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Jernej Letnar Čerňič

***Consolidating Democracy through Transitional Justice in Slovenia:
Lessons Learnt?***

Abstract

As many as 130,000 people are estimated to have been summarily executed in Slovenia in the months following the end of the Second World War on 8 May 1945. This article firstly outlines the factual background of the crimes committed in the Slovenian territory after Second World War. Then it goes on to discuss decisions of the Slovenian District and High Courts in the case against former officials of totalitarian regime. This article thereafter analyzes the decisions from the perspective of international criminal law and transitional justice, trying to draw out lessons concerning the understanding of current ideological divisions in Slovenia. Equipped with this knowledge, this article goes on to argue that there exist strong legal and moral grounds for prosecuting crimes against humanity committed in Slovenia after the Second World War. Though the present situation may appear grim, consensus does appear to be growing for meaningful and continued reform, which would settle the question of post-war killings and the secret mass graves of victims in a manner that will respect victims' right to a name and a grave.

Biography

Jernej Letnar Čerňič is Lecturer in Human Rights Law at the Graduate School of Government and European Studies, Slovenia and at the European Faculty of Law,

Slovenia. Jernej graduated from University of Ljubljana and obtained an LL.M in Human Rights Law at the Raoul Wallenberg Institute for Human Rights Law and Humanitarian Law, University of Lund, and an LL.M in European Law. He completed his Ph.D. in Human Rights Law in 2009 at the School of Law, University of Aberdeen, Scotland, UK. Jernej has worked in the European Ombudsman's Office, the Superior Court of the Republic of Slovenia, the Law Institute in Ljubljana, the International Criminal Court, University of Aberdeen, University of Lund, New York University and European University Institute. Jernej is fluent in six languages and he has written a number of articles and research studies in Slovene, English and Swedish. Jernej is a member of the International Human Rights Committee of the International Law Association.

Agata Fijalkowski

Transitional Criminal Justice: The Polish Way

Abstract

The 'Polish' approach to transitional criminal justice measures is not without controversy. Polish de-communisation measures have been met by considerable legal and political constraints. It is interesting to note that questions with respect to 'seeking justice' for grave human rights violations are ongoing and continue to be debated by various segments of Polish society, still, over twenty years since the Communist regime's breakdown.

My paper critically considers the criminal investigation and prosecution of Communist crimes in Poland. At the heart of this process are The Institute of National Remembrance and its Commission for the Prosecution of Crimes against the Polish Nation. This paper specifically focuses on one of the most contentious issues in this area, namely cases concerning the 'misadministration of justice' on the part of judges and prosecutors during the Communist regime. A critical assessment of this issue will reveal the complexities in determining whether the criminal prosecution as a transitional criminal justice measure can be said to be a success.

Biography

Dr Agata Fijalkowski's research interests lie within the areas of comparative constitutionalism, European human rights, and legal transition. Her monograph, *From Old Times to New Europe: the Polish Struggle for Democracy and Constitutionalism* (Ashgate, 2010) considers Polish constitutional and legal developments and their legal philosophical contexts starting with the pre-war period in 1918. Her current research concerns transitional justice in post-Communist, new Europe. Her research on Romanian developments was funded by the British Academy, and included interviews with military prosecutors who were involved in cases against members of the Romanian Communist Party and the security police. Her investigation now turns to Poland. Agata is a Lecturer-in-Law at Lancaster University Law School.

Arolda Elbasani

Politics and Debates in the Pursuit of Transitional Justice: Comparing Albania and Poland

Abstract

This paper aims to explore the role of public debates to shaping different modes of transitional justice after communism. We assume that the intensity and quality of public exchange of arguments can play to moderate the crucial influence of political interests in the long, intricate and fuzzy process of ensuing transitional justice. The empirical analysis draws on a comparison between Albania and Poland. The two cases feature different arrays of political actors, who have picked up the issue and made it part of public contestation, both they have also opted for different models of transitional justice and recorded different degrees of success. The comparison of the cases follows on a similar structure proceeding from the actors involved and unfolding debates, to the analysis of the models adopted, and the implementation process. Evidence from the cases suggests that political interests have permeated the whole process of ensuring transitional justice. Yet, the existence of a plural and sophisticated structure of argumentation in Poland proved to shield transitory justice from heavy politicization, a phenomenon very obvious in the case of Albania, where the process was from the start elite driven, exclusive and secretive.

Biography

Arolda Elbasani is A.S.K Social Science Award Fellow at the Rule of Law Centre, Social Science Research Centre, Berlin. She has a PHD in Social and Political Sciences from the European University Institute, Florence and an MA from Central European University and Bilkent University. Previously, she was a post-doctoral Fellow at Free University Berlin; Research Assistant at Robert Schuman Centre Florence; and lecturer in different universities. Her research interests lay at the intersection of theories of institutional change, EU enlargement, and comparative democratization with a particular focus in post-communist countries. She is currently working on three projects: 1) Enlargement and Institutional Change in the Western Balkans; 2) Transitional Justice after Communism; 3) The Role of Religion in Post-communist Democratization.

Raluca Ursachi

Transitional Trials as History-Writing: the case of the Romanian 1989 Revolution

Abstract

The paper concentrates on the transitional criminal trials attempted in post-communist Romania, concerning for the most part the events of December 1989 that led to the fall of the Ceausescu dictatorship. A surprisingly large number of persons were tried in these cases, considering that to this day, the events are still not elucidated and, for the public opinion, justice is still not rendered to the victims and perpetrators. Several types of trials can be cut out, according to the type of persons that were being accused (high-ranking members of the Communist Party, Army militaries and/or high-ranking generals, members of the troupes of the secret police or institutions themselves), the type of

accusations that were raised and the types of verdict that were being pronounced. The significance of this division becomes apparent when it is paralleled with the changing political context and discourse prevalent in each of the considered periods, and when it is showed how these accusations and verdicts helped the interests of the political parties that were in power at those times. We propose the hypothesis that the real stake of such trials is the institutionalisation of one version or another of these seminal events and of recent history in general, such as to support the political image and legitimacy of various political and civic actors.

Biography

Raluca Ursachi is PhD Candidate at University Paris 1 Pantheon La Sorbonne, where she prepares a thesis on Transitional Justice in Post-communist Romania. She teaches geopolitics and international relations within Institut Pole Paris Alternance. She co-authored (with Raluca Grosescu) the book *Transitional Criminal Justice. From Nurnberg to Post-communist Romania*, Iasi, Polirom, 2009.

Raluca Grosescu

Factors that Influence Transitional Criminal Justice: The Romanian Case

Abstract

The present article analyses the factors influencing the development of the criminal transitional justice in post-communist Romania. In this study, we shall approach the trials against communist dignitaries, responsible for crimes and abuses committed between 1945 and 1989, other than repressing the demonstrations leading to the fall of Ceausescu regime in December 1989. We find that, while the events of December 1989 were the object of numerous criminal trials (Mioc 2004, Stan 2008), the post-communist justice stood almost still concerning the political crimes and abuses committed along 45 years of dictatorship. Despite protests from civic organizations and victims associations, in Romania an official state policy regarding decommunization and punishing the political actors involved in repression was never implemented. From 1990 to date, only four indictments of crimes committed by members of the repressive apparatus were drawn, only two of which were finalized by verdicts of condemnation. The hypothesis we set out is that the small number of trials concerning communist crimes in Romania was determined by the following factors: a) constraints related to the criminal law system; b) the nature of the Romanian communism; c) the general disinterest shown by the post-communist political class regarding dealing with the past; c) the chaotic activism of the civil society regarding the decommunization process.

Biography

Raluca Grosescu is PhD in Political Science at University Paris Ouest Nanterre. Selected publications: *Communist Elites Before and After 1989* (Jassy: Polirom, 2007); *A History of the Romanian Communism. Textbook for High School* (Jassy: Polirom, 2008); *Transitional Criminal Justice: from Nurnberg to the Romanian Post-communism* (Jassy: Polirom, 2009). She has studied the political conversion of the Romanian communist elites after 1989. and the transitional justice that followed the demise of the communist regime. Starting with 2006, she coordinated the Research and

Documentation Department within the Institute for the Investigation of Communist Crimes in Romania, where she was actively involved in research and educational projects. Research interests: political elites in comparative perspective; transitional justice; political transformation and legacy in post-communist states.

Julie Trappe

Dilemmas of Transitional Justice - Romanian Criminal Justice Confronting Communist State Crime

Abstract

In 2003 several Romanian NGO's addressed the justice, asking the Court to oblige the President to condemn the Communist Regime as a criminal one. Such a „*Condemnation of communism*“, three years later realized by Basescu, was then refused by the Court, arguing that „without contesting the truth of the complainant's argumentation, we consider that there has to be found a solution in the field of history or society. The plaintiff's approach is not the right way to confront the problems created by the communist regime.“ The Court's answer focuses the general question of the role of the justice system in the process of Transitional Justice. Furthermore, this so called „*process of communism*“ raises the problem to what extent Criminal Law based on the principle of individual guilt with all its implications such as statute of limitation and non-retroactivity can be a tool to confront state crime. This paper aims to explore the role of Criminal Justice in the process of coming to terms with the wrongdoings of the past, using the Romanian example (f.e. the cases Ursu, Draghici, „the revolution cases“ and issue of rehabilitation), comparing it in certain points with the processes in Germany after 1989.

Biography

Julie Trappe has a PhD in Criminal Law at Humboldt-University of Berlin. She prepared a thesis on Transitional Criminal Justice in Romania. Since 2008, she is Project Manager within the German Foundation for International Legal Cooperation, Bonn/Germany; responsible for legal cooperation between Germany and Romania.

David Sugarman

Late Justice. Chile since the 1973 Coup

Abstract

Following General Augusto Pinochet's arrest in London (1998) for conspiracy to torture and murder, Chile's courts have convicted more former agents of the Pinochet dictatorship (1973-1990) than courts of any other Latin American society. This represents a new, distinct phase in Chile's struggle to secure truth and justice, and to define collective memory. After all, during the 1970s, 1980s and much of the 1990s Chile's courts proved largely unable, or unwilling, to pursue those responsible for the crimes of the dictatorship. This paper explores the Chilean experience of dealing with the aftermath of the Pinochet regime and how Chile has sought to balance stability, „reconciliation“, truth and justice. This paper also assess how Chile has sought to mark the recent past in the present, as in the emergence of public commemorative space,

such as the effort to turn a former torture centre into a “peace park”, and the creation of a National Museum of Memory and Human Rights. Finally, the paper reflects on the larger significance of the Chilean experience for current debates about memory struggles and transitional justice within and beyond Latin America.

Biography

Dr David Sugarman is Professor of Law and Director of the Centre for Law and Society, Lancaster University, UK. Having gained an undergraduate law degree (LLB) at Hull University, he completed graduate work in law at Cambridge University as a William Senior Scholar in Comparative Law (LLM and Diploma in Comparative Legal Studies), and Harvard Law School (LLM), where he was awarded a doctorate (SJD). He has published 18 books (encompassing sole authored books, edited and co-edited books and special issues of law reviews) and over 90 articles and book chapters in academic journals and scholarly collections. His scholarship has been translated into French, German, Italian, Japanese and Spanish. He has published academic and popular articles on the domestic and transnational struggles to bring Augusto Pinochet, the former Chilean dictator, to justice, the Pinochet precedent, and the post-Pinochet-era human rights trials in Chile, in a broad range of outlets including *The Times*, *The Guardian*, the *Santiago Times*, *Open Democracy*, the *North American Congress on Latin America (NACLA)*, *Amnesty International (Chile)*, *El Mostrador* (Chile), and has acted as a consultant to and occasionally appeared on a wide range of documentary and television and radio programmes addressing these topics. Relevant publications include: (2009) "Courts, Human Rights and Transitional Justice. Lessons from Chile" 36/2 *Journal of Law and Society* pp. 272-281; (2009) "Legge e diritti umani" in *La Forza. Atti Del Forum Internazionale*. Claudio Bertocchi (ed.). (Proctor: Bologna) pp 147-157; (2008) "The Arrest of Augusto Pinochet: Ten Years On" *Open Democracy*, (29 October); (2002) "From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power". *Journal of Spanish Cultural Studies*, vol. 3, issue 1, March pp. 107-124; (2001) "The Pinochet Case: International Criminal Justice in the Gothic Style?" *Modern Law Review* 64, pp. 933-944.

James Gallen

Transitional Justice in Nepal: Prosecutions, Reform and Accountability Strategies

Abstract

This presentation examines the development of transitional justice commitments in Nepal following its Comprehensive Peace Agreement in 2006 and in particular scrutinises the suitability and viability of prosecutions as a transitional justice strategy in Nepal. The presentation first identifies a number of challenges for legal reform in Nepal that are necessary preconditions for the emergence of a prosecutorial response to gross violations of human rights, as well as judicial developments that support this trend. The presentation then contrasts the considerable legal and political challenges facing a prosecutorial approach with other debates and transitional justice concerns in Nepal, most notably security sector reform and emergent accountability through the vetting of the security sector. The presentation is based on a series of interviews conducted with

international donors and domestic civil society and government actors in Nepal in May-June 2010. The paper concludes by offering some recommendations based on this research as accountability strategies across a variety of time spans.

Biography

James Gallen is a Scholar and graduate of Trinity College Dublin and New York University School of Law and is currently writing a PhD in the School of Law Trinity College Dublin. His doctoral research examines the relationship between transitional justice, post-conflict peace-building and economic development, with a particular focus on the cases of Nepal and Timor-Leste. He is a former Transitional Justice Scholar at NYU and served as an Intern and Fellow at the International Center for Transitional Justice in 2008 in New York and Kathmandu."

Emilian Cioc

... And Justice for All. Premises of the Rule of Law

Abstract

The contribution proposed hereafter is based on notions and reflections having emerged from the research developed in the framework of a bilateral project entitled *Rhetorics of social justice and deliberative perception of the rule of law in post-apartheid South-Africa and post-communist Romania*. A comparative approach gave us the means to further scrutinize presuppositions and procedures efficiently involved in the ways in which different post-authoritarian societies elaborate operative meanings of justice and injustice. On that ground and in reference to fundamental promises of rule of law based on legal and political representations, we intend to argue that transforming the exceptional procedures and aims specific to transitional criminal justice in a primary normalizing paradigm may narrow the genealogical perspective on plural meanings of justice. More precisely, we question the way in which this approach leads to declaring the present structurally incapable of injustice, and thus annuls rights abuses in democratic societies. By isolating injustice in the past, by determining the meaning of justice in criminal and transitional terms, this perspective fails to account for contemporary forms of injustice and for an inoperative rule of law.

Biography

Emilian Cioc is PhD in Philosophy, PhD candidate in Law, research and teaching position at the Faculty of Law Babes-Bolyai University Cluj-Napoca; articles and lectures on topics related to modern and contemporary philosophy, legal and political theory, urban spaces theory; translator into Romanian of French contemporary writings.

Piero Sullo

Genocide, Memory and Criminal Justice: The 'Constitutional Role' of the Criminal Law on Genocide Ideology

Abstract

This paper focuses on the recently approved Rwandan Law on genocide ideology which, by restricting the freedom of speech and thought, has triggered both, a wave of criminal proceedings that have complemented the multilayered transitional justice mechanisms implemented in the aftermath of the genocide and a wave of criticism. Taking into account the 'memory policy' implemented in different post-genocide settings, the specific objective of this paper is to analyze the way collective memory is shaped by states in transition through *ad hoc* criminal legislation and trials as well as to explore the connected consequences for the constitutional order, human rights compliance and the reconciliation process, starting from the recent Rwandan law on genocide ideology. The criminalization of a certain thought was held necessary in several post-genocide contexts, included Europe, to reinforce a vision of the past endangered by revisionism. As a result, the penal codes of many European countries criminalize the negation of the Holocaust. To prohibit a certain view of the past is however a dangerous limitation of the freedom of expression, as well as a sign of weakness by the state, whose citizens apparently do not share a common interpretation of their history. The premise on which this paper is based is that transitional justice plays a crucial role as constitution-making factor in post-genocide settings. Ultimately, this paper shows how states' need for social control expressed through the establishment of legal mechanisms aimed at providing an uncontroversial narrative of the past, often imperil the enjoyment of universal human rights.

Biography

Dr. Pietro Sullo is contract professor in history of justice at the law faculty of the Ateneo Federico II in Naples, Italy and research associate of the Transitional Justice Research Line of the K.U. Leuven, Belgium. Pietro's interests include legal history, international human rights law and transitional justice, with a particular focus on traditional justice systems and reparations issues. He has conducted extensive field research in different post-conflict settings including Rwanda, Guatemala, Cambodia and Morocco. He is currently a visiting professional at the International criminal Court with the Victims participation and Reparations Section.

Patricia Pinto Soares

Positive Complementarity: Fine-tuning the Transitional Justice Discourse?

Abstract

The argument that the establishment of the International Criminal Court (ICC) amounted to a 'constitutional' moment in the development of international criminal law is a strong one. This Article takes the argument a step further. It analyses how the coming into force of the Statute of Rome and the functioning of the permanent Court work as a catalyst for

the discourse of transitional justice. In particular, the Article endeavours to demonstrate how positive complementarity - understood both in its vertical and horizontal dimensions - is a powerful device in assisting States to promote credible and effective processes in the transition to peace, reconciliation and responsible liberty. By the same token, as a consequence of the analysis of the situations in DRC, Uganda and Kenya, the Article draws attention to how the ICC has neglected important opportunities to enforce positive complementarity which came at a cost not only for States involved but also for the Court itself. Concluding, the Article proposes specific measures aimed at optimizing efforts and resources of different agencies so as to permit the discourse of transitional justice to be supported by a comprehensive framework built upon different operational networks working together.

Biography

Patricia Pinto Soares is a PhD candidate in the European University Institute, in Florence, currently awaiting her thesis defence. She holds a Master of Research in Law by the same Institute, where she also worked as research assistant to Professor Francesco Francioni. She practiced law for two years in Lisbon and, in 2007, she interned at the Extraordinary Chambers of the Court of Cambodia, in Phnom Penh. During the academic year 2009-2010, she was a research fellow at the Center for Transatlantic Relations of SAIS Johns Hopkins University, in Washington D. C. In the past few years she was a research guest in different academic institutions, including the Max Planck Institute for Foreign and International Criminal Law, the Institute for Criminal Law and Criminal Justice of the University of Göttingen; the Law School of the University of Aberdeen, and the International Institute for Higher Studies in Criminal Sciences.

Ruxandra Ivan

International politics of justice: the political underpinnings of the emergence of an international regime

Abstract

This paper is an attempt at reconstituting the emergence of the international mechanisms of criminal justice after the Cold War from the point of view of the articulation between the fundamental norm of the modern system of states – sovereignty – and the corpus of human rights, more precisely, on the regime formation of international criminal justice. Our approach will focus on the political, rather than on the legal aspects of this process. While it is difficult enough to conceptualize and to theoretically justify the link between sovereignty and the possibility for individuals to become subjects of international law, a further obstacle to the emergence of international criminal justice is the overcoming of the strategic interests of particular states, especially great powers, in establishing such a jurisdiction. Since international law remains politically negotiable, we will try to look into the political context that allowed for the developments that led, at the end of the 90s, to the creation of the ICC, as well as to the transformation of the meaning of “sovereignty” in order to include the responsibility to protect citizens against ethnic cleansing, genocide, war crimes, and crimes against humanity. Thus, some of the questions addressed in this contribution will be: which is

the conceptual link between sovereignty and human rights? Subsequently, how do individuals become subjects of international law? And, from a practical point of view, how could international tribunals be established for the cases of Bosnia or Rwanda, but not for Cambodia or East Timor? Which is, in this case, the extent of the “universality” of human rights? The linkage between these sets of questions might provide a critical perspective on the transformation of international politics.

Biography

Ruxandra Ivan is a Lecturer at the Faculty of Political Sciences, University of Bucharest, and a researcher at the Romanian Diplomatic Institute. She has a PhD in political science from the Université Libre de Bruxelles (2007), with a thesis on the Romanian foreign policy after 1989. At present, her main research interests are: sovereignty and the responsibility to protect, Black Sea regionalism, deconstruction of security discourses in Western democracies. Her most relevant publication is *La politique étrangère roumaine, 1990 – 2006*, Bruxelles, Editions de l'Université de Bruxelles, 2009.