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UKRAINE'S ACCESSION TO THE ROME STATUTE AND THE PRINCIPLE OF COMPLEMENTARITY. THE ANALYSIS OF CURRENT LEGAL ISSUES

In the last couple years Ukraine has made significant steps towards democratization and integration to European Union. Each of these steps means a lot of effort from not only the Ukrainian government but primarily from Ukrainian citizens.

The obligation to respect human rights implies that states must not only abstain from encroachments or attempts to limit human rights, but is obligated to take appropriate measures to protect individuals and groups of people, to provide all available instruments for effective protection of fundamental human and civil rights. It is the main task of government and constitution to protect citizens, especially in conditions of armed conflicts, acts of terrorism and aggression. The significant role in establishing justice and protection of human rights is played by international courts.

Aim of the article is to study the principle of complementarity of the Rome Statute and its impact on the national legislation of Ukraine. The domestic legal system should create a holistic mechanism for human rights protection. However, in cases where domestic legal mechanisms do not ensure the protection from violations - the application of procedures and mechanisms established at regional and international levels should be provided. The proper provision of national and international human rights standards requires the implementation of effective international control [5,122].

The Rome Statute in 1998 (entered into force in 2002) established a unique judicial body – the permanent International Criminal Court. So far 124 states are parts to this international agreement. Ukraine is one of the 31 countries that signed but not ratified the Rome Statute. In 2001 the Constitutional Court of Ukraine

analyzed various issues related to the accordance of the Rome Statute with the Constitution of Ukraine. As a result the Constitutional Court of Ukraine has concluded that this treaty is "one that does not comply with the Constitution of Ukraine [2], as it relates to the provisions of paragraph 10 of the preamble and Article 1 of the Statute: “International criminal court ... complements the national criminal justice authorities”[1].

Overall properly having considered other aspects of compliance of the Rome Statute with the Constitution of Ukraine, the Constitutional Court incorrectly interpreted the principle of complementarity, which led to an opinion mentioned above. This erroneous approach is partly explained by the fact that the conclusion about the Rome Statute was granted at a time when there was no practice of the interpretation of principle of complementarity by International Criminal Court and by the Assembly of States-Parties to the Statute. The opinion of an Assembly of States-Parties to the Statute should be considered when interpreting the Statute according to paragraph 2 and paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (which is part of the national legislation of Ukraine) [4, 296].

The principle of complementarity creates a great deal of concerns in the context of art. 17 of the Rome Statute. Such concerns are based “on a sincere and firmly-held belief that the test in Article 17 provides that a “case is inadmissible unless the State is unwilling or unable genuinely to carry out the proceedings” [7]. Canadian professor Darryl Robinson underlines that “text of Article 17 expressly and unambiguously provides not a one-step test, but a two-step test, the first explicit question of which is whether a State is investigating or prosecuting the case or has done so (“the proceedings requirement”). Where there are no such national efforts at all, the case cannot be inadmissible under complementarity” [7].

If any of the crimes has been committed under the Statute (genocide, crimes against humanity, war crimes, and, potentially, the crime of aggression), the International Criminal Court (hereinafter ICC) entitles the state to conduct the criminal process resulting in punishment of those responsible for the crime. However, if the competent State is unable or demonstrates reluctance to do justice, the ICC is entitled perform its own criminal jurisdiction in accordance with the principle of complementarity, acting this way against the will of the State. In this way only the State, showing the willingness and ability to do justice is guaranteed with jurisdictional sovereignty [6].

According to the principle of complementarity, in this case inability and unwillingness of the State to open an investigation against the suspect, the International Criminal Court shall fully review state legislation, including its substantive and procedural part. Thus, this procedure will undoubtedly have a tangible impact on the international image of the State in political, legal, diplomatic and economic terms. The consequences of this impact will be much more significant and noticeable for the State than the ones from bringing perpetrator to justice in the national court [5, 121].

Concerns of Ukraine regarding the interference with state sovereignty refutes the fact that in the case of the International Criminal Court, the ICC confirms the respect of the sovereignty of States emphasizing that the main work in combating the

impunity for the most serious crimes against international law must be carried out at national level. This of course means that Ukraine should be willing and able to proceed in the above mentioned cases. The positive progress of Ukraine's accession process is uttered by fact that Ukraine used the *ad hoc* instrument of ICC, however the ratification of the Rome Statute is still in question.

It is definitely worth emphasizing the role of the Constitution of Ukraine as a guarantee to the protection of rights and freedoms of citizens, but it is also necessary to consider specific factors and the situation of the State. In present conditions of rapid political and social changes it is worth considering the application of the theory of «law in action» in order to include current instruments of human rights protection. This update concerns in particular the conclusion of the Constitutional Court of Ukraine on July 11, 2001 at number 3/2001 [3].

Even though Ukraine acknowledged the importance of the ICC in the context of current armed conflict and past events during Euromaidan, the 2001 Opinion of the Constitutional Court «requires relevant amendments to the Constitution before the Rome Statute could actually be ratified». Ukrainian researcher of the current issue professor Mykola Gnatovsky underlines that «while the two declarations made by Ukraine, accepting the ICC's jurisdiction on an ad hoc basis are positive, a number of serious legal issues can only be solved if the Rome Statute is ratified by the Verkhovna Rada»[6]. The three year delay declared by the President is not justified by any legal or political reason. All the necessary amendments to the Constitutional Court opinion where approved by the Venice Comission. In the context of European integration it is crucial to access to the Rome Statute as it is one of the main requirements stated in the Association Agreement with the European Union (art.8).

The principle of complementarity enshrined in the Rome Statute, aims to establish a delicate balance between the sovereignty of States and the independence of international judicial institution which is the International Criminal Court. Thus it is fundamentally incorrect to interpret the principle of complementarity as such that violates the sovereignty of the state. On the contrary, its primary purpose is to ensure full respect for the State, its sovereignty and judiciary [4,297]. Moreover the major misunderstandings could be easily refuted taking into account the experience of other European countries.

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THE POLISH AND UKRAINIAN EXPERIENCES WITH RADBRUCH'S FORMULA

The conflict between legal positivism and the natural law is something like sense of the theory of law. Since more or less XIX century each researcher in that area of knowledge have to support one between these theory. However during before the second world war supremacy of legal positivism was unqouestionable, now the natural law seem to be in the period of reneissance.

Gustav Radbruch one of the most famous German lawyer is very outstanding merit in the process of rebirth of the natural law. His critics of the legal positivism and pointed out some connexion between that doctrine supremacy and the victory of nazism was the beginning of the controlling back to the some elements of natural law in the jurisprudency.

In my short article I would like to present the basically element of the Radbruch's doctrine so as to present the strong analogy between his critics of the *legal lawlessness* in the Nazi Germany and Polish and Ukrainian experiences with undemocratic regimes in the XX and XXI century. In the last part of my article I would like to consider in which way the Radbruch's doctrine was used and can be use by the our democratic governments. I suppose that such considerations can be very useful during the time than we still have problems with the heritage of undemocratic regimes and we try to build democratic system of power however without using thr simple policy of revenge.

The Radbruch doctrine

Gustav Radbruch belongs to the most famous German lawyers. In 1932 he wrote the basically from the point of view of his career book *The philospohy of law.* There is very discutable things if these book expressed the support for legal positivism or even in that time include some elements of natural law. Radbruch rejected the primat of morality and the connexions betweem legal system and religious philosophy.