

Policy Memo

TRANSITIONAL JUSTICE AS METHOD OF HEALING A POLARIZED SOCIETY

Skopje, December 18, 2018

The attempts to normalize a society that has only recently started recovering from a deep political crisis, and whose index of fragility is fairly high, by purely legalistic means are habitually due to fail. Macedonia's index of fragility in 2018 is equal to that of 2015,¹ which signals a deep social division and a prolonged political crisis and, thus, a diminished level of institutional capacity of the state to deal with incidents such as the storming of the Parliament on 27th of April 2017 by judicial means only. The incident itself was in fact the result of a deep political polarization and grave crisis in terms of social and national cohesion. In order to reinstate Judiciary's full capacities, one needs to reestablish societal normality and heal the wounds of the deep political and national division. It is impossible to initiate a proper reform – in particular in the Judiciary – if one part of the society has the perception that the Judiciary serves the ruling coalition's interests (regardless of whether this is a fact or not – the perception itself maintains a social division and undermines the credibility of the institutions). Thus, an overcoming of the social polarization in order to substantively implement the Urgent Reform Priorities – instead of just ticking boxes – is the prerequisite for a truly credible Judiciary. Therefore, the vision of the Prime Minister and the ruling coalition to tackle the issue of deep political polarization by methods of transitional justice seems timely and quite adequate considering the conditions in the country. At this point, it is important to note that it is a process that should be carried out in a way that covers a longer period of time and is not reducible either to only one incident or to the simple pragmatism of ensuring votes for a qualified majority that would support the constitutional amendments issuing from the Prespa Agreement of June 2018.

According to the literature of authority in the area of conflict studies as well as according to the policy recommendations and guidelines of institutions such as the UN, the deeply divided societies that

have undergone a profound socio-political crisis are in need of healing from the national trauma in order to establish a proper rule of law. Furthermore, the literature at issue points to the fact that a social crisis following a deep destabilization of the institutions coupled with a high index of fragility can be overcome by means of transitional justice. In other words, the conventional judicial remedies do not suffice. A normal judiciary system does not have either the appropriate solutions or the capacity of absorption to address incidents that have emerged as the result of the aforementioned type of crisis. Normally transitional justice does not provide full amnesty, but rather only a partial one and is, therefore, complemented by classical juridical procedures for the cases of identifiable crimes and perpetrators. The methods of transitional justice, however, yield truth of a period of crisis and polarization as well as means of reconciliation. They are the only means to tackle the types of behavior or actions that do contain a certain form of moral responsibility but their formulation as proper legal cases may be controversial, often because they go beyond the mere issue of crime or legal transgression. For example, agitators of a particular political cause, activists that may have led to dramatic polarization that has issued into violence – but have not themselves committed acts of crime – cannot really fit a proper case of legal persecution. Moreover, a truth and reconciliation commission, an admission of guilt and a public apology may be more beneficial methods of depolarization for a society than a classical legal processing of cases where acts of crime are not easily and indisputably identifiable as such from a legal point of view.

The courts become meaningless in a society that is devastated when it comes to healthy and productive social relations, engulfed by utter socio-political polarization. In such cases, the priority is a healed social tissue out of which credible institutions can emerge that can insure a proper rule of law.

Following a prolonged political crisis of at least two years, one that has been verging with a full-fledged destabilization (let us recall the tragedy of Divo Naslje in Kumanovo in 2015), the Macedonian society needs to heal from its trauma. The first steps in that direction relate to learning to listen and understand the arguments and the motives of the other side, to establish a proper societal dialogue reflected adequately in the public discourse. On the basis of such social transformation, a precondition for establishing credible institutions – including Judiciary – will be created.

The methods of *transitional justice* enable a society to establish the facts and the truth, i.e., the underlying narratives behind the facts, of a period of deep divisions and thereof – a national reconciliation. Following such processes, conditions can be created to enable legal processing of justice of ostensible cases of crime and violence. According to the relevant literature we consulted, in most of the cases the institutions of transitional justice do not recommend a full amnesty but only a partial and gradual one.

Having all of the above in mind, we recommend to the Macedonian parliament:

- To follow the guidelines of organizations such as the United Nations and its Office of the High Commissioner for Human Rights in the implementation of measures of transitional justice.² There can be a number of methods. However, we find the one implemented in South Africa – mainly through truth and reconciliation commissions characterized by public hearings, gradual transitional justice, gradual amnesty combined with judicial proceedings of certain cases – as applicable to the Macedonian case considering the fact that we are not dealing with a post-conflict transition but rather with a political transition from authoritarian to democratic rule (as was the case in South Africa).

- To adopt guidelines for a systematic organization of the process that are provided by relevant organizations such as the UN and its Office of the High Commissioner for Human Rights, or the International Center for Transitional Justice, providing instructions and terms of reference following the best practices.

- To establish a commission, constituted by politically neutral individuals with reputation of impartiality and resilience to corruption. This often means involvement of international authorities that do not necessarily have to be juridical authorities, and often are not (they can be writers, activists, religious figures, etc.).

- To apply gradual transitional justice, which includes establishing of truth and reconciliation commissions, following the example of Nelson Mandela in South Africa, involving public sessions with the intention to establish truth and enable forgiveness and reconciliation (where possible), but also open court trials for the cases where the act of confession is insufficient.

- The gradual transitional justice entails partial amnesty, and we recommend to apply it not only to certain individuals related to the case of 27 April 2017, but also to the participants in the Colorful Revolution against whom court proceedings are still active. The latter refer to acts that were not life threatening to anyone and the material damage they produced was the result of a social polarization that in that moment had the characteristics of a revolution (as a reminder: transitional justice is primarily applicable in cases of revolution and regime change).³

- In addition to the partial amnesty, and according to the principle of gradual transitional justice, judicial processes should be open for the cases of established intention to pose physical harm or liquidation, terrorist attack, and similar legally classifiable acts of crime.

(Endnotes)

¹ Fragile States Index 2018, released by the Fund for Peace, available at <http://fundforpeace.org/fsi/countrydata/>, accessed on 1 September 2018.

² Office of the United Nations High Commissioner for Human Rights: *Rule-of-Law Tools for Post-Conflict States*. United Nations: New York and Geneva, 2006.

³ There are ongoing trials against Mariglen Demiri, Mirjana Najcevska, Branko Trickovski, Simona Spirovska, Zamir Mehmeti and others.