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ROLE OF TRANSITIONAL CRIMINAL JUSTICE LAW IN BUILDING IRAQI SOCIAL PEACE

Rol de la ley de justicia penal de transición en la construcción de la paz social iraquí

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ABSTRACT

The transitional criminal justice is purely a judicial procedure following the transitional phase. Instrumentally, it aims to achieve justice and recompense the victims of human rights violations by all legal means, including retribution from the perpetrators. It passes through all societies suffering from human rights violations, genocide, or any other form of violations against humanity. It passes through multiple stages to prepare compensation and reparation programs and ends with the procedures for reforming the security services that violate human rights and work to perpetuate the tragedies that occurred against the victims as well.

Keywords: Transitional justice, transitional criminal justice, criminal accountability, human rights.

RESUMEN

La justicia penal de transición es un procedimiento puramente judicial que sigue a la fase de transición. Instrumentalmente, tiene como objetivo lograr justicia y recompensar a las víctimas de violaciones de derechos humanos por todos los medios legales, incluida la retribución de los perpetradores. Pasa por todas las sociedades que sufren violaciones de derechos humanos, genocidio o cualquier otra forma de violación de lesa humanidad. Pasa por múltiples etapas para elaborar programas de compensación y reparación y culmina con los procedimientos de reforma de los servicios de seguridad que violan los derechos humanos y trabajan para perpetuar las tragedias ocurridas contra las víctimas.

Palabras clave: Justicia transicional, justicia penal transicional, responsabilidad penal, derechos humanos.

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INTRODUCTION

The concept of transitional justice represents an alternative to the idea of revolutionary courts witnessed in some countries in the nineteenth century until the middle of the twentieth century. Transitional justice is a term given to the set of procedures and mechanisms applied in societies that are going through transition periods, in the aftermath of civil wars or the transition from a state of internal armed conflict to a state of peace, or the transition from an authoritarian political rule to a democratic rule, or liberating from foreign occupation by restoring or establishing a national government with the aim of confronting a legacy of violations of human rights and freedoms before and during the period of change, giving rights to victims and compensating them materially or morally. This justice differs from regular criminal justice in that the former deals with transitional periods and within some laws and special courts. It is concerned with achieving justice for victims of human rights violations in periods of political or ethnic conflict or civil wars, provided that these countries are in a state of transition to a more calm and stable state in the case of wars and conflicts, and more democratic in the case of authoritarian rule. Whereas the second is the demand of humanity at all times and times against the perpetrators of the crime (Wray-Lake et al.: 2008, pp. 84-92).

The importance of the research lies in the fact that the concept of transitional criminal justice is relatively recent and that transitional justice leads to the process of democratization by confronting human rights violations in the past to prevent their occurrence in the future (Vinck: 2019, pp. 105-112).

The problem lies in a key point, which is, What role does transitional criminal justice play in laying the foundations of security and societal peace? Can transitional justice change the psychological composition of societies and people after the end of wars or the removal of dictatorial regimes and create a homogeneity that removes the sediments and bitterness of the past?

The research aims to study the concept of transitional criminal justice and its role in promoting national unity and civil peace in Iraq.

METHODOLOGY

Due to the multiplicity of issues related to the research topic and its novelty, the approach, which mostly in harmony with the nature of the topic, is based on the use of the analytical legal research method and based on the analysis of legislative texts, the jurists' opinions, judicial rulings, and the descriptive review approach that reviews the aspects of the research topic and draws conclusions in order to reach the achievement of the objectives of this search.

Research Structure

We shall discuss the research topic as follows:

- 1-The concept of transitional criminal justice.
- 2-Criminal accountability and its role in achieving societal peace.
- 3-The research shall be concluded with the most important conclusions and proposals reached.

The first topic

The concept of transitional criminal justice

Transitional justice is based on four foundations: the prosecution and disclosure of those involved in the violations that occurred, the revealing the truth of these violations, compensating the victims and those affected, and sometimes an apologizing by the state if the crimes are of an ethnic nature, and then administrative and institutional reform to ensure that such violations are not repeated. Future violations, societal peace, and stability will not be achieved without the application of transitional criminal justice and justice for the victims. The importance of transitional criminal justice is an urgent necessity to build a state of the law on civil foundations and democratic multiplicity (Belkush, 2014, p 38). It is the only way to guarantee justice and fairness for the victims and the transition from a painful past to a bright future because building a

sustainable peace requires a comprehensive and final reconciliation of all past conflicts. If the victims' rights of severe violations are neglected, and the condition of injustice is not treated and the wounds caused are not treated, this will lead to societal divisions and will increase the victims' mistrust in state institutions (Backer: 2009, pp. 23-90).

Totalitarian systems of government violate the minimum standards of human rights and do not care about the rule of law, which leads to collapsing the legal systems of states, making them ineffective and incompetent. Human rights violations during armed conflicts or revolutions mostly cause collapsing legal systems. After the disappearance of these reasons, the relevant countries contribute to building different and just foundations, where the affected community members try to find commonalities to uncover the truth, assume perpetrators of serious crimes accountable, compensate the victims, and rebuild for a different future. So, they resort to transitional criminal justice for the sake of peace and establishing justice (Al-Sailawi, 2017, p. 300).

RESULTS

Introducing transitional criminal justice

Transitional justice represents a methodological philosophy whose composition is shared by a curriculum from the sciences of law, politics, sociology, and ethical and human values, to address a legacy of gross violations of human rights and the suppression of its basic freedoms. It works to create a general atmosphere for the transition of society in all its formations directly and peacefully from a state of tyranny and dictatorship to a state Democracy (Backer: 2009, pp. 23-90).

Justice is "integrity and equality before the law and fairness in rights." It is a "set of values in which human rights are taken into account." Ideally, it means "the transformation of societies from one type to another" (Davies: 2017, pp. 333-350). Criminal trials are the first class of transitional justice mechanisms and, in general, the prosecutions are clearly directed at those people who bear the greatest responsibility for crimes, namely senior political leaders with decision-making and senior military commanders who have contributed to committing crimes that violate the principles aimed at protecting human rights and dignity. (Backer: 2009, pp. 23-90). Transitional justice has been defined as "a response to widespread violations against human rights with the aim of recognizing the violations suffered by the victims, with the aim of achieving peace and democracy" (Naguib: 2020, pp. 404-424). It is meant that traditional justice was adapted to suit the societies in which gross violations of human rights occurred. Even if these transformations occurred suddenly or over a long period of time, as another defined them as "a group of activities aimed at implementing the law and achieving justice in societies suffering from conflicts and inherited serious violations of human rights, which may reach Crimes against humanity and genocide, aiming to hold accountable the crimes that were committed in the past to prevent their occurrence in the future and build a democratic society " (Bibri: 2018, pp. 39-131).

Mark Ernhovle defined it as "a set of mechanisms that society uses during transitional periods with the aim of achieving justice. These periods usually arise after revolutions or the end of the war and lead to a transition from authoritarian rule to a transitional stage and then to a democratic transformation." (Gallant: 2009, pp. 60-85). As for the UN, transitional justice is defined as all the processes and methods used by society with the aim of overcoming the past with the aim of realizing the right and achieving justice." These measures include criminal prosecutions, truth commissions, reparation programs, various forms of institutional reform, and reviving the memory of those violations. Hence, transitional justice can be defined as a set of measures taken by countries where gross violations of human rights occurred, whether wars, conflicts, revolutions, etc., with the aim of achieving stability, building peace, and reaching democracy. These measures include criminal trials, truth commissions, and reparation for damages, victims' compensation, institutional reform, and memorialization mechanisms (Stewart & Wiebelhaus-Brahm: 2017, pp. 97-133).

It provides recognition of victims' rights, encourages civil confidence, strengthens the rule of law, and strengthens The role of the judiciary, and activating the concept of democracy. Another one defined it as "the

set of methods and judicial mechanisms that a society uses to achieve justice in a transitional period in its history. This period often arises after the outbreak of a revolution or the end of a war, which results at the end of an era of oppressive authoritarian rule inside the country, and a transitional phase towards a democratic transition. During this transitional period, society faces a very important problem dealing with issues of human rights violations, whether physical, economic or even political rights, by holding them accountable for criminal violators" (Ang & Nalepa: 2019, pp. 631-666).

Thus, "it is a set of procedures and mechanisms of judicial accountability in transitional periods, especially for human rights violators represented by senior leaders, officials and influential individuals who committed criminal crimes against individuals for the sake of the permanence of the tyranny in periods preceding the transition process and imposing the necessary punishment." The perpetrator shall be punished for what he committed in a way that achieves a special deterrence for the perpetrators and a general deterrence for others who may themselves be tempted to commit such violations in the future, in addition to calming the souls of the victims and those affected (Wiebelhaus-Brahm: 2016, pp. 56-70).

The most prominent crimes related to transitional criminal justice

Triple substantial classes of crimes were classified under international law that was adopted by the Iraqi legislator in enacting the law of the Supreme Iraqi Criminal Court. These crimes are:

First: Genocide

The basics of the genocide crime were defined for the first time in the Genocide Convention of 1948, where it is now not only a representative of customary international law but also a rule of international law that may not be derogated from (Van Ommering & El Soussi: 2017, pp. 168-188).

The principality of the genocide crime is concomitant with the crime and specifically includes specified acts conducted to totally or partially terminate a group (national, ethnic, racial, or religious). In genocide crime, the group is treated as the crucial objective or the victim of this type of widespread criminal behavior. The measures adopted towards group members are the ways employed to fulfill the optimum criminal goal in relation to the group (Bantekas: 2005, pp. 215-237). It was stated in the 1948 International Convention on the Prevention of the Crime of Genocide. The researcher found that Iraq ratified this convention in 1959, and based on this accession, the Iraqi legislator has listed this crime and the related acts in the Law of the Iraqi High Criminal Court (10) of 2005, as it was mentioned in Article (11) thereof in detail (Bantekas: 2005, pp. 215-237).

Second: Crimes against humanity

The Law of the International Criminal Court represents the decisive file in describing these crimes because of its universal character. These crimes were defined for the first time in Article (6 / c) of the Nuremberg Charter, and after the end of the Second World War, the class crimes towards humanity was included in the major system of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, the Rome Statute of the International Criminal Court, and the Special Court Statute for Sierra Leone, as canons related to crimes towards humanity are provided in Article (7) of the Rome Statute of the International Criminal Court, and there are two groups of elements of crimes against humanity. One of them can be defined as fundamentals that must fall within a specific scope, and all cases must be fulfilled as an act that constitutes a crime against humanity, and these elements are (Van Ommering & El Soussi: 2017, pp. 168-188):

- 1- An attack occurred against a group of the civil population.
- 2- The violence was widely spread and organized.
- 3- That the aforementioned act was carried out as a bit of the incident.
- 4- That the indicted person is aware of the wider perspective in which he committed action.

If these parts and fundamentals are changed, then the action must be one of the banned actions that constitute a crime to humanity, including murdering, termination, exile, forced displacement, detention, rape, and other kinds of sexual violence, persecution, and other non-human acts, and there is no condition for the presence of armed conflicts, as the law applies in times of peace as in times of war, and on a related level, the law of the Supreme Iraqi Criminal Court, which is competent to try the pillars of the previous regime, has clarified the acts that constitute crimes against humanity (Miethe et al.: 2005, pp. 115-130).

Third: War Crimes

War crimes are known as those outlaw acts of international humanitarian law that are committed during the armed clash and bring individual criminal responsibility, and for the crime to create a war crime, two groups need to be proven (Van Ommering & El Soussi: 2017, pp. 168-188):

- 1- The basics to demonstrate the presence of an armed, international or non-international in nature conflict.
- 2- Committing any of the forbidden actions, such as deliberately affecting civilians or using certain prohibited weapons, or recruiting, enlisting, or using children to actually participate in hostilities by force.

Criminal accountability and its role in achieving societal peace

The criminal accountability of crimes perpetrators and violators of human rights to those in power before the transitional stage of transition is an essential point in providing reassurance to the victims by imposing punishment against criminals and preventing them from impunity as a penalty for their criminal acts.

DISCUSSION

Criminal lawsuits and prosecutions are an essential component of an integrated response to gross violations of human rights in order to punish the perpetrators of these violations and restore rehabilitation to the victims. The principles of amnesty, tolerance, and reconciliation may be resorted to in societies that have known the scourge of wars, oppression, and persecution, but this does not happen. These trials are necessary not only when it comes to serious human rights violations, but for the promotion of the principles of monitoring and accountability also at a stage in which society is preparing to turn the painful page of the past from its history and start a new phase. It gives a measure of redress to the suffering of the victims and provides an important opportunity to consolidate the credibility of the judicial system that has been afflicted by corruption and destruction or which has not functioned properly in the past (Gazzotti: 2020, pp.408-435).

National courts are one of the options that are taken up by the judicial system in the transitional criminal justice stage, and it is preferable to resort to because this has a great role in increasing the ability of national trials to follow up cases and keep abreast of political and social changes in the transition phase. It allows direct contact between victims, witnesses, and evidence, and achieving reconciliation and rehabilitation has greater opportunities in prolonging national trials according to the consensus of legal experts (Ihsan: 2019, pp. 29-37). The most important experiences in this field are the Nuremberg trials in Germany and Tokyo in Japan that took place in the mid-nineteenth century and international and quasi-international criminal trials. Transitional criminal justice as happened in the former Yugoslavia, Rwanda, Sierra Leone, and East Timor (Backer: 2009, pp. 23-90).

The Iraqi Criminal Court for Crimes against Humanity was established by Law No. (1) of 2003 issued by the Governing Council in Iraq at the time and authorized by the dissolved Coalition Authority Order No. 48 of 2003, which defined the jurisdiction of that court. By trying the pillars of the previous regime, where the court represents a qualitative leap in legal philosophy in Iraq and the Arab region, this law was abolished by Law No. (1) of 2005, which replaced the name of the court with the name "The Iraqi High Criminal Court" (Stover et al.: 2005, pp. 830-857).

In conclusion, applying criminal accountability in place of a culture of impunity that allowed at times to commit violations gives victims a sense of safety and sends a warning to those who contemplate committing

violations in the future, and it also gives a measure of redress to the suffering of victims. It helps to curb the tendency to exercise vigilante justice and a policy of revenge and creating chaos (Boduszyński: 2019, pp. 35-65).

Perhaps the issue of transitional justice is the most important issue, and one of the first issues being worked on after the radical changes in societies that are accompanied by strife, victims, and destruction, as closing the previous stage and restoring civil peace, community unity, and internal reconciliation requires first of all to calm souls by restoring grievances, restoring rights to their owners, and compensation for the affected. Revealing the fate of the missing, revealing the facts of what happened, determining the responsibilities, and holding the perpetrators of violations and crimes accountable through the legal and judicial institutions prepared for this purpose and is a necessary and obligatory condition. (Bantekas: 2005, pp. 215-237).

The goal of transitional criminal justice is not only to condemn criminals and apply the law, but basically to restore societal peace, achieve national reconciliation, and erase the effects of a previous phase that encourages the continuation of devastation if it is not overlooked (Hollywood: 2007, pp. 59-78). The goal of transitional criminal justice is not limited to holding perpetrators of crimes accountable and to reassure people that their rights will not be wasted, but rather its goal is to give reassurance to non-perpetrators that they will not be held accountable or punished for crimes they did not commit (Fletcher et al.: 2009, pp. 135-163). It gives an important guarantee to the perpetrators themselves that they will not be under the weight of a retaliatory reaction and that justice and justice institutions will hold them accountable with evidence and pieces of evidence to make a determination about what they committed (Fletcher et al.: 2009, pp. 135-163).

Trials restrict known perpetrators of violations and lead to rehabilitating them. They purify society from dangerous leaders, deter future war criminals, and rehabilitate rebellious states. In addition, trials are important in terms of penalties as they impose punishment and correct conditions, and on the other hand, prevents the emergence of any attempt to violate human rights in the future, because when individuals are exempt from punishment and are not held accountable or subject to any penalties, this leads to a lack of human rights, as impunity is the antithesis of the rule of law (Al-Ghusain, *ibid.* P, 86-91).

The researcher finds here that societies ruled by dictatorial regimes, albeit in different proportions, during which society has been exposed to various forms of human rights violations and suppression of freedoms, and because it is not possible to advance forward and achieve any democratic transition unless the files of the past legacy and what has been committed are addressed. From crimes and felonies against individuals, persecution of ethnic and religious minorities, and political repression, transitional criminal justice came to address the previous situations, and it is not based on revenge and revenge but rather aims to do justice to the victims and their families and not to escape punishment for the perpetrators, no matter how simple, in light of a wise treatment between the perpetrators. Violations and their victims, in order to rebuild a nation that accommodates all, based on respect for human rights, democracy, and the rule of law (Lemay Langlois: 2018, pp. 146-167).

CONCLUSION

The following research has come up with the following conclusions and recommendations.

1- Transitional criminal justice represents a purely judicial process with its integrated procedures that start with the investigation and end with the issuance of judicial decisions in accordance with specific legal frameworks, standards, and institutions.

2- Transitional justice is a broader perception than criminal justice and includes fact-finding and disclosure processes, compensation for victims, reform of state institutions such as the army, police, and others, remembrance of victims, and the provision of apologies. However, individual accountability for perpetrators of gross human rights violations should be the cornerstone of any transitional justice process.

3- The need for transitional criminal justice is linked to the repressive product of a tyrannical political power that is indifferent to the supposed social contract between the ruler and the ruled, which leads to the occurrence of various grievances and crimes during a certain historical stage. That was prevalent during the previous ruling with more objectivity and impartiality.

4- The application of the foundations of transitional criminal justice represents various methods. It is the most appropriate option to resort to the mechanism of society through the legal procedure to confront the errors and crimes committed by the previous repressive regime, as in the case of the Iraqi regime before 2003.

5- The establishment of the Iraqi High Criminal Court represents an important step in the field of transitional criminal justice because it strengthened the concept of eliminating impunity in Iraq, as it provided many legal guarantees that embody the imperative of punishment for the crimes it contained.

6- Three main crime classes were classified within international law that was adopted by the Iraqi legislator in enacting the law of the Supreme Iraqi Criminal Court, and these crimes are genocide, crimes against humanity, and war crimes.

7 - The application of a culture of criminal accountability in place of a culture of impunity that has allowed for the perpetration of violations gives a sense of safety to victims and sends a warning to those who contemplate committing violations in the future. It also gives a measure of justice to the suffering of victims and helps to curb the tendency to exercise civil justice and a policy of revenge and creating chaos in order to rebuild a nation that is spacious for all and free from hatred and revenge processes among members of its society in a way that enhances civil peace.

8- We suggest that the Iraqi legislator consider developing the transitional criminal justice system and unifying it into a unified and integrated legislative system, which has not been updated for a long time, according to a national strategy in line with the highest applicable international standards in the field of human rights protection as possible.

9 - We suggest that the crimes included in the Iraqi Criminal Court Law be included in the Iraqi Penal Code, as it is a general law and has legal stability at all times.

10- We propose establishing a supreme national commission for transitional justice, under which all transitional justice institutions in Iraq would be organized.

11- We propose including the transitional criminal justice subject within the vocabulary of the human rights subject for Iraqi university students to consolidate the idea and concept of community peace by citing the criminal accountability of human rights violators from the pillars of the former Iraqi regime.

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