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Transitional Justice

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## Contents

Introduction  3

**ONE**  The Rule of Law in Transition  11

**TWO**  Criminal Justice  27

**THREE**  Historical Justice  69

**FOUR**  Reparatory Justice  119

**FIVE**  Administrative Justice  149

**SIX**  Constitutional Justice  191

**SEVEN**  Toward a Theory of Transitional Justice  213

Epilogue  229

Notes  231

Index  285
Introduction

In recent decades, societies all over the world—throughout Latin America, East Europe, the former Soviet Union, Africa—have overthrown military dictatorships and totalitarian regimes for 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? This question leads to others that explore the question of the relation of the treatment of the state's past to its future. How is the social understanding behind a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relation between a state's response to its repressive past and its prospects for creating a liberal order? What is law's potential for ushering in liberalization?¹

The question of the conception of justice in periods of political transition has not yet been fully addressed. Debates about “transitional justice” are generally framed by the normative proposition that various legal responses should be evaluated on the basis of their prospects for democracy.² In the prevailing debates about the relation of law and justice to liberalization, there are two generally competing ideas, the realists versus the idealists on the relation that law bears to democratic development. Either political change is thought necessarily to precede the establishment of the rule of law or, conversely, certain legal steps are deemed necessarily to precede political transition. The privileging of one developmental sequence or another derives either from disciplinary bias or from the generalization of particular national experiences to universal norms. So it is that in political theory the dominant account of how liberalizing transition occurs comprises a sequence in which political change comes first. On this account, a state's transitional responses are explained largely in terms of the relevant political and institutional constraints. Justice seeking in these periods is fully epiphenomenal and best explained in terms of the balance of power. Law is a mere product of political change. Political realists generally confine the question of why a given state action is taken with that of
what response is possible. Such theorizing clarifies why transitional justice is a vital issue in some countries but not in others. The prevailing balance of power, structuring the "path" of the transition, is thought in turn to explain the legal response. However, to say that regimes will "do what they can" does not well explain the great diversity of transitional legal phenomena. Indeed, to contend that, as in the realist account, states do what is possible simply conflates the descriptive account with its normative conclusions. The connections between a state's response to the transition and its prospects for liberalization remain largely unjustified.

From the idealist perspective, by contrast, the question of transitional justice generally falls back on universalist conceptions of justice. Ideas of full retributive or corrective justice regarding the past are considered necessary precursors to liberal change. While, in the abstract, certain legal ideals may be thought necessary to liberal transition, such theorizing does not account well for the relation of law and political change. Ultimately, this approach misses what is distinctive about justice in times of transition.

The realist/idealist antinomy on justice in transition, like liberal/critical theorizing, divides on the relation of law and politics. Whereas in liberal theorizing, dominant in international law and politics, law is commonly conceived as following idealist conceptions largely unaffected by political context, critical legal theorizing, like the realist approach, emphasizes law's close relation to politics. Again, neither liberal nor critical theorizing about the nature and role of law in ordinary times accounts well for law's role in periods of political change, missing the particular significance of justice claims in periods of radical political change and failing to explain the relation between normative responses to past injustice and a state's prospects for liberal transformation.

This book moves beyond prevailing theorizing to explore the role of the law in periods of radical political transformation. It suggests these legal responses play an extraordinary, constitutive role in such periods. Transitional Justice adopts a largely inductive method, and, exploring an array of legal responses, it describes a distinctive conception of law and justice in the context of political transformation. Transitional Justice begins by rejecting the notion that the move toward a more liberal democratic political system implies a universal or ideal norm. Instead, this book offers an alternative way of thinking about the relation of law to political transformation. Important phenomena here discussed relate to the contemporary wave of political change, including the transitions from Communist rule in East and Central Europe and the former Soviet Union, as well as from repressive military rule in Latin America and Africa. When relevant, the book draws on historical illustrations, from ancient times to the Enlightenment, from the French and American Revolutions through this century's postwar periods up to the contemporary moment.

The interpretive inquiry proceeds on a number of levels. On one level, I attempt to provide a better account of transitional practices. Study of the law's response in periods of political change offers a positive understanding of the nature of accountability for past wrongs. On another level, I explore the normative relation of legal responses to repressive rule, related conceptions of justice, and our intuitions about the construction of the liberal state.

The problem of transitional justice arises within the distinctive context of transition—a shift in political orders. By focusing its inquiry on the stage of "transition," this book chooses to shift the terms of the debate away from the vocabulary of "revolution" often deployed by theorists to an analysis of the role of law in political change. Rather than an undefined last stage of revolution, the conception of transition advanced here is both more capacious and more defined. What is demarcated is a postrevolutionary period of political change; thus, the problem of transitional justice arises within a bounded period, spanning two regimes.

Of course, the above characterization continues to beg the question of transition to what? What rule of recognition governs transitions? Within political science, there is substantial debate about the meaning not only of "transition" but also of its limiting stage, "consolidation," as well as, ultimately, "democracy" itself. Within one school of thought, "transition" is demarcated by objective political criteria, chiefly procedural in nature. Thus, for some time, the criteria for the transition to democracy have focused on elections and related procedures. For example, Samuel Huntington's formulation, following Joseph Schumpeter, defines twentieth-century democratization to occur when the "most powerful collective decision makers are selected through fair, honest and periodic elections." For others, the transition ends when all the politically significant groups accept the rule of law. Beyond this school are others that embrace a more teleological view of democracy. Nevertheless, the teleological approach has been challenged for incorporating a bias toward Western-style democracies.

In the contemporary period, the use of the term transition has come to mean change in a liberalizing direction, which is true concededly of the transitions discussed here. The liberalizing trend is well illustrated historically, earlier in the century in the democratic transitions of West Germany, Italy, Austria, France, Japan, Spain, Portugal, and Greece. To date, political scientists have not incorporated this positive normative direction expressly in their definition of the term. This book explores the significance that the contemporary understanding of transition has a normative component in the move from less to more democratic regimes. It is this phenomenon of liberalizing transition that is the subject of this book.

The aim here is to shift the focus away from the traditional political criteria associated with liberalizing change to take account of other practices, particularly the nature and role of legal phenomena. The constructivist approach proposed by this book suggests a move away from defining transitions purely in terms of democratic procedures, such as electoral processes, toward a broader inquiry into other practices signaling acceptance of liberal democracy and the rule-of-law. The inquiry undertaken examines the normative understandings, beyond majority rule, associated with liberalizing rule-of-law systems in political flux. The phenomenology of transition points to a close tie in the normative shifts in understandings of justice and law's role in the con-
Each chapter of the book explores how various legal responses in periods of substantial political change enable the construction of normative shift. Adjudications of the rule of law construct understandings of what is fair and just. Criminal, administrative, and historical investigations establish past wrongdoing. Reparatory projects vindicate rights generated by past wrongs to victims as well as to the broader society. Transitional constitutionalism and administrative justice reconstruct the parameters of the changing political order in a liberalizing direction. The analysis proposed here focuses on law's phenomenology in periods of political change, termed "transitional jurisprudence."

Chapter 1 concerns the rule of law in transition. In established democracies, adherence to the rule of law depends on the application of principles constraining the purposes and application of the law, but this is not its primary role in transitional times. In periods of radical political change, the law is unsettled, and the rule of law is not well explained as a source of ideal norms in the abstract. Within the context of a transitional jurisprudence, the rule of law can be better understood as a normative value scheme that is historically and politically contingent and elaborated in response to past political repression often perpetuated under the law. Thus, the transitional rule of law comprises distinctive values particular to such periods. While the rule of law ordinarily implies prospectivity in the law, transitional law is both settled and unsettled; it is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms. Although the rule of law and constitutionalism both concern the norms that seek to guide lawmaking in democracy, these understandings are seriously challenged during transitional periods. Despite prevailing theorizing, neither the concepts of the rule of law nor constitution making are well understood as sources of idealized foundational norms. A transitional jurisprudence helps to elucidate the variation in the ideas of the rule of law across legal cultures and over time, as it also shows the rule-of-law concepts varying as a measure and in relation to past legacies of its abrogation.

Chapter 2 concerns criminal justice in transition. Successor trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule. Nevertheless, the exercise of the state's punishment power in the circumstances of radical political change raises profound dilemmas. Transitional practices show trials to be few and far between, particularly in the contemporary period. The low incidence of successor trials reveals the dilemmas in dealing with often systemic and pervasive wrongdoing by way of the criminal law. So it is that in the transitional context, conventional understandings of individual responsibility are frequently inapplicable, spurring development of new legal forms. The emergence of partial sanctions falls outside conventional legal categories. These developments offer a deeper understanding of the relation that remedies bear to wrongs and, in particular, the distinctive wrong of state persecution. The transitional sanction illuminates the relation between the concepts of democratic accountability and individual rights in their contribution to the construction of a liberal politics.
The third chapter explores the workings of historical justice. Following periods of repressive rule, transitional societies commonly create historical accountings. Historical inquiry and narrative play an important transitional role linking past to present. Transitional accountings incorporate a state's repressive legacy and by their very account draw a line that both redefines a past and reconstructs a state's political identity. Transitional historical justice illuminates the constructive relation between truth regimes and political regimes, clarifying the dynamic relation of knowledge to political power.

Chapter 4 turns to justice in its reparatory dimension. The focus of transitional reparatory justice is the repair of prior wrongs. Perhaps the most common transitional form, reparatory justice's pervasiveness reflects its multiple roles and complex functions in periods of radical political change. Reparatory measures appear most definitional of the liberalizing move, as these responses instantiate recognition of individual rights. The equal protection of individual rights is fundamental to the liberal state; therefore, this remedy plays an important constructive role in periods seeking to reestablish the rule of law. In the dual economic and political transitions that characterize the contemporary wave of political change, reparations play explicitly political roles mediating the change by enabling the creation of new stakes in the political community in the midst of transition. Transitional reparatory measures depart from their conventional compensatory role to perform functional and symbolic roles particular to the state's political transformation.

Chapter 5 explores administrative justice and the uses of public law to redefine the parameters of political membership, participation, and leadership that constitute the political community. While political purges and disabilities are concededly common after revolutions, the question is whether any principles guide such measures in political transitions. More than any other transitional response, explicitly political collective measures pose a challenge to the construction of the rule of law in the liberalizing regime. Administrative justice illuminates law's distinctive potential for restructuring the relation of the individual to the political community in the transition. These public law measures define new boundary conditions on a sweeping and explicitly political basis. Through administrative justice, public law is used to respond to the past regime, as well as to reshape the successor political order. This response exemplifies transitional jurisprudence in its most radical form.

Chapter 6 explores transitional constitutionalism. Transitional constitutionalism serves conventional constitutionalism's constitutive purposes, but it also serves transformative purposes. While our intuitions are to conceive constitutions as forward-looking and foundational texts; in periods of radical political change, constitutions are instead dynamic mediating texts, simultaneously backward- and forward-looking, comprehending varying constitutional modalities and degrees of entrenchment. Transitional constitutionalism, criminal justice, and the rule of law share affinities in the contingent relation that the norms protected bear to prior rule, as well as to the new political order.

The concluding chapter brings together and analyzes the various ways in which new democracies respond to legacies of injustice. Patterns across legal forms inform a paradigm of "transitional jurisprudence." The analysis proposes that law's role here is constructivist, and that 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 decidedly multiple, the idea of justice always a compromise. Transitional jurisprudence centers on the law's paradigmatic use in the normative construction of the new political regime. Escalating general prescriptive principles from legal and political theorizing, the dynamic relation of law and political change contended for here challenges the reigning rhetoric regarding the course of political development. This study of law's role in political change suggests criteria beyond the fairness of elections, stability of institutions, or economic development by which to evaluate new democracies. Legal responses are both performative and symbolic of transition.

This book offers the language of a new jurisprudence rooted in prior political injustice. Conceiving of jurisprudence as transitional helps to elucidate the nature and role of law during periods of radical political change. Transitional jurisprudence also has implications that transcend these extraordinary periods. Offering another way of conceptualizing law should have ramifications affecting our intuitions about the nature and function of law more generally. The problem of justice during periods of political transformation has a potentially profound impact on the resulting societal shift in norms and the groundwork for transformed constitutional and legal regimes. Unresolved problems of transitional justice often have lasting implications over a state's lifetime. This book offers a new perspective by which we can understand the significance of the enduring political controversies that presently divide our societies. Ultimately, the recent changes of Latin America, East and Central Europe, the former Soviet Union, Africa, as well as the historical European transitions, offer us an opportunity to reflect on what is a liberal democratic response to the illiberal state, as well as, more broadly, on the potential of law in a transformative politics.