

Rethinking *the Rule of Law* after Communism



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and Wojciech Sadurski*

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Transitional Rule of Law

RUTI TEITEL

INTRODUCTION -

My remarks attempt to provide a distillation of arguments that are more fully elaborated in my book (Teitel 2000).

In recent decades, societies throughout much of the world—Latin America, Eastern Europe, the former Soviet Union, Africa—have been engaged in transition: postcolonial changes, and the overthrowing of military dictatorships and totalitarian regimes, for greater freedom and democracy. In these times of massive political movement from illiberal rule, one burning question recurs: how should societies deal with their evil pasts? What, if any, is the relation between a state's response to its repressive past and its prospects for creating a liberal order?

For about two decades now, the point of departure in the transitional justice debate is the notion that the move toward a more liberal democratic political system implies a universal norm. Indeed, this methodological question is the subject of a paper by one of the editors of this book (Krygier 2001). Yet, I suggest this way of framing the debate is too stark. Instead, my remarks propose an alternative way of thinking about the relation of law to political transformation. Exploring an array of experiences describes a distinctive conception of justice and rule of law in the context of political transformation.

The problem of transitional justice arises within the distinctive context of transition—a shift in political orders, and more precisely, of change in a liberalizing direction. Understanding the problem of justice in the transitional context requires entering a distinctive discourse organized in terms of the profound dilemmas characteristic of these extraordinary periods. The threshold dilemma arises from the context of justice in political transformation: law is caught between the past and the future, between the backward-looking and the forward-looking, between the retrospective and prospective. Transitional justice, therefore, is that justice associated with these political circumstances. Transitions imply paradigm shifts in the conception of justice; therefore, law's role appears deeply paradoxical. In ordinary times, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. What this means is further elaborated in the chapter. It does not mean that ideals of rule of

law are irrelevant to transitions, but rather that they are inapplicable to these exceptional circumstances without making a variety of adjustments, both to the context of transition, and to the particulars of that state's political conditions. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.

What emerges is a conception of justice that is contextualized and partial: it is constituted by, and constitutive of, the transition. The very notion of what is just is contingent, and informed by prior injustice. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.

Indeed, at some level, one might say that the legal responses create transition: In transition, the rule of law is historically and politically contingent, elaborated in response to past political repression that had often been condoned. While the rule of law ordinarily implies prospectivity in the law, transitional rule of law is both backward- and forward-looking, as it disclaims illiberal past values, and reclaims liberal norms.

PUNISHMENT OR IMPUNITY

In the prevailing view of transitional justice, the core debate as it takes as its point of departure ordinary times, frames the relevant question as whether or not to punish the predecessor regime. This is the so-called "punishment or impunity" debate. Punishment dominates our understandings of transitional justice, and of the related rule of law. In the public imagination, transitional justice is generally linked with the trials of ancient regimes. The enduring symbols of the English and French revolutions from monarchic to republican rule are the trials of Kings Charles I and Louis XVI. A half century after the events, the leading monument to the Nazis' World War II defeat remains the Nuremberg trials. The contemporary wave of transitions from military rule, throughout Latin America and Africa, as well as from communist rule in Central Europe and the former Soviet bloc, has revived the debate over whether to punish. While trials are thought to be foundational, and to enable drawing a bright line demarcating the normative shift from illegitimate to legitimate rule, the exercise of the state's punishment power in the circumstances of radical political change raises profound dilemmas. Transitional trials are few and far between, particularly in the contemporary period. The low incidence of successor trials reveals the real dilemmas in dealing with systemic wrongdoing by way of the criminal law. In the transitional context, conventional understandings of individual responsibility are frequently inapplicable, and have spurred the emergence

of new legal forms: partial sanctions that fall outside conventional legal categories.

This harshest form of law is emblematic of accountability and the rule of law; yet, its representation far transcends its actual exercise.

TRANSITIONAL RULE OF LAW AND THE LIMITED CRIMINAL SANCTION

Despite the call for justice in the abstract, transitional practices over the last half-century reveal the recurring problems of justice as a result of the norm shift characterizing transition. These compromised conditions of justice mean that there are real limits on the exercise of the punishment power in periods of political transition. These real rule of law dilemmas help explain why, despite the dramatic expansion in criminal liability in the abstract, enforcement lags far behind. Indeed, transitional practices reveal a pattern of criminal investigations and prosecutions, often followed by little or no penalty. While ordinarily punishment is conceptualized as a unitary practice that includes both the establishment and penalizing of wrongdoing, in the transitional criminal sanction, the elements of investigation and condemnation have become somewhat detached from one another. It is this partial criminal process I term the "limited sanction" that distinguishes criminal justice in transition.

The "limited criminal sanction" constitutes compromised prosecution processes that do not necessarily culminate in full punishment: and that imply differentiation of the phases of establishing responsibility, and ascribing penalty. Depending on just how limited the process, investigations may or may not lead to indictments, adjudication, and conviction. Convictions are often followed by little or no punishment. In transition, the criminal sanction may be limited to an investigation establishing wrongdoing.

The limits of the transitional criminal sanction are well illustrated throughout history: in post-World War I and World War II cases, in the postmilitary trials of Southern Europe, as well as by the contemporary successor criminal proceedings in Latin America and Africa, and in the wave of political change in Central Europe, following the Soviet collapse. Though it is often repressed, post-World War II successor justice illustrates the limited criminal sanction. In the midst of the Allied Control Council No. 10 follow-up trials, the International Military Tribunal began the reversal of the Allied punishment policy. Between 1946 and 1958, a process of reviews and clemency culminates in the mass commutation of sentences for war criminals. In Germany's national trials, a similar sequence unfolds. Out of the more than one thousand cases tried between 1955 and 1969, fewer than one hundred of those convicted

received life sentences, and fewer than three hundred received limited terms. Years later, in Southern Europe, a similar sequence unfolds. Greece's trials of its military police culminate largely in suspended or commutable sentences. A similar pattern appeared in the transitions out of military rule in Latin America. In the 1980s, soon after the Argentine junta trials, began the limits on the follow-up trials. Ultimately, pardons would be extended to everyone convicted of atrocities, even the junta leaders. Amnesties became the norm throughout much of the continent: Chile, Nicaragua, and El Salvador.

The story repeats itself in Central and Eastern Europe after the communist collapse. Ten years after the revolution and the real story is the transitional limited criminal sanction. In unified Germany's "borderguards" trials, suspension of sentences is the norm. This was also true of the few prosecutions in the Czech Republic, Romania, Bulgaria, and Albania. The course of developments reflects a limiting of the final phase of punishment policy. Sometimes the limiting of the criminal sanction is used strategically, as an incentive to achieve other political goals, such as cooperation in investigations or other political projects; in Chile, a law, exempting its military from prosecution, was conditioned on officers' cooperation in criminal investigations relating to past wrongdoing under military rule. Penalties were dropped up front and on condition of confession to wrongdoing, in postapartheid South Africa, with the amnestying of crimes deemed "political" on conditions of participation in the truth and Reconciliation Commission. This left a window open for investigations into past wrongs, a practice which could also be understood as a limited prosecutorial process.

Other contemporary legal responses occurring in the region, such as the *ad hoc* International Criminal Tribunal established to adjudicate genocide and war crimes of the former Yugoslavia, reflect similar developments. The common problem of securing custody over the accused, as well as the lack of control over the evidence, as well as the many other constraints relating to war crimes prosecutions—means that the International Tribunal has often had little choice but to investigate and indict—but to go no further.

The "limited criminal sanction" constitutes the pragmatic resolution of the core rule of law dilemma of transition: namely, the problem of attempting to attribute individual responsibility for systemic wrongs perpetrated under repressive rule. The basic transitional problem is whether there is any theory of responsibility that can span the move from a repressive, to a more liberal regime. Indeed, the emergence of the limited sanction suggests a more fluid way to think about what punishment does: namely, clarify and condemn wrongdoing, without necessary attribution of individual blame and penalty. The transitional sanction prompts rethinking the theory of punishment, namely to think about punishment's justification as more closely connected to discrete stages of the criminal process. The emergence of the transitional sanc-

tion points to an alternative sense of the retributivist idea. Though this sanction is characterized by its limited character, transitional practices suggest that core retributive purposes of recognition and condemnation of past wrongdoing are vindicable by diminished—even symbolic—punishment. The sheer recognition and condemnation of past wrongdoing has transformative dimensions. Where wrongdoing is publicly established, it liberates the collective in a measured process of transformation. Mere exposure of wrongs can stigmatize and disqualify affected persons from entire realms of the public sphere, and relegate them to a predecessor regime. In extraordinary circumstances of radical political change, some of the purposes ordinarily advanced by the full criminal process are advanced in the sanction's more limited form.

Practices in such periods suggest the transitional limited sanction is that mediating form. The absence of traditional plenary punishment in periods of political transition suggests that more complex understandings of criminal responsibility emerge in the application of the principle of individual responsibility in the distinct context of criminal justice associated with systemic crimes in shifts out of repressive rule. Rule of law within a liberalizing state is commonly equated with individual accountability, individual responsibility central to law in the liberal state. Yet, this perspective on punishment does not account well for its role in times of radical political flux, where the transitional criminal form is informed by values related to the distinctive project of political change. Ordinarily, criminal justice is theorized in starkly dichotomous terms, as animated by either a backward-looking concern with retribution, or a forward-looking, utilitarian concern with deterrence, considered internal to the justice system. In transition, however, punishment is informed by a mix of retrospective and prospective purposes: whether to punish, or to amnesty, to exercise or restrain criminal justice is rationalized in overtly political terms. Values such as mercy and reconciliation commonly treated as external to criminal justice are an explicit part of the transitional deliberation (Teitel 2000). The explicit politicization of criminal law in these periods challenges ideal understandings of justice, and yet turns out to be a persistent feature of jurisprudence in the transitional context.

The extraordinary transitional form of punishment I term the "limited" criminal sanction is directed less at penalizing perpetrators, than it is at advancing the political transformation's normative shift. The limited sanction is well illustrated historically, not only in postwar policy, but also in the course of punishment following more recent cases of regime change, during which the sanction performs important operative acts—formal public inquiry into and clarification of the past, the indictment of past wrongdoing—, advancing the normative shift central to liberalizing transition. Even in its arch limited form, the limited sanction is a symbol of rule of law that enables expression of a critical normative message.

What distinguishes transitional criminal measures is their use to construct normative change. This is plainly seen in the way transitional responses' focus varies from country to country to "undo" rationalized past political violence, through procedures of inquiry and indictment, rituals of collective knowledge that enable isolation and disavowal of past wrongdoings. Where the prior regime was sustained by persecutory policy rationalized within a legal system, this policy rationale is addressed by the transitional critical legal response. Critical responses to past persecution express the message that the policy is manmade, and, therefore, reformable. The transitional criminal sanction by isolating knowledge of past wrongdoing and individuating responsibility enables the potential of liberalizing change, in this way liberating the successor regime from the weight of states' evil legacies. Through ritualized legal processes of appropriation and misappropriation, of avowal and disavowal, of symbolic loss and gain, allowing the perceptions of transformation, societies begin to move in a liberalizing direction.

Criminal justice in some form, transitional practices suggest, is a ritual of liberalizing states, as it is these practices that publicly construct rule of law norms. Through these processes, a line is drawn, liberating a past that allows the society to move forward. While punishment is conventionally considered largely retributive in its aim, in transition, even punishment's purposes become largely corrective, going beyond the individual perpetrator to the broader society. This function is seen in the primacy of systemic political offenses, for example, in the persistence of prosecutions of crimes against humanity—the archetypal offense of persecutory politics, constituting a critical response to illiberal rule through the criminal law. Moreover, whereas ordinarily punishment is thought to divide society, in transition, wherever punishment is exercised, it is done in a limited fashion, to allow the possibility of return to a liberal state. As such, criminal processes have affinities with other transitional exercises of rule of law.

THE PARADIGMATIC TRANSITIONAL RULE OF LAW RESPONSE

The operative effects advanced by the limited criminal sanction, such as establishing, recording, and condemning past wrongdoing, display affinities with other legal acts and processes constructive of transition. The massive and systemic wrongdoing characteristic of modern repression implies a recognition of a mix of individual and collective responsibility. There is a pronounced overlap of punitive and administrative institutions and processes. Individualized processes of accountability give way to administrative investigations and commissions of inquiry, the compilation of public records, official pronouncements and condemnation of past wrongs.

uncements and condemnation of past wrongs. These are often subsumed in state histories commissioned pursuant to a political mandate for reconciliation. However, whether bureaucratic forms of public inquiry and official truth-tellings are desirable, and will signify liberalization, is contingent on the nature of the state legacies of repressive rule. To illustrate, one might compare, in this regard, postmilitary Latin America with the postcommunist bloc on the social meaning of state history and accountability. As is elaborated further on, the diversity in their historical responses reflects their disparate histories of repression.

The paradigmatic affinities discussed here bear on the recurrent question in transitional justice debates concerning what is the right response to repressive rule, towards supporting a lasting democracy. The subtext of this question assumes a transitional ideal and that normative concerns somehow militate for a particular categorical response. However, this is simply the wrong question: there is no one right response to how to deal with a state's repressive past, and to liberalize for the future. This question should be reframed. Among states, the approach taken to transitional justice is politically contingent, nevertheless, it is worth distinguishing between states undergoing juridical transitions, where there is an established rule of law tradition and those where there is not. At the same time, there appears to be a paradigmatic transitional response in the law. Transitional constitutionalism, criminal justice, and the rule of law share affinities in the contingent relation that these norms bear to prior rule, as well as in their operative work in the move to a more liberal political order.

Transitional constructivism

I will now turn to the constructive role of law in transition. How is transition constructed? What is law's role in political passage? The paradigmatic form of the law that emerges in these times operates in an extraordinary fashion, and itself plays a constructive role in the transition. It both stabilizes and destabilizes. In these circumstances, law's distinctive feature is its mediating function, as it maintains a threshold level of formal continuity, while enabling transformative discontinuity. The extent to which formal continuity will be maintained depends on the modality of transformation, while the content of the normative shift will be a function of history, legal culture, and political tradition, as well as the society's receptiveness to innovation.¹ What this also implies, of course, is that states with more established rule of law traditions will have an easier time to reestablish.

Just what do transitional legal practices have in common? Law constructs transitions through diverse processes, including legislation, adjudication, and administrative measures. Transitional operative acts include pronouncements of indictments and verdicts; the issuing of amnesties, reparations, and apolo-

gies; and the promulgation of constitutions and reports. These transitional practices share features, namely, they are ways to publicly construct new collective political understandings. Transitional processes, whether taking the forms of prosecution, lustration, or inquiry, share this critical dimension. These are all transitional actions taken to manifest change by publicly sharing new political knowledge. Law here works on the margin, as it performs the work of separation from the prior regime, and integration with the successor regime. Transitional law has a "liminal" quality, it is law between regimes. The peculiar efficacy of these salient transitional legal practices is their ability to effect separation and integration functions—all within continuous processes.

Transitional rule of law often implies procedures that do not seem fair or compelling: trials lacking in regular punishment, reparations based on politically driven and arbitrary baselines, constitutions that do not necessarily last. What characterizes the transitional legal response is its limited form, embodied in the provisional constitution and purge, the limited sanction and reparation, the discrete history and official narrative. Transitional rule of law is, above all, limited and symbolic—a secular ritual of political passage.

The legal process has become the leading transitional response for its ability to convey publicly and authoritatively the political changes that constitute the normative shift between regimes. What is constructed through these processes is the relevant political difference between illiberal and liberal regimes. In its symbolic form, transitional jurisprudence reconstructs the relevant political differences through changes in status, membership, and community. While the relevant critical difference is necessarily contingent, it is recognized as legitimate, in light of a given successor society's past legacies. Moreover, the language of law imbues the new order with legitimacy and authority.

In modern political transformation, legal practices enable successor societies to make liberalizing political change. By mediating the normative hiatus and shift characterizing transition, the turn to law comprises important functional, conceptual, operative, and symbolic dimensions. Law epitomizes the liberal rationalist response to mass suffering and catastrophe; it expresses the notion that there is, after all, something to be done. Rather than resignation to historical repetition, in the liberal society, the hope of change is put in the air. By their engagement in transitional justice debates, successor societies signal the rational imagining of a more liberal political order.

Legal rituals offer the leading alternative to the violent responses of retribution and vengeance in periods of political upheaval. The transitional legal response is deliberate, measured, restrained, *and* restraining; in their transitional form, ritualized legal processes enable gradual, controlled change. As the question of transitional justice is worked through, the society begins to perform the signs and rites of a functioning liberal order. Transitional law

transcends the "merely" symbolic to be the leading ritual of modern political passage. Ritual acts enable the shift between two orders: of the predecessor and successor regimes. In contemporary transitions, characterized by their peaceful nature and occurrence within the law, legal processes perform the critical "undoings," the inversions of the predicates justifying the prevailing regime, through public processes that produce the collective knowledge constitutive of the normative shift. Legal processes simultaneously disavow aspects of the predecessor ideology, and affirm the ideological changes constituting liberalizing transformation.

These are various ways in which the new democracies respond to legacies of injustice. Patterns across legal forms constitute a paradigm of "transitional jurisprudence," rooted in prior political injustice. Law's role is constructivist: transitional jurisprudence emerges as a distinct paradigmatic form of law responsive to and constructive of the extraordinary circumstances of periods of substantial political change. In transitional jurisprudence, the conception of justice is partial, contextual, and situated between at least two legal and political orders. Legal norms are multiple, the idea of justice pragmatic. Transitional jurisprudence centers on the law's paradigmatic use in the normative construction of the new political regime.

TRANSITIONAL RULE OF LAW AS LIBERAL NARRATIVE

Transitional justice's main contribution is to advance the construction of a collective liberal narrative. Its uses are to advance the transformative purpose of moving the international community, as well as individual states in transition, towards greater liberalizing political change. Consider law's potential in constructing a story that lays the basis for political change. Let us begin with the trial, though observe that the transformative dimension is also advanced in other legal responses.

Law's history

One of transitional criminal justice's primary roles is historical. Trials have long played the arch role in transitional historymaking. Criminal justice creates public, formal shared processes that link up the past to the future, the individual the collective. Criminal trials are the historical, ceremonial form of shared memory-making in collectives, a way to work through a community's events in controversy. Even the ordinary criminal trial's purposes are not only to adjudicate individual responsibility, but also to establish the truth about an event in controversy in a society; this is even more true of the trial's role in settling historical controversies characteristic of periods of transition. Transitions follow regime change, and periods of heightened political and

historical conflict; therefore, a primary purpose of successor trials is to advance a measure of historical justice.

What sort of “truths” are established in such periods? They are “transitional critical truths”; namely, shared political knowledge critical of the ideology of the prior regime. Through the trial, the collective historical record produced both delegitimizes the predecessor regime, and legitimizes the successor. While military or political collapse may bring down repressive leadership, unless the bad regime is also publicly discredited, its ideology often endures. An example is the trial of King Louis XVI, which served as a forum to deliberate over and to establish the evil of monarchic rule (Walzer 1974). Leading trials, whether of the major war criminals at Nuremberg, or the public trials of Argentina’s military junta, are primarily remembered, not for their condemnation of individual wrongdoers, but, instead, for their roles in creating lasting historical records of state tyranny, and for representing political shift.

Transitional criminal processes enable authoritative accounts of past evil legacies and collective historymaking. There are many representations: the recreation and dramatization of the repressive past in the trial proceedings, in the written transcript, trial records, and the judgment. Radio and television reportage add to the many representational possibilities (consider The Hague today). One might add the Internet.

The contemporary post-Cold War period has given rise to even more complex and disaggregated understandings of responsibility, as well as to a problematizing of the public and the private realms. Consider the growing focus on the role of the multinationals in World War II, and other monetary settlements that attempt to legitimate the transforming global private regime.

The connections between law in the production of history discussed above adverts to the broader role of law in constructing what I have termed the “narrative” of transition. The next part explores the distinct narrative structure of transitional rule of law.

Narratives of transition

Narratives constructed in transitions, whether trials, administrative proceedings, or historical commissions of inquiry, make a normative claim about the relation of a state’s past to its prospects for a more democratic future. As is explained further on, the very transitional narrative structure propounds the claim that particular knowledge is relevant to the possibility of personal and societal change. Narratives of transition offer an account of the relation construction of the political knowledge bears to the move away from dictatorship, as well as to the potential of a more liberal future.

Transitional narratives, I claim, follow a distinct rhetorical form: beginning in tragedy, they end on a comic or romantic mode. In the classical under-

standing, tragedy implicates the elements of catastrophic suffering by individuals, whose fate, due to their status, implicated entire collectives, and was followed by some discovery or change from ignorance. In tragedy, knowledge seems only to confirm a fate foretold. Contemporary stories of transitional justice similarly involve stories of affliction on a grand scale. While such narratives begin in a tragic mode, in the transition they switch over to a non-tragic resolution; there is a turn to what might be characterized as a comic phase. Something happens in these accounts; the persons enmeshed in the story ultimately avert tragic fates to somehow adjust and even thrive in a new reality. In the convention associated with transitional accounts, change necessitates a critical juncture, where, as opposed to tragic structure, knowledge’s revelation actually makes a difference. The country’s past suffering is somehow reversed, leading to a happy ending of peace and reconciliation.

The transitional narrative structure manifests itself in fictional and non-fictional accounts of periods of political transformation. National “truth” reports read as tragic accounts that end on a redemptive note. Suffering is somehow transformed into something good for the country, to a greater societal self-knowledge, that is thought to enhance prospects for an enduring democracy. Thus, after “Night and Fog” disappearance policies throughout much of Latin America, bureaucratic processes were deployed to set up investigatory commissions. Beginning with their titles *Never Again*, the truth reports promise to deter future suffering. Thus, the prologue to the report of the Argentine National Commission on the Disappeared declares the military dictatorship “brought about the greatest and most savage tragedy” in the country’s history; but history provides lessons. “[G]reat catastrophes are always instructive.” “The tragedy which began with the military dictatorship in March 1976, the most terrible our nation has ever suffered, will undoubtedly serve to help us understand that it is only democracy which can save a people from horror on this scale.” Knowledge of past suffering plays a crucial role in the state’s ability to make liberating transition.

Confrontation with the past is considered necessary to liberalizing transformation. The report of the Chilean National Commission on Truth and Reconciliation asserts that knowledge and disclosure of past suffering is necessary to reestablishing the country’s identity. The decree establishing Chile’s National Commission declares “the truth had to be brought to light, for only on such a foundation... would it be possible to... create the necessary conditions for achieving true national reconciliation.” “Truth” is the necessary precondition for democracy. This is also the organizing thesis of the El Salvador Truth Commission. This story line is seen in the report’s title: *From Madness to Hope* tells a story of a violent civil war, followed by “truth and reconciliation.” According to the report’s introduction, the truth’s “creative consequences” can “settle political and social differences by means of agree-

ment instead of violent action." "Peace [is] to be built on [the] transparency of ... knowledge." The truth is a "bright light" that "search[es] for lessons that would contribute to reconciliation and to abolishing such patterns of behavior in the new society." Even where the reporting is unofficial, the claim is similar, that the revelation of knowledge—in and of itself—offers a means to political transformation. In the preface to the unofficial Uruguayan *Nunca Mas* or *Never Again* report writing, in and of itself, constitutes a triumph against repression. The claim is that the transitional truth-tellings will deter the possibility of future repression. It is the lack of "critical understanding which created a risk of having the disaster repeated... to rescue that history is to learn a lesson... We should have the courage not to hide that experience in our collective subconscious but to recollect it. So that we do not fall again into the trap."

In transitional history making, the story has to come out right. Yet this implies a number of poetic leaps. Was it the new truths that brought on liberalizing political change? Or was it the political change that enables restoration of democratic government, and reconsideration of the past?

Despite ongoing processes of political change, without some form of clarification of the deception and ensuing self-understanding, the truth about the evil past is hidden, unavailable, external, foreign. In the postcommunist transitions characterized by struggling with the accumulated past state archives, the region's transitional accounts begin with the story of invasion and popular resistance; the foe represented as foreign outsider, progressing to the ever more troubling discovery of collaboration, closer to home and pervasive throughout the society. In the narratives of transition, whether out of a repressive totalitarian rule in the former Soviet bloc, or, out of authoritarian military rule; whether Latin America's truth reports, or postcommunist "lustration," transitional stories all involve a "revealing" of supposedly secreted knowledge. What is pronounced is the tragic discovery.

What counts as liberalizing knowledge? These productions are not original, or foundational; but contingent on state legacies of repressive rule. Successor truth regimes' critical function is responsive to the repressive practices of the prior regime. For example, after military rule, where the truth was a casualty of disappearance policies, the critical response is the "official story." While, after communist rule, the search for the "truth" constituted a matter not of historical production as such, as previous uses of official history had been deployed as instruments of repressive control; but, instead, a matter of critical response to repressive state histories, to the securing of private access to state archives, to the privatization of official histories, and to the introduction of competing historical accounts.

Knowledge's exposure means that the possibility of change is introduced through the potential of human action. The very notion of a knowledge objec-

tified and exposed suggests somehow that there was "logic" to the madness, and intimates now that there is something to be done. The message pro-pounded the notion that, had the newly acquired knowledge been known then, events would have been different. And, moreover, that now that the truth is known, the course of future events will indeed be different. Processes that illuminate the possibility of future choice distinguish the liberal transition. In the transitional accounts lie the kernels of a liberal future foretold. The revealed truth allows the switch from the tragic past to the promise of a hopeful future. A catastrophe is somehow turned around, an awful fate averted by the introduction of a magical switch. Transitional justice operates as such a device: legal processes incorporate persons vested with transformative powers, judges, lawyers, commissioners, experts, witnesses with special access to privileged knowledge. Reckoning with the past enables the perception of a liberalizing shift.

Narratives of transition suggest that minimally what is at stake in liberalizing transformation is a change of interpretation. In this process, political and truth regimes have a mutually constitutive role. Societies begin to change politically when citizens' understanding of the ambient situation change. As Václav Havel has written, the change is from "living within a lie to living within the truth." Consider that the Eastern European literature of the period such as Bernard Schlink's *The Reader*; Ivan Klima's *The Ultimate Intimacy*; Pavel Kohout's *I am Snowing* and *The Confessions of a Woman of Prague* are stories of precisely this move, from "living within a lie," to the revelation of newly gained knowledge and self-understanding, effecting a reconstitution of personal identity, and of relationships. These tales of deceit and betrayal, often stories of longstanding affairs, appear to be allegories of the citizen/state relation, shedding light on the structure and course of civic change.

What emerges clearly is that the pursuit of historical justice is not simply a response to, or, representation of political change, but itself helps to construct the political transformation. Change in the political and legal regimes shapes and structures the historical regime. New truth regimes go hand in hand with new political regimes, indeed, they support the change. Transitional accounts themselves construct a normative relation, as they connect the society's past with its future; narratives of transition are stories of progress, beginning with the backward-looking reflection on the past, but always in light of the future. The constructive fiction is that, had the knowledge now acquired been known then, the tragedy would have been avertable. New societies can be built on this claim about knowledge. It is this change in political knowledge that allows the move from an evil past, to a sense of national redemption.

Transitional narratives follow a distinct structured form. Revelation of knowledge of truth occurs through switching mechanisms, critical junctures

of individual and societal self-knowledge. There is a ritual disowning of previously secreted knowledge, a purging of the past, as well as an appropriation of a newly revealed truth, enabling corrective return to the society's true course. A new course is charted.

The practices in such periods suggest that the new histories are hardly foundational, but explicitly transitional. To be sure, historical narrative is always present in the life of the state, but, in periods of political flux, the narrative's role is to construct perceptible transformation. Transitional histories are not "meta"-narratives, but discrete, "mini"-narratives, always situated within the state's preexisting national story. Transitional truth-tellings are not new beginnings, but build upon preexisting state political legacies. Indeed, the relevant truths are those implicated in a particular state's past political legacies. These are not universal, essential, or metatruths; a marginal truth is all that is needed to draw a line on the prior regime. Critical responses negotiate between historical conflict in contested accounts. As political regimes change, transitional histories accordingly offer a displacement of one interpretive account or truth regime for another, so preserving the state's narrative thread.

Transitional law transcends the merely symbolic to be the leading ritual of modern political passage. The legal response epitomizes the liberal secular rationalist response to mass suffering and catastrophe; and expresses the notion that there is something to be done. Rather than resignation to historical repetition; in the liberal society, hope is put in the air. Ritual acts enable the passage between the two orders, of predecessor and successor regimes. In contemporary transitions, characterized by their peaceful character within the law, legal processes perform the critical undoings of the predicate justifications of the prior regime, through public procedures that produce constitutive collective knowledge transformative of political identities. The paradigmatic feature of the transitional legal response is that it visibly advances the reconstruction of public knowledge, comprehending operative features that enable the separation from the past, as well as integration processes. The importance of establishing a shared collective truth regarding the past repressive legacies has become something of a trope in the discourse of transitions. The meaning of "truth" is not universal, but rather is largely politically contingent to the transition. Accordingly, the paradigmatic transitional legal processes rely on discrete changes in salient public political knowledge for their operative transformative action. Legal processes construct changes in shared public justifications underlying political decision-making and behavior that simultaneously disavow aspects of the predecessor ideology and justify the ideological changes constituting liberalizing transformation. What is politically relevant to transformation is plainly constituted by

the transitional context, as well as by the legacies of displacement and succession of predecessor truth regimes.

Legal processes are ways of changing public reasoning in the political order, for these processes are predicated on authoritative representations of public knowledge. So it is that transitional legal processes contribute to the interpretive changes that create the perception of political social transformation. At the same time, transitional legal processes also vividly demonstrate the contingency in what knowledge will do the work of constructing the normative shift underpinning political regime change. The normative force of transitional constructions in public knowledge depends on critical challenges to the policy predicates and rationalizations of predecessor rule and ideology. Accordingly, what the relevant "truths" are in transition is discrete and yet of disproportionate significance. These reinterpretations displace the predicates legitimizing the prior regime, and offer newfound bases for the reinstatement of the rule of law.

Law offers a canonical language, and the symbols and rituals of contemporary political passage. Through trials and other public hearings and processes, legal rituals enable transitionally produced histories, social constructions of a democratic nature with a broad reach. These rituals of collective historymaking publicly construct the transition, they divide political time into a "before" and an "after." Transitional responses perform the critical undoings that respond to the prior repression: the letting go of discrete facts justificatory of the predecessor regime, critical to political change. The practices of historical production associated with transition often publicly affirm only what is already impliedly known in the society, transitional processes bring forward and enable a public letting go of the past.

Whether through trials or other practices, transitional narratives highlight the role of knowledge, agency and choice. Though the received wisdom on historical responses to past wrongs is that these are popular in liberalizing states emphasizing structural causation, transitional histories are complex accounts, dense layered narratives that weave together and mediate individual and collective responsibility. By introducing the potential of individual choice, the accounts perform a transitional liberalizing function. By revealing "truths" about the past, these accounts are distinctive narratives of progress, as they suggest that the course of events might have been different—had this knowledge been previously known—adverting to the potential of individual action. The message is of avertable tragedy. This expression of the hope for prospective individual freedom and human action goes to the core of liberalism and its rule of law discourse.

NOTES

1 It is worth observing that, notwithstanding Martin Krygier's comments to the contrary, the context of the legal transformation is not only defined by the project or aims of the transition (see Krygier 2001: 25–26), but rather is also shaped by the mix of past and present variables that are almost definitional of transition.

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