Transitional justice and rule of law

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General information

1. Academic objectives and outcomes: The main objective is to critically analyse the concept of transitional justice and various approaches to it as presented in socio-legal studies, legal and political theories from the point of view of its connection and relations to the concepts of rule of law.

The principal aims of this course are to:
- Furnish students with an awareness of some of the central and continuing traditions of thought about transitional justice and rule of law and interactions;
- Enable them to think both within the paradigms of such traditions, as well as critically about them;
- Encourage them to step beyond narrow disciplinary boundaries to take in the variety of sources that focus on common problems, among them from sociology, law, history, political science and philosophy;
- Focus the general themes on the course on contrasts between characterizations of law that emphasize its role as the servant of power, and those that see it as a force that constrains it;
- Focus them also on those who see society as an inert recipient of law and those that emphasize it as an active source of law;
- Acquaint students with major shifts and changes in the character of law and its social and political environment in the West and in the world.

2. Learning outcomes: By the end of this course, students should be able to:
- identify the sociological, political and legal assumptions underlying contemporary writings about transitional justice and rule of law;
- evaluate the strengths and weaknesses of different perspectives on these matters;
- participate in discourses on these matters versed in empirical, theoretical and normative material relevant to them;
- apply what they have learnt to their own societies and legal orders.

2. **Content:** The main part will be devoted to the different perspectives of transitional justice/‘dealing with the past’ in the context of contemporary social, legal and political theories. Also main concepts of rule of law present in legal theory will be presented and discussed. In the second part of the course we will analyse case studies of different strategies and institutions used in transitional justice.

3. **Teaching method:** The teaching is designed as an interactive seminar, whereby the lecturer introduce the material and the participants contribute to the discussion on the basis on pre-distributed readings and their own experiences.

4. **Assessment:** the final grading will be a combination of three elements:
   a. 30% of written synopsis with outline of the arguments on the topic chosen by the students. It has to include 3 elements:
      - Overview of the problem
      - Strategies and institutions of dealing with the past
      - Critical assessment of the transitional justice mechanism from the point of view of chosen concept of rule of law
   b. 50% a final essay of maximum 2000 words (including footnotes and bibliography) that include comments on oral presentation. This essay should advance theoretical and empirical understanding of discussed problem. The essay should be handed in by 10 June 2012 in the electronic form to the following address: a.czarnota@unsw.edu.au
   c. 20% active participation in the class discussions

5. **Class schedule** – TBA

6. **Consultation place and hours** – TBA

**Important date:**

Deadline for submitting proposal for assignment – 29 February 2012

SUBMITTING OF THE OUTLINE OF ASSIGNMENT- SYNOPSIS – 26 March 2012

Deadline for submitting final assignment – 20 April 2012

**Course schedule:**

Introducing transitional justice and rule of law

*After introducing the main objectives of the course and the organizational framework for the entire course we will imitative discussion on the main concepts to be explored during the course; transitional justice and rule of law. Student’s should prepare to the discussion thinking trough their own answers to the crucial questions. Among the question we will explore are: what does the term transitional justice mean? What are its goals? Is possible to connect the*
What is the concept of transitional justice with special type of social theory? How it differs from other traditional types of justice?

What is rule of law? What is its structure? What are the basic requirements of rule of law? Is the concept of rule of law connected with the specific social theory? What is its normative background?

Sociology of law background readings

Transitional justice bibliography:

http://users.polisci.wisc.edu/tjdb/The%20Transitional%20Justice%20Bibliography%203.0%20-%20Alphabetical.pdf

Reza Banakar, ‘Sociological Jurisprudence’ in Reza Banakar and Max Travers, eds., An Introduction to Law and Social Theory, 33-50.

Module 1 Transitions, transitional justice

Do particular types of authoritarian regimes determine and shape the possibility or desirability of transitional justice? Is transitional justice connected with globalisation? If so how? How do transitions shape the transitional justice mechanisms and institutions? How important is the “exit” from former regimes for institutional design of transitional justice mechanisms? Generally speaking what are the relations between different types of authoritarian regimes, the transitional justice and the desirability and possibility of transnational justice mechanisms?

Readings:

Module 2 Memory politics and dealing with the past

Usually we think that remembering is contradictory to forgiveness and that settling account with the past is impossible when people remember. On the other hand some argue that without remembering there will be return to the past. Is memory necessary for reconciliation with the past? What is memory and what are relations between collective memory and personal memory? Does collective memory plays positive role in implementing rule of law in transitional societies? What is relation between memory and identity? Does memory provide normative ground for rule of law?

Readings:


Module 3 Law, Society and Rule of Law

According to many scholars rule of law is great if not universal good. What a the perception of rule of law?

Discussion on rule of law is usually conducted by lawyers and sometimes political philosopher. Rarely have legal sociologists explored the concept. In order for law to rule it must have a prestige in society. What are the conditions for the prestige of law?

Readings:

Leon L. Fuller, The Morality of Law, Yale University Press, 1961 chapter 2
Jospeh Raz, ‘The Rule of Law and its Virtue’ in; The Authority of Law, Oxford UP, 1979, pp.210-29
Blandine Krygiel, The State and Rule of Law, Princeton University Press, 1995, pp. 3-10
Philip Selznic,’Culture and the Rule of Law’ in; M. Krygier and A. Czarnota (eds.) Law after Communism, Ashgate, Aldershot, 1999, pp.21-38

Module 4 Law, rule of law and society in transformation

What about the situation of law in the process of transition or transformation? There are not legal philosophy questions but par excellence question of the sociology of law. We will discuss it on the
Case study of the post-communist transformations. Communism represented one of the most comprehensive and radical challenges both in practice and ideology to the rule of law. The post-communist states at least in theory are dedicated to achieve rule of law but doing it is difficult and not easy process due especially to the huge gap between official law (statutes) and socially significant roles of law in post-communist societies. Why this distance? What occupied space between official law and social its role in society?

Readings:


Module 5 The difficult journey from impunity to accountability – retributive justice

In the transition form authoritarian regimes to new one old ruling elites usually want to grant itself impunity for gross abuse of human rights. Transitional justice process is a strategy which does not fully accept the duty to punish but try to develop new forms of accountability. Are these new forms of accountability compatible with rule of law? What is justification for new forms of accountability? What is relation between

Readings:

Impunity and Amnesty


National courts

International tribunals and courts


Criminal prosecution in third countries (universal jurisdiction)


Module 6 Alternative Forms of Accountability

*New mechanisms of accountability include such procedure as lustration and de-communization in former communist world. In this class we will discuss the character of this new form of accountability and discuss also there relation to rule of law.*

*We will also discuss the institutions of national remembrance and their role in implementation of new normative order necessary for implementation of rule of law.*

Readings:


Module 7 New institutional of transitional justice – truth commission

*New institution such as truth commission became flagship of transitional justice. What is their structure? And procedure? Do they represent quasi-judicial bodies? Is operation of such bodies compatible with rule of law?*

Readings:


Martha Minnow, Between Venegance and Forgiveness: facing History after genocide and Mass Violence, pp.

Margaret Popkin and Naomi Roht-Arriaza, “Truth as Justcie: Investigatory Commissions in Latin America,

Mary Albon, ‘truth and Justice: The Delicate Balance- documentation of Prior Regimes and Individudal Rights”
Douglass W. Cassel, Jr. “International Truth Commissions and Justice


Modul 8 Traditional mechanisms

In some countries we can observe adaptation of some traditional institutions in order to deal with gross abuses of human rights. What is an effectiveness of such institutions and to what degree are they compatible with rule of law?

Readings:


Traditional Justice and reconciliation after Violent Conflict. Learning from African Experiences, Luc Huyse & mark Slater (Eds.) International IDEA, Stockholm 2008

Module 9 Reconciliation: Remorse, Apology, Forgiveness

Reconciliation is very often presented as moral justification for the transitional justice. In this class we will discuss what is the meaning of reconciliation? What is relation of legal institutions to reconciliation? We will also discuss the extra-legal mechanisms such as formal apologies and its impact on reconciliation.
Readings:

