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DEFINING TRANSITIONAL JUSTICE: SCHOLARLY DEBATE AND UN PRECISION

The article trace he origins and development of the notion of transitional justice in scholarly publications and UN practice. It reveals the historical preconditions of its development. It is being demonstrated that the notion of transitional justice was originally associated with political transit, however later it has been used as a name for the series of measures designed to overcome the consequences of armed conflicts and other situations of mass violence. The article demonstrates the dual nature of transitional justice.

Keywords: Transitional justice, post-conflict justice, political transit, human rights.

Плотников О. Визначення транзитивної юстиції: наукові дебати та практика ООН. – Стаття.

В статті розглядається виникнення та розвиток поняття транзитивної юстиції в науковій думці та практиці ООН. Простежуються історичні передумови зародження цього поняття, виявляються джерела його виникнення та розвитку. Доводиться, що поняття «транзитивна юстиція» початково асоціювалося з правовим забезпеченням політичного транзиту, однак пізніше воно почало використовуватися для позначення комплексу заходів, спрямованих на подолання наслідків збройних конфліктів та інших ситуацій масового насильства. Демонструється дуалізм концепції транзитивної юстиції.

Ключові слова: транзитивна юстиція, постконфліктне врегулювання, правосуддя перехідного періоду, політичний транзит, права людини.

Плотников О. Определение транзитивной юстиции: научные дебаты и практика ООН. – Статья.

В статье рассматривается возникновение и развитие понятия транзитивной юстиции в научной мысли и практике ООН. Прослеживаются исторические предпосылки зарождения этого понятия, выявляются источники его возникновения и развития. Доказывается, что понятие «транзитивная юстиция» изначально ассоциировалось с правовым обеспечением политического транзита, однако позже оно стало использоваться для обозначения комплекса мер, направленных на преодоление последствий вооруженных конфликтов и других ситуаций массового насилия. Демонстрируется дуализм концепции транзитивной юстиции.

Ключевые слова: транзитивная юстиция, постконфликтное урегулирование, правосудие переходного периода, политический транзит, права человека.

Van Zyl and Freeman in 2002 compared transitional justice to biotechnology, that is "undergoing such rapid change that new developments often precede careful considerations of their impacts and implications" [26, p. 3]. This was ten years after the term "transitional justice" became a part of the scholarly discussion. Now, after transitional justice has celebrated its 25th birthday, it remains the same rapidly growing child of the changing international system, which is itself characterized by transition. The evolution of transitional justice has not slowed down since 2002 and virtually every case of its application brings new developments.

The term "transitional justice" first appeared in the legal discourse in th late 80s or early 90s of the XX century. However, just as with many other phenomena, the introduction of the term finalized a long-lasting evolution and signified its rise to a new level. The scholars are seemingly unanimous in the opinion, that the methods, techniques, and processes, that were later named "transitional justice", existed decades if not centuries before. The difference is only in the moment that is defined as the birth of transitional justice.

Elster offered, perhaps, the most extravagant view. He suggests that elements of transitional justice can be found even in ancient history, giving an example of changes of the form of government in Ancient Athens from democracy to oligarchy and from oligarchy to democracy followed by property retributions. He proceeds with examples from the history of French restorations in 1814 and 1815 and adds cases from the XX century [7].

Teitel proposed a less radical approach, pointing at the origins of transitional justice after the World War I. According to her theory, the development of transitional justice can be divided into three phases. The first or "internationalism", or "postwar" phase began as an attempt to restore peace after WWI, including through prosecutions of certain leaders of Germany and continued with the more successful cases of the Nurnberg and Tokyo Tribunals, as well as with the multi-year efforts of the WWII aggressor states to cure the committed wrongs both

on the domestic and international level. The second phase was associated with a series of democratic transitions, which started in many parts of the world in the late 80s, most notably in Latin America and Eastern Europe. The third phase, which started around 2000 was characterized by a discourse on justice as means to overcome the consequences of conflicts and situations of violence [17].

Finally, Paige summarized the most common view, according to which the field of transitional justice began to emerge in the late 80s as a consequence of democratic transitions in the Latin American countries. It is here where the approach towards the country's grimy past changed from judging and shaming (common for post-WWII trials) to attempts to bring the particular perpetrators to justice and achieve social reconciliation [14].

Undoubtedly, Elster's and Teitel's views reflect interesting historical experiences, which probably contributed to our understanding of justice, and which developed some tools, that later became a part of the transitional justice instrumentarium. However, transitional justice as a single legal theory did not exist and could not appear before the late 1980s. Its development goes hand in hand with the with the theories of the democratic, or, in a broader understanding, political transit. As O'Donnell and Schmitter ironically observed, these theories described "transition from certain authoritarian regimes towards an uncertain "something else" [13, p. 3]. Indeed, transitions from right-wing or left-wing authoritarian rule in Southern Europe and Latin America in the 70s and 80s were not always smooth and did not always lead to the establishment of showcase democratic regimes [6, p. 3]. Already then it was clear that "transitions often fail" as "many countries succumb to the powerful forces that hinder democratic transition" [16, p. 9]. Already then it was apparent that the overthrow of a dictator by a parliament, the military, or an angry mob does not itself guarantee democratization. Democratic regimes did not grow immediately on the graves of the dictators, and required a long and complicated effort of the state and society. This effort became known under the name "democratic transition".

The academic discussion on the recent experiences of democratic transitions in the late 80s has been institutionalized in a series of conferences that brought together activists and experts from the affected regions, as well as interested scholars from the democratic states. Probably the first among those remarkable conferences, which laid the foundations of the future global transitional justice network, was a meeting arranged by the Ford Foundation and the Aspen Institute in November 1988. This Conference called "State Crimes: Punishment or Pardon" [see generally: 2] "aimed to sort out through moral, political, and legal implications of recent trials, commissions of injury, purges and other measures intended to hold previous regimes to account for systematic human rights abuses, as well as to foster a transition to democracy" [14, p. 322].

In this regard Henkin, one of the Conference organizers, later observed that "at that time there appeared to be only two ways in which the successor regime might deal with human rights violators who had remained members of the community… arrest, prosecute and punish or amnesty and amnesia" [8, p. 1]. These methods relied on the post-WWII experiences, however, the cases of Latin American transition demonstrated their insufficiency, since "the desire of truth is often more urgently felt by the victims… than the desire of justice" [2, p. 93]. The 1988 Conference concluded that a new paradigm of post-violence justice was necessary, where the establishment of truth would be more important, than prosecution, and the reparation to the victims would be more important than punishment of the perpetrators. Justice was no longer seen as a punishing sword for the villains, but a helping hand for those who suffered from violations and the society as a whole.

The next major development came with the Conference in Salzburg (Austria), which established the "Justice in Times of Transition" Project. On 7-10 March 1992 politicians, experts and activists from Latin America, Eastern and Western Europe, Post-Soviet countries and the USA met to discuss the ongoing democratic transitions. Probably, it was here where the term "transitional justice" has been articulated for the first time. At least, it is on several occasions

mentioned in a journalist report prepared as a result of the Conference [1].

Ruti Teitel, who participated in the Salzburg Conference, claims personal authorship: "'Transitional justice' is an expression I coined in 1991 at the time of the Soviet collapse and on the heels of the late 1980's Latin American transitions to democracy. In proposing this terminology, my aim was to account for the self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule" [18, p. 1]. In the absence of the other pretenders, Teitel's authorship seems to be undisputed. Most probably, the new term has been used in the correspondence between the organizers preceding the Salzburg Conference, including Teitel herself, Tim Pillips, Wendy Luers and Herman Schwartz [14, p. 229].

Yet, what is equally important, the term "transitional justice" was used sporadically alongside with similar terms. Finally, the term "justice in times of transition" has been chosen as the name of the Conference and the Project established as a result of the Conference. Probably, this solution looked sound at that time to separate the legal matters from the process of political transition and to avoid the question of whether transitional justice is a special kind of justice, and whether it is distinct from the human rights movement (these questions shall be discussed in the subsequent chapters).

Teitel's term could remain an unsuccessful attempt to invent a name for a newborn phenomenon, but in 1995 it was picked up by a group of authors led by Kritz in their three-volume "Transitional justice: how emerging democracies reckon with former regimes" – the first fundamental research in the field. This quite jumble collection of essays was nevertheless united by the common understanding of transitional justice as accompanying the process of democratization although is not equal to it [21, P. XVI]. The treatise lacked generalized theoretical understanding of the notion, characteristics and purposes of transitional justice. Rather it was a series of reflections from different countries, cultures and backgrounds, which painted a big picture of the existing factual situation and a set of narratives for further consideration

and theorizing (this approach remains popular until today. See, for example [22]).

The absence of theoretical comprehension of the emerging field of transitional justice affected its subsequent development. Kritz himself claims that between 1990 and 2000 there were more than a 1000 of scholarly publications worldwide in some manner addressing the issues of transitional justice (not including references in the popular press) [11, p. 22]. In contrast, according to Paige's calculations, by 2000 there were only 17 references to the term "transitional justice" in the scientific journals. In the absence of the theoretical basis for the new field, authors continued to research particular aspects of the problem (like treatment of the fallen regime officials, truth commissions, compensations to victims of abuses), but each of these works was just a piece of a puzzle, which the authors did not know exist.

Another important feature of the studies in this period was that the authors seemed to agree that transitional justice had only a very limited international legal dimension (if any at all). The 1988 Aspen Conference considered that issues of transitional justice remain within the discretion of states. Although there exists a general international obligation to respect human rights, there is no obligation to take any exact measures, including those associated with the notion of transitional justice [2, p. 4]. In a similar vein, the participants of the 1992 Salzburg Conference agreed with Orentlicher's position, that the states are obliged under international law to comply with their obligation to protect human rights, including through prosecution of offenders. Yet, international law does not impose any strict obligations in this respect. Rather Orentlicher spoke of the "pressure of international law", that "can make the difference in getting countries to prosecute" [1, p. 9]. Yet, the dramatic developments in the late 90s greatly expanded the role of international law and reshaped the notion of transitional justice itself.

In the mid-90s the World witnessed that what seemed to be forever blamed and forsaken: the genocide in Rwanda and a bloody conflict in the Former Yugoslavia, accompanied by war crimes, ethnic

cleansings, concentration camps and other atrocities. Less famous, but not less horrific, were the atrocities committed during short and small-scale armed conflicts following the collapse of the USSR. Conflicts in Abkhazia, South Ossetia, Upper Karabakh, gathered their death toll amounting to tens of thousands.

All of those conflicts resulted from power change which was intended to democratize the ruling regimes. In Rwanda, the Genocide broke out after the peace accords which were to establish a government of national reconciliation. In Yugoslavia and the Post-Soviet States, mass atrocities took place in the course of armed conflicts between the parts of the former socialist federations, one brought together by force. Absence or tardiness of the international response casted discredit on the UN system, which failed to prevent the conflicts and accompanying atrocities. In the field of transitional justice, these cases demonstrated the need for greater international attention to cases of transition.

The Tribunals for Yugoslavia and Rwanda were important for the accountability of the perpetrators. They also demonstrated that state sovereignty and immunities do not protect those responsible for international crimes. Yet these tribunals were an occasional reaction to the gravest atrocities that could not be left without international response. They were an instrument of investigation of punishment, in other words, retributive justice. Yet it was doubtful whether they could become an instrument of long-lasting peace and reconciliation. This was one of the reasons why the UN abandoned the international criminal tribunals model in favor of mixed tribunals and non-judicial means.

The experiences of Rwanda and Yugoslavia predetermined two remarkable shifts in the development of transitional justice. Firstly, it became a matter of international concern on the UN level. Secondly, it was no longer a model of justice for the period of transition to democracy. Rather it was a response to all forms of human rights violations, aimed at restoration of these rights and the rule of law. These shifts were accompanied by the further institutionalization of transitional justice both with NGO's and international organizations.

Questions associated with transitional justice have been occasionally discussed by the UN bodies since the early 90s (for example, [3], [4]). In 2003 the Security Council first mentioned the term in the framework of its longstanding work on the international rule of law. At the 4833 Session, which took place on the 24 of September 2003, the Council has set the Justice and the Rule of Law as an item of its agenda. Jack Straw, who was at the time, The President of the Council as a representative of the United Kingdom, has set the direction of the discussion noting that the UN has long wrestled "with the challenges of bringing countries out of conflict and into societies based on justice and the rule of law" [10]. Further, the Secretary-General addressed the Council. Referring to the experience of the Task Force on the Rule of Law in Peace Operations, he noticed that "people lose faith in a peace process when they do not feel safe from crime, or secure in returning to their homes, or able to start rebuilding the elements of normal life, or confident that the injustices of the past will be addressed... we have seen that the rule of law is too fragile seldom lead to lasting democratic governance" [10]. He further observed that "transitional justice mechanisms need to concentrate on only on individual responsibility for serious crimes, but also on the need to achieve national reconciliation" [10]. The national representatives agreed on the importance of the rule of law in international relations, although their reports looked somehow like routine confirmations of the importance of the topic for international relations and for maintenance of peace.

What makes this meeting illustrative is that it was arguably the first international forum where transitional justice has been mentioned in relation to internal and international conflicts prevention. The President and the Secretary-General seemingly based their speeches on the previous scholarly works, thus making reference to the concept of democratic governance or national reconciliation. On the other hand, they attempted to tie the topic of the rule of law to the tasks of the Security Council, and therefore they could not avoid mentioning the current work of the United Nations on the maintenance of peace and security.

Interestingly, the focus of the academic debate at that time also gradually shifted from the discussion of democratic transitions to the resolution of conflicts. Kritz illustrated the need for transitional justice with the example of the Former Yugoslavia, where failure to address the legacy of the ethnic conflict resulted in its repetition [11, p. 20]. On the other hand, many scholars continued to view transitional justice in its traditional "justice in times of transition" aspect. Elster in 2004 limited the scope of transitional justice to the "transition from one political regime to another" [7, p. I]. Teitel continued to associate transitional justice "with the periods of political change as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing predecessor regimes" [19, p. 893], analyzing even post-war transitions as types of a political transition [20]. In this fashion, in the early 2000 transitional justice became a partially fragmented concept discussing post-regime change transitions and post-conflict change transitions.

These processes were sometimes combined as the regime change is often accompanied by internal or even international armed conflict or other situations of mass violence. However, these situations do not necessarily follow or predetermine each other. Moreover, recent practice demonstrated that mechanisms associated with the field of transitional justice can be utilized even in the absence of both regime change and mass atrocities, but merely as an instrument to cure systematic human rights violations of the past (For example, in Canada a Truth and Reconciliation Commission has been established in response to lawsuits over the damages inflicted by the Indian residential school system [12]. This fragmentation makes it considerably harder to offer a legal definition of international justice and, possibly even questions the need for such definition.

In this cacophony of differentiating views, the UN continued its attempts to bring the field of transitional justice to a common standard. In 2004 the Secretary-General in his famous report defined transitional justice as "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" [21]. This definition clearly followed the "post- conflict" approach. The report uses terms like "war-torn societies" or post-conflict societies". This possibly reflects the UN role as a guarantor of peace, as well as the principle of sovereignty, which prohibits, *inter alia*, the UN intervention into domestic regime change. One the other hand, the Secretary-General clearly took the reformist approach into account, as it describes the restoration of the rule of law and reform as the key instrument to achieve post-conflict reconciliation. The idea of the Report revolves around assisting the domestic institutions and capacity building.

Remarkably, in 2005 the Human Rights Council expanded the idea of the Report of the Secretary-General. In its report on human rights and transitional justice the Council underlined the importance of efforts "to restore justice and the rule of law in conflict and post-conflict situations and, where relevant, in the context transitional process" [9]. This remark may demonstrate that the UN understanding expanded to include political transition, or, more probably, that the Human Rights Council was able to say that what has been omitted by the Secretary-General as a political leader and that situations of transition were from the very beginning in the focus of attention of the UN experts.

In the 2006 Report "Uniting our strengths: Enhancing United Nations support for the rule of law" the Secretary-General grouped the UN activities into "baskets", where transitional justice was placed in the second basket: rule of law in the context of conflict and post-conflict situations. He slightly altered the content of the notion compared to 2004 Report describing transitional justice as "national transitional justice consultation processes, truth and reconciliation processes, reparations, international and hybrid tribunals, national human rights institutions, vetting processes and ad hoc investigations, fact-finding and commissions of inquiry" [25]. In fact, the definition

offered a list of institutions, actions and mechanisms in which the UN could assist the domestic transitional justice effort. Yet it remained pretty indefinite for a legal document.

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, appointed in 2011 by the Human Rights Council, in his first report noticed that the term "transitional justice" does not refer to a special kind of justice, but "to a strategy for the realization of the rights to justice, truth, reparations and guarantees of non-recurrence in the aftermath of gross violations of human rights and serious violations of international humanitarian law" [15]. However, in the same report, the Rapporteur clearly refers to the "practices and experiences in post-authoritarian settings, such as the Latin American countries of the Southern Cone and, to lesser extent, those in Central and Eastern Europe and South Africa". Further, the Rapporteur gave the account of the "progressive transfer" from post-authoritarian settings to post-conflict context, where overcoming the consequences of the violations becomes more important than the reformation of the institutions.

Considering the personality and experience of the Special Rapporteur, it would be surprising if he was unaware of the post-authoritarian aspect of transitional justice. Pablo de Greiff, who continuously occupies the position since 2011, is a Columbian lawyer, who personally participated in the processes of democratic transition in his country, and later headed the International Center for Transitional Justice in New York. That person is clearly more than familiar with the legal aspects of political transition. Nevertheless, the abovementioned report and the subsequent reports demonstrate the prevalence of the post-conflict approach.

In his personal capacity, de Greiff prefers that what he calls "holistic approach" to transitional justice, however, only to conclude that "strictly speaking, there is no such thing as "transitional justice" but only conceptions of what justice means when applied in transitional situations" [5]. For him, transitional justice seems to remain an abstract idea, that can have some applicability in practical situations, but is always too idealistic and never successful enough.

This may be true at the highest levels of abstraction. 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. In other words, it must describe what the UN can consider to be transitional justice for the purposes of further action.

If this stands true, no wonder that the UN experts have chosen the conflict-based approach to defining transitional justice. 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.

On the one hand, this resolves the definition problem, at least partially. An imperfect definition is better than no definition at all, and its availability makes further work possible. The conflict-based approach seems to be more comprehensive than the reformist approach, since virtually every political transition is accompanied by some sort of conflict and violence, while not every violence is a result of a reform. It also allows paying greater attention to the needs of the victims seeking justice. The definition can be amended as more information is collected on the ground and greater theoretical understanding is achieved.

On the other hand, the definition of transitional justice by such reputable bodies as the UN Human Rights Council and the Secretary General is likely to misleadingly limit further research. For instance, already now the Stanford Encyclopedia of Philosophy in an article on transitional justice concentrates heavily on overcoming conflicts and virtually ignores political transitions [23]. It should therefore be determined whether the early UN definitions will be guiding for further understanding of transitional justice (which in that case would shift from its original meaning), or these definitions reflect only the practical UN capabilities in regulating the field, which is itself much broader and covers all the legal and political aspects of transitions. In fact, the

question is whether transitional justice will become a legal notion, or will remain a vague politico-socio-philosophic concept.

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