

Transitional Justice as Liberal Narrative

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Introduction

In recent decades, societies in 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 in favor of greater freedom and democracy. In these times of massive political movement away from illiberal rule, the 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?

The point of departure in the transitional-justice debate is the presumption that the move toward a more liberal, democratic political system implies a universal norm. Instead, my remarks here propose an alternative way of thinking about the law and political transformation. In exploring an array of experiences I will describe a distinctive conception of justice in the context of political transformation.

The problem of transitional justice arises within the distinctive context of a shift in political orders, or, more particularly, of change in a liberalizing direction. Understanding the problem of justice in this context requires entering into a discourse organized in terms of the profound dilemmas characteristic of these extraordinary periods. The threshold dilemma arises from the situation of justice in times of political transformation: law is caught between past and future, between backward-looking and forward-looking, between retrospective and prospective. Transitional justice is the justice associated with these circumstances. To the extent that transitions imply paradigm shifts in the conception of justice, the role of law at these moments appears deeply paradoxical. In ordinary times, law provides order and stability, but in extraordinary periods of political upheaval, law is called on to maintain order even as it enables transformation. Accordingly the ordinary intuitions and predicates about law simply do not apply in transitional situations. These dynamic periods of political flux generate a *sui generis* paradigm of transformative law.

The conception of justice that emerges is contextualized and partial: it is both constituted by and constitutive of the transition. 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 it is the legal responses to these legacies that create the transition. In these situations 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, transitional law is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms.

I. Punishment or Impunity

The core debate in the prevailing view of transitional justice is the so-called "punishment or impunity" debate, the debate over whether or not to punish the predecessor regime. Punishment dominates our understandings of transitional justice, which, in the public imagination, is generally linked with the trials of *anciens regimes*. The enduring symbols of the English and French revolutions, which effected transitions 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 defeat of the Nazis in World War II

remains the Nuremberg trials. The contemporary wave of transitions away 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 the drawing of a bright line demarcating the normative shift from illegitimate to legitimate rule, the exercise of the state's punishment power in circumstances of radical political change raises profound dilemmas. Transitional trials are emblematic of accountability and the rule of law, yet their representation far transcends their actual exercise; they are few and far between, particularly in the contemporary period, and their low incidence reveals the real dilemmas in dealing with systemic wrongdoing by way of criminal law. In transitional contexts, 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.

The agonizing questions raised by successor-regime criminal justice include: whether to punish or to amnesty? Is punishment a backward-looking exercise in retribution or an expression of the restoration of the rule of law? Who properly bears responsibility for past repression – does it lie with the individual or perhaps with the collective, the regime, the entire society?

The Legacy of Nuremberg

Trials have long been used to express international legal norms regarding injustice in war, and to distinguish legal from illegal political violence. The foundational argument for successor trials has a rich historical pedigree going back to the trials of kings Charles I and Louis XVI to more recent trials including the Nuremberg trials, the Tokyo war-crimes trials, Greece's trial of its colonels, and Argentina's trial of its military commanders.

Since World War II, international justice has been dominated by the legacy, even the myth, of the Nuremberg trials. The significance of Nuremberg is best understood, in its full political context, by returning to the period after World War I, and to the policies set at Versailles and the failed national trials. The national prosecution policies were seen as hopelessly political, and their failures were said to explain the subsequent resurgence of German aggression. This view had repercussions for the rest of the century: the Nuremberg trials shifted the paradigm of justice from national to international processes. It is this shift that has framed both the successor-justice debate and the dominant scholarly understanding of transitional justice over the last half-century.

While there are many dilemmas associated with the application of criminal justice in the national arena, within the international legal system these dilemmas appear to fall away. In the abstract, the dilemmas of successor justice are seemingly best resolved by turning to an autonomous legal system. Within the national legal scheme, the question of justice may seem inextricably political, but international justice is thought by comparison to be neutral and apolitical.

A number of dilemmas recur in the deployment of law in political transition, most basically the question of how to conceptualize justice in the context of a massive political shift. But this problem is mitigated within international law, as the international legal system offers a degree of continuity. The postwar entrenchment of international legal norms affords a jurisdictional basis that goes beyond the limits of domestic criminal law. International law seemingly offers a way to circumvent problems endemic to transitional justice: international standards and forums appear to uphold the rule of law while satisfying core concerns of fairness and impartiality.

Another dilemma of transitional justice is how to ascribe criminal accountability for offenses that implicate the state in a policy of repression. Here, too, international law offers a standard, in the "Nu-

remberg Principles”, a turning point in the conceptualization of responsibility for state crime. These principles for the first time attributed responsibility to individuals for atrocities under international law. In rejecting traditional defenses against such charges, Nuremberg dramatically expanded potential individual criminal liability under law. While, historically, heads of state enjoyed sovereign immunity, under the Nuremberg Principles public officials could no longer avail themselves of a “head of state” defense based on their official positions. Instead they could be held criminally responsible. Moreover, while, under the traditional military rule applicable in a command structure, “due obedience” to orders was a defense, under the Nuremberg Principles even persons acting under orders could be held responsible. By eliminating the “head of state” and “superior orders” defenses, the Nuremberg Principles pierced the veil of diffused responsibility characterizing the wrongdoing perpetrated under totalitarian regimes.

With the Nuremberg Principles, international humanitarian law came to offer a normative framework and language for thinking about successor justice. The wrongdoing of a political regime could now be conceptualized under the rubric of the law of war. Mediating the individual and the collective, the Nuremberg Principles – and World War II itself – left our understanding of individual responsibility permanently altered: they wrought a radical expansion of potential individual criminal liability, at both ends of the power hierarchy. The post-Nuremberg liability explosion has profound ramifications that have not yet been fully absorbed. The massive contemporary expansion in potential criminal liability raises real dilemmas for successor regimes deliberating over whom to bring to trial, and for what: the priority is to target those at the highest level of responsibility for the most egregious crimes. These dilemmas continue to appear in contemporary international criminal proceedings.

At The Hague, where war-crime trials are in process at this writing, developments are currently underway to expand on the postwar understandings of state persecution to include nonstate actors. This is seen in those developments in international humanitarian law in which understanding of the offense of wartime persecution extends beyond the international realm to actions within the state. It is also seen in the jurisdiction of the ad hoc international war-crimes tribunal addressing the former Yugoslavia, as well as in the jurisdiction of the proposed permanent International Criminal Court. In these contemporary instances a dynamic understanding of “crimes against humanity” moves beyond a predicated nexus of armed conflict to persecution, and becomes virtually synonymous-with enforcement of equality of the law. Though the strength of international law may not be evident in the record of international trials, its profound normative force is evident in current international discourse, where it stands for what rule of law exists in global politics.

II. The Transitional Limited Criminal Sanction

Despite the call for criminal justice in the abstract, the history of the last half-century reveals recurring problems of justice within the norm shifts that characterize political transitions. Under such conditions, there are limits on the exercise of the power to punish, and justice is often compromised. These real rule-of-law dilemmas help explain why, despite dramatic expansions of criminal liability in the abstract, enforcement lags far behind. Indeed, transitional practices reveal a pattern of criminal investigations and prosecutions followed by little or no penalty. While punishment is ordinarily conceptualized as a unitary practice that includes both the establishment and the penalizing of wrongdoing, in transitional criminal law the elements of establishing and sanctioning have become somewhat detached from one another. It is this partial process, which I term the “limited criminal sanction”, that distinguishes criminal justice in transition.

The limited criminal sanction constitutes compromised prosecution processes that do not necessarily culminate in full punishment. Depending on just how limited the process is, investigations may or may not lead to indictments, adjudication, and conviction. If conviction does ensue, it is often followed by little or no punishment. In situations of political transition, the criminal sanction may be limited to an investigation establishing wrongdoing.

The constraints on the limited criminal sanction are well illustrated historically, in, for example, the aftermaths to World Wars I and II, the postmilitary trials of Southern Europe, the contemporary successor criminal proceedings in Latin America and Africa, and the wave of political change in Central Europe following the collapse of the Soviet Union. Although the specific history is often repressed, post-World War II successor justice well illustrates the limited criminal sanction: even in the midst of trials mounted by Allied Control Council No. 10 after the war, the International Military Tribunal began a reversal of the Allied punishment policy, and between 1946 and 1958, a process of reviews and clemency culminated in the mass commutation of war criminals' sentences. A similar sequence unfolded in Germany's national trials, in which, out of more than 1,000 cases tried between 1955 and 1969, fewer than 100 of those convicted received life sentences, and fewer than 300 received limited terms. Years later a similar sequence unfolded in Southern Europe: Greece's trials of its military police culminated largely in suspended or commutable sentences. In the 1980s in Latin America, soon after the Argentine junta trials, limits on followup trials were imposed, and pardons were ultimately extended to everyone convicted of atrocities, even the junta leaders. In fact amnesties became the norm throughout much of the continent: Chile, Nicaragua, El Salvador.

The story has repeated itself since the communist collapse: ten years after the revolution, the story is the transitional limited criminal sanction. In unified Germany's border-guards trials, suspension of sentences is the norm. This was also true of the few prosecutions in the Czech Republic, Romania, Bulgaria, and Albania. History repeatedly 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 in 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. In postapartheid South Africa, penalties were dropped up front on condition of confession to wrongdoing, as crimes deemed "political" were amnestied on condition of participation in the Truth and Reconciliation Commission. This left a window open for investigations into past wrongs, a practice that could also be understood as a limited prosecutorial process.

Other contemporary legal responses, such as the ad hoc international tribunals established to adjudicate genocide and war crimes in Yugoslavia and Rwanda, reflect similar developments. The general absence of custody over the accused – currently only thirty-eight are in custody in the case of the former Yugoslavia – as well as the lack of control over the evidence and the many other constraints relating to war-crimes prosecutions, have left little choice but to investigate, indict, and go no farther. In Rwanda there has been resort to traditional criminal proceedings, which also reflect a form of limited criminal sanction.

The limited criminal sanction offers a pragmatic resolution of the core dilemma of transition: namely, that of attributing individual responsibility for systemic wrongs perpetrated under repressive rule. The basic transitional problem is whether there is any theory of individual 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, in fact a rethinking of the theory of punishment: wrongdoing can be clarified and condemned without necessarily attributing individual blame and penalty. In effect, punishment is justified as inherent in the stages of the criminal process.

The transitional sanction, in other words, points to an alternative sense of the retributivist idea. Although the sanction is limited in character, it suggests that core retributive purposes of the recognition and condemnation of wrongdoing are vindicable by diminished – even symbolic – punishment. The recognition and condemnation of past wrongdoing themselves have transformative dimensions: the public establishment of wrongdoing liberates the collective. Mere exposure of wrongs, moreover, can stigmatize their agents, and can disqualify them from entire realms of the public sphere, relegating them to a predecessor regime. In the extraordinary circumstances of radical political change, some of the purposes ordinarily advanced by the full criminal process can be advanced instead by the sanction's more limited form.

The limited criminal sanction may well be the crucial mediating form of transitional periods. The absence of traditional plenary punishment during these shifts out of repressive rule suggests that they may allow more complex understandings of criminal responsibility to emerge through the application of criminal justice to the principle of individual responsibility in the distinct context of systemic crimes. 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 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. In transitions, however, punishment is informed by a mix of retrospective and prospective purposes: the decision whether to punish or to amnesty, to exercise or to restrain criminal justice, is rationalized in overtly political terms. Values such as mercy and reconciliation, commonly treated as external to criminal justice, are explicit parts of the transitional deliberation. The explicit politicization of criminal law in these periods challenges ideal understandings of justice, yet turns out to be a persistent feature of jurisprudence in the transitional context.

The limited criminal sanction is an extraordinary form of punishment, for it is directed less at penalizing perpetrators than at advancing the normative shift of a political transformation. It is well illustrated historically, not only in policy after World War II but also in the punishments following more recent cases of regime change. Performing important operative acts – formal public inquiries into and clarifications of the past, indictments of past wrongdoing – the sanction has advanced the normative shift that is central to the liberalizing transition. Even in its most limited form, it is a symbol of the rule of law, and as such has enabled the expression of a critical normative message.

This use to construct normative change is what distinguishes transitional criminal measures, even in their varying application from country to country. Where the prior regime was sustained by a persecutory policy rationalized within a legal system, transitional legal responses express the message that the policy was manmade and is therefore reformable. In that their procedures of inquiry and indictment act as rituals of collective knowledge, enabling the isolation and disavowal of past wrongdoings and individuating responsibility, they enable the potential of liberalizing change, freeing the successor regime from the weight of the earlier state's evil legacies. The ritualized legal processes of appropriation and misappropriation, avowal and disavowal, symbolic loss and gain allow perceptions of transformation, and the society begins to move in a liberalizing direction.

Transitional practices suggest that criminal justice is in some form a ritual of liberalizing states, providing them with a public method of constructing their new norms. These processes allow them to draw a line, liberate a past, and let the society move forward. While punishment is conventionally considered largely retributive in its aim, in transitional situations its purposes become corrective, going beyond the individual perpetrator to the broader society. This function is clear in the case of systemic political offenses, for example in the persistence of prosecutions of crimes against humanity – the archetypal offense addressed by transitional persecutory politics, which here use criminal

law to mount a critical response to an earlier illiberal rule. Moreover, whereas punishment is ordinarily thought to divide society, the punishments exercised in transitional situations are so limited as to allow the possibility of a return to a liberal state. As such, criminal processes have affinities with other transitional responses.

III. The Paradigmatic Transitional 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 demands a recognition of the mix of individual and collective responsibility. There is an overlap of punitive and administrative institutions and processes; individualized processes of accountability give way to administrative investigations, commissions of inquiry, the compilation of public records, official pronouncements, and condemnations of past wrongs. These are often subsumed in state histories commissioned pursuant to a political mandate of reconciliation, as in South Africa. Whether or not bureaucratic forms of public inquiry and official truth-telling are desirable, and signify liberalization, is contingent on state legacies of repressive rule, but generalized uses of these independent historical inquiries can be seen in contemporary human-rights law.

The paradigmatic affinities discussed here bear on the recurrent question in transitional-justice debates: what is the right response to repressive rule, the response most appropriate to supporting a lasting democracy? The subtext of this question assumes a transitional ideal, and the notion that normative concerns somehow militate for a particular categorical response. But this is simply the wrong question: in dealing with a state's repressive past, there is no one right response. The question should be reframed. Among states, the approach taken to transitional justice is politically contingent, even at the same time that 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 work in the move to a more liberal political order.

Transitional Constructivism

How is transition constructed? What is the role of law 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, and in this respect its distinctive feature is its mediating function: it maintains a threshold level of formal continuity while engendering a transformative discontinuity. The extent to which formal continuity is maintained depends on the modality of the transformation, while the content of the normative shift is a function of history, culture, and political tradition, as well as of the society's receptiveness to innovation.

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 apologies; and the promulgation of constitutions and reports. These practices share features: namely, they are ways to publicly construct new collective political understandings. Transitional processes, whether prosecution, lustration, or inquiry, share this critical dimension. They are actions taken to manifest change by publicly sharing new political knowledge. Law works on the margin here, as it performs the work both of separation from the prior regime and of integration with the successor

regime. It has a liminal quality: it is law between regimes. The peculiar efficacy of these salient legal practices is their ability to effect functions of both separation and integration – all within continuous processes.

Transitional 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 law is above all symbolic – a secular ritual of political passage.

The legal process has become the leading transitional response because of its ability to convey, publicly and authoritatively, the political differences that constitute the normative shift from an illiberal to a liberal regime. In its symbolic form, transitional jurisprudence reconstructs these political differences through changes in status, membership, and community. While the differences are necessarily contingent, they are recognized as legitimate, in light of the legacies with which a given successor society has to deal. Moreover, the language of law imbues the new order with legitimacy and authority.

In modern political transformations, legal practices enable successor societies to advance 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 rationalist liberal response to mass suffering and catastrophe; it expresses the notion that there is, after all, something to be done. Rather than resigning itself to historical repetition, the liberal society sees the hope of change put in the air. Where successor societies engage in transitional-justice debates, they signal the rational imagining of a more liberal political order.

In periods of political upheaval, legal rituals offer the leading alternative to the violent responses of retribution and vengeance. The transitional legal response is deliberate, measured, restrained, and restraining, enabling gradual controlled change. As the questions of transitional justice are worked through, the society begins to perform the signs and rites of a functioning liberal order. Transitional law transcends the “merely” symbolic to become the leading ritual of modern political passage. It is a ritual act that makes the shift possible between the predecessor and the successor regimes. In contemporary transitions characterized by a peaceful nature and an occurrence within the law, it is legal processes that perform the critical “undoings”, the inversions of the predicates justifying the preceding regime. It is these public processes that produce the collective knowledge constitutive of the normative shift, simultaneously disavowing aspects of the predecessor ideology and affirming the ideological changes that constitute liberalizing transformation.

New democracies respond to legacies of injustice in different ways, but patterns across their various legal forms constitute a paradigm of transitional jurisprudence rooted in prior political injustice. The role of law 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. The conception of justice in transitional jurisprudence is partial, contextual, and situated between at least two legal and political orders. Legal norms are always multiple, the idea of justice a compromise. Transitional jurisprudence centers on the paradigmatic use of the law in the normative construction of the new political regime.

IV. The Construction of Liberal Narrative

The main contribution of transitional justice is to advance the construction of a collective liberalizing narrative. Its uses are to advance the transformative purpose of moving the international community, as well as individual states, toward liberalizing political change. Just how does transitional justice offer its narrative? What is the potential of law in constructing a story that lays the basis for political change? Let us begin with the trial.

The History of Law: The Uses of the Human Rights-Trial

A primary role of transitional criminal justice is historical. Trials have longed played a crucial role in transitional history-making; criminal justice in these situations creates public, formal shared processes that link the past to the future, the individual to the collective. Criminal trials are a historical, ceremonial form of shared memory-making in the collective, a way to work through controversy within a community. The purposes of even the ordinary criminal trial are not only to adjudicate individual responsibility but also to establish the truth about an event in controversy; this is even more true of the role of the trial in settling the historical controversies characteristic of periods of transition. Since transitions follow regime change, and periods of heightened political and historical conflict, a primary purpose of successor trials is to advance a measure of historical justice.

What sort of truths are established in such periods? I call them “transitional critical truths”: namely, a shared political knowledge critical of the ideology of the predecessor regime. The collective historical record produced through the trial both delegitimizes the predecessor regime and legitimizes the successor. Repressive leadership may be brought down by military or political collapse, but unless it 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. Other leading historical trials, whether of the war criminals at Nuremberg or of Argentina’s military junta, are now remembered not for their condemnation of individual wrongdoers but for their roles in creating lasting historical records of state tyranny.

Transitional criminal processes create authoritative accounts of evil legacies, allowing a collective history-making. The many representations that they involve – trial proceedings, written transcripts, public records, judgments – re-create and dramatize the repressive past. Radio and television reports add to these possibilities (consider The Hague today). One might also add the Internet.

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

The connection between legal proceedings and history adverts to the broader role of law in constructing the narrative of transition. I turn to explore that structure in the next part of this essay.

Narratives of Transition

The narratives constructed in a transition, whether they develop out of trials, administrative proceedings, or historical commissions of inquiry, make a normative claim about the relationship of a state's past to its prospects for a more democratic future. As I will explain, the transitional narrative structure itself propounds the claim that particular knowledge is relevant to the possibility of personal and societal change. Narratives of transition offer an account of the relationship of political knowledge to the move away from dictatorship and toward a more liberal future.

Transitional narratives follow a distinct rhetorical form: beginning in tragedy, they end on a comic or romantic mode. In the classical understanding, tragedy implicates the catastrophic suffering of individuals, whose fate, due to their status, in turn implicates entire collectives. Some discovery or change away from ignorance ensues, but in tragedy, knowledge seems only to confirm a fate foretold. Contemporary stories of transitional justice similarly involve stories of affliction on a grand scale, but, while they begin in a tragic mode, in the transition they switch to a nontragic 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, and somehow adjust and even thrive in a new reality. In the convention of the transitional narrative, unlike that of the tragedy, the revelation of knowledge actually makes a difference. The country's past suffering is somehow reversed, leading to a happy ending of peace and reconciliation.

The structure of the transitional narrative appears in both fictional and nonfictional accounts of periods of political transformation. National reports read as tragic accounts that end on a redemptive note. Suffering is somehow transformed into something good for the country, into a greater societal selfknowledge that is thought to enhance the prospect of an enduring democracy. After "Night and Fog" policies of "disappearance" throughout much of Latin America, for example, bureaucratic processes were deployed to set up investigatory commissions. Beginning with titles such as "Never Again", the truth reports produced by these commissions promise to deter future suffering. Thus the prologue to the report of the Argentine national commission on the disappeared declares that the military dictatorship "brought about the greatest and most savage tragedy" in the country's history, but history provides lessons: "Great 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 only democracy can save a people from horror on this scale"¹. Knowledge of past suffering plays a crucial role in the state's ability to make a 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 are necessary to reestablishing the country's identity. The decree establishing the 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"². "Truth", then, is the necessary precondition for democracy. This is also the organizing thesis of the El Salvador truth commission, a story line seen in the title of its report, "From Madness to Hope". The report tells a story of violent civil war followed by "truth and reconciliation". According to its introduction, the "creative consequences" of truth can "settle political and social differences by means of agreement 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."³

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. The preface to the unofficial Uruguayan report *Nunca más* (Never again) casts writing in and of itself as a social triumph, claiming that 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”⁴.

In transitional history-making the story has to come out right. Yet these reports imply a number of poetic leaps. Was it the new truths that brought on liberalizing political change? Or was it the political change that enabled the restoration of democratic government, and then a reconsideration of the past? Or is it simply that, despite ongoing processes of political change, unless there is some kind of clarification of the concealments of the evil past, and some kind of ensuing self-understanding, the truth about that past will remain hidden, unavailable, external, foreign. In postcommunist transitions characterized by struggles with past state archives, transitional accounts begin with stories of invasion and popular resistance; the foe is represented as the foreign outsider, before the story progresses 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 in Latin America, 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 neither original nor foundational; they are, however, contingent on state legacies of repressive rule. The critical function of the successor regime responds to the repressive practices of the prior regime. After military rule in Latin America, for example, where truth was a casualty of disappearance policies, the critical response is the “official story”. After communist rule, on the other hand, the search for the “truth” was a matter not of historical production as such, for the “official story” had previously been deployed as an instrument of repressive control; instead, it was a matter of critical response to repressive state histories, to the securing of private access to state archives, to privatization of official histories, and to the introduction of competing historical accounts.

The link between the exposure of knowledge and the possibility of change means that the possibility of change is introduced through human action. The very notion of a knowledge objectified and exposed suggests not only that there was somehow a “logic” to the madness but that now there is something to be done. The message propounded is the notion that, had the newly acquired knowledge been known earlier, events would have been different – and, conversely, that now that the truth is known, the course of future events will indeed be different. The liberal transition is distinguished by processes that illuminate the possibility of future choice. Transitional accounts hold the kernels of a liberal future foretold. The revelation of truth brings on the switch from the tragic past to the promise of a hopeful future. A catastrophe is somehow turned around, an awful fate averted. Transitional justice operates as this magical kind of switch: legal processes involve 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 what is at stake in liberalizing transformation is at minimum a change of interpretation. The regimes of politics and of truth have a mutually constitutive role in this process: societies begin to change politically when their citizens’ understanding of the ambient situation changes. As Vaclav Havel has written, the change is from “living within a lie to living within the truth”⁵. So it is that much of the literature of these periods involves 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 relation between citizen and state, shedding light on the structure and course of civic change.

What emerges clearly is that the pursuit of historical justice is not simply responsive to or representative 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. As transitional accounts connect a society’s past with its future, they construct a normative relation. In this sense narratives of transition are stories of progress, beginning with backward-looking reflection on the past but always viewing it in light of the future. If the constructive fiction is that earlier awareness of the knowledge now acquired might have averted the tragedy, a new society can be built on this claim. It is the change in political knowledge that allows the move from an evil past to a sense of national redemption.

Transitional narratives have a distinct structure. Their revelations of truth occur 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 a corrective return to the society’s true nature. A new course is charted.

The practices of 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 “mini”-narratives, always situated within the state’s preexisting national story. They are not new beginnings but build upon preexisting political legacies. Indeed the relevant truths are always implicated in the past political legacies of the state in question. They 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 the historical conflict apparent in contested accounts; as political regimes change, transitional histories offer a displacement of one interpretive account or truth regime for another, so preserving the state’s narrative thread.

The importance of establishing a shared collective truth regarding repressive legacies from the past has become something of a trope in the discourse of political transition. The meaning of “truth” is not universal, but rather is largely politically contingent. Accordingly, the paradigmatic transitional legal processes rely on discrete changes in the public’s salient political knowledge for their operative transformative action. Legal processes construct changes in the public justifications underlying political decision-making and behavior, changes that simultaneously disavow aspects of the predecessor ideology and justify the ideological changes constituting the liberalizing transformation. Legal processes can make these changes in the public rationale for the political order because they are predicated on authoritative representations of public knowledge. In this way they contribute to the interpretive changes that create the perception of political and social transformation.

At the same time, transitional legal processes also vividly demonstrate the contingency in what knowledge will advance the construction of the normative shift. The normative force of these transitional constructions depends on their critical challenges to the policies, predicates, and rationalizations of the predecessor rule and ideology. Accordingly, what the relevant “truths” are is of disproportionate significance. In an example from this region, the Nanavaki commission accounts of the 1984 anti-Sikh riots, it is crucial whether a victim is identified as an “unarmed civilian” rather than as a “combatant”.

The critical truth turns on whether violence was “organized”. Such findings of publicly shared political knowledge can topple a regime (at least on the normative level) by undermining a key ideological predicate of repressive national security policies. 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 history-making publicly construct the transition, dividing political time into a “before” and an “after”. Transitional responses perform the critical undoings that respond to the prior repression – the releasing of justifications of the predecessor regime that is critical to political change. The practices of historical production associated with transition often publicly affirm what is already implicitly known in the society, but bring forward and enable a public letting go of the evil past.

Whether through trials or other practices, transitional narratives highlight the roles of knowledge, agency, and choice. Although the received wisdom on them is that their popularity in liberalizing states comes from their emphasis on structural causation, they are actually complex, densely layered accounts that weave together and mediate individual and collective responsibilities. By introducing the potential of individual choice, the accounts perform transitional history’s liberalizing function. By revealing “truths” about the past, they become narratives of progress, and by suggesting that events might have been different had this knowledge been previously known, they invoke the potential of individual action. Their message is one of avertable tragedy. Their expression of hope in individual choice and human action goes to the core of liberalism and human-rights discourse.

Transitional narratives are also redemptive stories of return, of wholeness, of finding the way to political unity. They comprise a turn to the corrective and offer state and public an alternative, successor identity centered on political unity. Emphasizing the possibility of bounded choice, of the reconciliation of the potential for individual agency with set political circumstances, they also stress the possibility of societal self-understanding and of averting tragic repetition associated with liberation. The message is that, despite past bad legacies, the contemporary liberal state offers redemptive political possibilities.

Transitional justice offers a way to reconstitute the collective across racial, ethnic, and religious lines, to ground it in a contingent political identity responsive to its particular legacies of fear and injustice. So it is that transitional justice has become an enduring feature of political liberalization. As liberal narrative, though, it should not become a fixed identity; despite its appeal, its entrenchment as a story of unity could undermine its potential for a more revolutionary project. The entrenchment of policies of unity would stunt the development of party politics and a robust political culture. It would ultimately be illiberal. Transitional justice points instead to the significance of ongoing counternarratives and of nurturing transitional modality. These are the dynamic processes that characterize effective liberalization strategies and allow for ongoing political transformation.

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