occupation.

In this regard, the key aspect is the resolution of the validity of forensic findings conducted by the persons who, in accordance with the Procedure for Issuing the Certificate of Qualification of Forensic Expert, were entitled to carry out expert studies and who were listed in the State Register of certified forensic experts, but in fact

conducted research in the uncontrolled territory, and their conclusions were drawn up on the blanks of the occupational authorities. At present, all the documents of a person’s death, expert opinions issued by specialists in the territory, which are temporarily not under the control of State authorities of Ukraine, cannot be considered as evidence in criminal proceedings. They can only be recognized as such if there is an appropriate court order. The fact that such persons are not excluded from the Unified Register of Experts of Ukraine, their licenses are not revoked and they conducted the autopsy and forensic examination in accordance with the current order of the Ministry of Health of Ukraine no. 6 of January 17, 1995 compounds the problem (Kalinin, 2017). One of the ways to solve this problem is to appoint a forensic examination based on the materials of criminal proceedings. The opinion of a forensic expert, who worked in temporarily uncontrolled territories, is provided without the object of the study in this situation.

All the facts of death, which occurred during the occupation period, including disappearances of citizens, previously unknown to the law enforcement agencies of Ukraine, should be recorded in the journals of a unified account of statements and reports on criminal offenses and other events. In the event that the causes of death are not accurately identified, and sufficient evidence is not obtained pointing to non-violent nature of death, all measures provided for by the Criminal Procedural Code of Ukraine should be taken to investigate the circumstances of death comprehensively, fully and impartially.

In order to investigate the deaths because of the armed conflict, it is advisable to develop a nationwide program to search for murdered and missing persons and to commemorate the victims. In this regard, it is important to take into account international experience, for example, the activities of the International Commission on Missing Persons (ISMR), which was established in 1996 to organize the search and identification of persons, who were considered missing during the war. ISMR helped with the development and adopting the Law on Missing Persons (2004), and facilitated the opening of Missing Persons Institute at later stages (International Commission on Missing Persons, 2019). Obviously, such an experience has profound prospects for its incorporation into Ukrainian realities.

It might be also necessary to inspect the corpses of people, who have died during the occupation, after the liberation of the occupied territories. However, such procedural actions may offend the members of the family and close relatives of deceased person and lead to serious conflicts between local population and law enforcement agencies on ethical, moral and religious grounds. Besides, the choice of the due procedural action to conduct such research remains a debatable issue. It should be either an autopsy in accordance with Article 238 of the Criminal Procedural Code of Ukraine, or examination of the exhumed body (Article 239 of the Criminal Procedural Code of Ukraine). In order to solve this problem it is necessary to consider first of all whether the body was buried in an official burial place, that is, in the territories, which were specially designated for the burial of the bodies by the authorized agencies before the occupation. In such cases, the exhumation of the corpses should be carried out. If the burial has been carried out elsewhere, then the procedure for removing the corpse from the soil may be carried out by the procedure for autopsy.

Conclusions

Thus, we have tried to consider the main aspects of implementation of transitional criminal justice as one of the measures aimed at returning temporarily occupied certain areas of Donetsk and Luhansk regions to the Ukrainian legal field. The main steps to the restoration of criminal justice in the reintegrated territories are: adaptation of the criminal and criminal procedural legislation of Ukraine in accordance with international agreements on the reintegration of the Donbas; renewal of criminal proceedings for crimes which, for various reasons, have not been completed and left in the temporarily occupied territories; identifying and organizing information on the offences that fall under the jurisdiction of the International Criminal Court; organization of investigation of crimes committed during the occupation; investigations into the causes of death of persons, who died in temporarily occupied territories. We believe that the proposed steps and mechanisms will contribute to the restoration of the Ukrainian legal system in the reintegrated territories and to the post-conflict reconstruction of the Donbas as a whole.

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