

Transitional justice and rule of law

Adam Czarnota

Akademia Gorniczo-Hutnicza

Wydział Nauk Społecznych i Humanistycznych

2011/2012

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 ASIGNEMNT- 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

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.

Klaus A. Ziegert, 'The Sociology behind Eugen Ehrlich's Sociology of Law', in (1979) 7 *International Journal of the Sociology of Law*, 225-73

David Nelken, 'Law in action or living law? Back to the beginning in sociology of law' (1984) 4 *Legal Studies* 157-174

Sally Falk Moore, 'Law and Social Change: the semi-autonomous social field as an appropriate subject of study' in *Law as Process. An Anthropological Approach*, Routledge & Kegan Paul, London, 1978, 54-81.

Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law*, 1-47

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:

Teitel, R. (2003) Transitional Justice Genealogy, 16 *Harvard Human Rights Journal*, 69-94.

Huyse, L. (1996) Justice after Transition: On The Choices Successor Elites, Make in Dealing with the Past, Chapter 13 in Jongman, A. (ed.), *Contemporary Genocides*, PIOOM, Leiden, 187-214.

Huyse, L. (2003) Victims, in Bloomfield, D., Barnes, T. & Huyse, L. (eds.), *Reconciliation After Violent Conflict. A Handbook*, Stockholm, International Idea, 54-66. (www.idea.int)

Huyse, L. (2003) Offenders, in Bloomfield, D., Barnes, T. & Huyse, L. (eds.), *Reconciliation After Violent Conflict. A Handbook*, Stockholm, International Idea, 67-76. (www.idea.int)

Jon Elster, *Closing the books. Transitional justice in historical perspectives*, Cambridge U.P., Cambridge 2004, pp. 77-135.

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 fo law in transitional societies? What is relation between memory and identity? Does memory provide normative ground for rule of law?

Readings:

Jeremy Waldran, *Redressing Historical Injustice*, 52 *University of Toronto Law Journal* 154, Winter , 2002, pp. 125-138

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

E.P. Thompson, *Whigs and Hunters*, Penguin, Harmondsworth, 1975, pp. 258-79

Morton Horwitz, 'The Rule of Law: an unqualified human good? (1977) 86 *Yale Law Journal*, 561 ff.

Philip Selznick, '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:

Antal Orkeny and Kim Scheppele, 'Rules of law: the Complexity of Legality in Hungary' in; M. Krygier and A. Czarnota (eds.) *The Rule of Law after Communism*, Ashgate/Dartmouth, Aldershot, pp. 55-76

Denis Galligan, 'Legal failure: Law and Social Norms in Post-Communist Europe' , in; galligan Kurkchian, (Eds.) *Law and Informal Practices. The Post-Communist Experience*, Oxford UP, 2003, pp.1-24

Marina Kurkchian, 'The Illegitimacy of Law in Post-Communist Societies', in; Galligan and Kurkchian, (eds.), *Law and Informal Practices. The Post-Communist Experience*, Oxford UP, 2003, pp. 25-46

K. Hendlay, S. Holmes, A. Aslund, A. Sajo, K. Pistor, 'Demand for Law', n (1990 8, 4 *East European Constitutional Review*, pp. 88-108

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

- Orentlicher, D. (2005) *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, New York, United Nations, Commission on Human Rights, E/CN.4/2005/102 of 18 February 2005.

National courts

- Orentlicher, D. (1991) *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale Law Journal*, 2537-2615.
- Orentlicher, D. (2007) 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency, 1 *International Journal of Transitional Justice* 10-22.

International tribunals and courts

- Bassiouni, C. (1997) From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 *Harvard Human Rights Journal* 11-62.

Criminal prosecution in third countries (universal jurisdiction)

-Slaughter, A.-M. (2006) Defining the Limits: Universal Jurisdiction and the National Courts, in Ratner, S. (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press, 168-192

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 their 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:

Czarnota, A. (2007) The Politics of Lustration law in Poland (1989-2006), in Mayer-Rieckh, A. & De Greiff, P. (eds.), *Justice as Prevention. Vetting Public Employees in Transitional Societies*, New York, Social Science Research Council, 222-260.

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:

Priscilla B. Hayner, "Fiftieth Truth Commission 1974-1994: A Comparative Study

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 Indicividual Rights"

Douglass W. Cassel, Jr. "International Truth Commissions and Justice

James L. Gibson, "The Contribution of Truth to Reconciliation: lessons from South Africa" *Journal of Conflict Resolution* 50:3 (2006), pp.409-32

Charles Villa-Vicencio and S'Fiso Ngesi, "South Africa: beyond the 'Miracle' in; Trough Fire with water, Erik Doxtader and Charles Villa-Vicencio (eds.) Cape Town: Institute for Justice and reconciliation, 2003, pp.267-99

Andre du Toit, The Moral Foundation of the South African TRC. Truth as Acknowledgement and Justice as Recognition, in: Rothberg, Robert and Dennis Thompson (Eds.) *Truth vs. Justice*, Princeton University Press, Princeton-Oxford 2000, pp. 122-140

Aguilar, P. (2001) Justice, Politics and Memory in the Spanish Transition, in: Barahona de Brito, A., Gonzalez-Enriquez, C. & Aguilar, P. (eds.), *The Politics of Memory. Transitional Justice in Democratizing Societies*, Oxford, Oxford University Press, 92-118.

Czarnota, A. (2001) Law as Mnemosyne and as Lethe: Quasi-Judicial Institutions and Collective Memories, in Christodoulidis, E. & Veitch, S. (eds.), *Lethe's Law: Justice, Law and Ethics in Reconciliation*, Oxford, Hart Publishing, 115-128.

Hayner, P. (2001) *Unspeakable Truths. Confronting State Terror and Atrocity*, New York, Routledge, 289-305.

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:

Corey and S.F. Joireman, "Retributive Justice: The GACACA Courts in Rwanda" *African Affairs* 103:410 (2004)pp.73-89

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:

Russel Daye, *Political Forgiveness: lessons from South Africa*, New York: Orbis books, 2004, pp.7-22

P.E.Digeser, "forgiveness and Politics: Dirty Hands and Imperfect Procedures", *Political Theory* 26:5 (October 1998), pp.700-724

Donald W. Shriver, Jr., "Political Ethics as Moral Memory", in; *An Ethics for Enemies: Forgiveness in Politics*, Oxford UP, 1995, pp.63-72