Justice in Transitional Contexts

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> "The conception of justice in periods of political change is extraordinary." (Teitel, "Transitional Jurisprudence")

> "The study of transitions can shed light on justice, but the light it sheds will help in better understanding our common or garden variety of justice, rather than in revealing something entirely, or even largely new." (Dyzenhaus, "Judicial Independence")

Introduction

Over the past four decades a large number of societies around the world have attempted to transition from an extended period of civil conflict and/or repressive rule to liberal democracy. Afghanistan, Argentina, Cambodia, Chile, East Germany, El Salvador, Guatemala, Iraq, Northern Ireland, Poland, Rwanda, Sierra Leone, and South Africa and are just some of the more prominent examples. These transitions have occurred with varying degrees of success, and one condition that is widely taken to affect the success of a transition is the way that a society addresses the characteristic legacy of wrongdoing from the period of conflict and repression. The scale and nature of wrongdoing during the pretransition period is often truly horrific, characterized by widespread, systematic, and often brutal human rights abuses - 800,000 killed in 100 days in the 1994 genocide in Rwanda; 2,000,000 dead during the four-year reign of Khmer Rouge in Cambodia; 55,000, largely indigenous people, killed during Guatemala's civil war; and an estimated 200,000 surviving rape victims in the Democratic Republic of the Congo. Very often a number of unknowns surround such wrongdoing, including the exact number of victims, the location of the remains of victims, the identities of the perpetrators, and the role of government in sanctioning or carrying out abuses.

Scholars have coined the term "transitional justice" to refer to the justice involved in transitioning from conflict or authoritarianism to democracy and, in particular, responding to past wrongdoing in this

context. Questions asked in such contexts include: To what extent and in what way should the past be confronted? Should perpetrators of wrongdoing be punished? Should a policy of lustration, in which officials from the old regime are barred from assuming public office in the new regime, be adopted? Or should a community concentrate exclusively on the future, reforming and rebuilding institutions and relationships? Transitional justice now constitutes a growing interdisciplinary academic field, and numerous think tanks, such as the International Center for Transitional Justice, take as their mission the promotion of transitional justice. Examinations of transitional justice are often case specific and empirical in nature. Indeed, one primary concern in this emerging field is evaluating the effectiveness of different kinds of legal responses to wrongdoing, such as criminal trials, truth commissions, and reparations, in promoting reconciliation or ending impunity, and the factors (e.g., the way a transition was brought about) that influence which kind(s) of response(s) a particular society selects.

In contrast to these empirical studies, my concern in this paper is conceptual and normative in nature. There is wide consensus in the literature that transitional justice demands that a legacy of wrongdoing be dealt with in a way that is both effective in consolidating the process of democratization and, at the same time, morally justifiable. It is very difficult to satisfy both criteria in practice. Very often the transition to a new regime is fragile; ambiguity surrounds whether a military defeat is decisive, a peace agreement will hold, or a revolution is permanent. In such contexts granting amnesty for wrongdoing may be conducive to consolidating a transition, particularly when a military responsible for atrocities continues to wield extensive power. However, given the especially egregious character and scale of wrongdoing, the justifiability of granting amnesty to perpetrators of atrocities strikes many as dubious, if not outright offensive. In the existing literature, attempts to grapple with the tensions involved in satisfying both dimensions of transitional justice rest on a central assumption, namely, the assumption that transitional justice is a *unique* or *distinctive* kind of justice. That is, transitional justice is presumed to be distinct from the ordinary kinds of justice found in stable democracies. It is this presupposition that I examine in this paper.

My primary objective is to identify grounds for claiming that transitional justice is distinctive. Given that transitional justice concerns the morality of responding to past wrongdoing in transitional contexts, there are two obvious possibilities for the source of transitional justice's claim to a unique status. First, the distinctiveness of transitional justice could be found in the distinctiveness of *transitions themselves*. Second, the source of the distinctiveness could be the *legacy of wrongdoing in transitions*. In this paper

I explore the first possibility, that there is something distinctive about transitions which helps to explain why transitional justice is distinctive. I consider this possibility because it is the one implicit in most accounts of transitional justice in the literature.

Theorizing about justice generally presupposes the existence of a reasonably just, stable democracy. This is the context for thinking about what is called "ordinary justice" in the literature on transitional justice. To establish that transitional justice is a distinctive kind of justice, - i.e., that it is fundamentally different from and irreducible to ordinary justice - theorists try to demonstrate that there is some aspect or characteristic that distinguishes transitional contexts from ordinary contexts. In the first section I identify three different explanations of the distinctiveness of transitional contexts found in the literature. Transitional contexts are claimed to be distinctive in virtue of (1) characteristic features of transitions, (2) the moral dilemmas and questions that arise in such contexts, or (3) the standards appropriate for resolving the dilemmas and moral questions inherent to such periods. In the second section I consider skeptical arguments that have been advanced against each of these explanations of the distinctiveness of transitions. In each case the skeptical argument demonstrates that the same features/dilemmas/standards found in or appropriate for transitional contexts are also found in and appropriate for the context of stable democracies.

The third and final section offers a novel explanation of the distinctiveness of transitions, one that concentrates on the distinctive characteristics of transitions themselves and incorporates the central insight of the skeptics but avoids falling prey to their objections. My central thesis is that two distinct kinds of uncertainty - existential uncertainty and uncertainty about authority - are paradigmatically present in transitional contexts but rare in stable consolidated democracies. As such, the presence of these uncertainties as a fundamental and persistent feature of people's lives serves to decisively distinguish transitional from nontransitional contexts. They provide the basis for an alternative explanation for the distinctiveness of transitional contexts, an alternative that I hope to show proves to be more promising and plausible than the ones that have been on offer so far. This account of the distinctiveness of transitions does not by itself provide a complete account of transitional justice. Indeed, in this paper I am silent about the substance of what justice demands in terms of how communities in transition respond to a legacy of wrongdoing. However, as I discuss in the conclusion, my account of the distinctiveness of transitions provides theoretical resources for understanding why

the standards of justice articulated in ordinary contexts are not satisfactory as standards of justice in transitional contexts.

Before turning to the first section it is important to define what I mean by "transitions" or "transitional contexts." There is general consensus that a society is in transition during the period in which political orders are in flux. A transition begins "right after revolution" from an illiberal order or with a cessation of conflict. While there is consensus that the transition ends when a country has completed the process of democratization and thus is a "full" or "consolidated" democracy, there is disagreement about the criteria that mark this transition. Some theorists advocate procedural and institutional criteria, such as the holding of elections, introduction of constraints on the executive branch, establishment of the rule of law, and respect for human rights. Others concentrate on the attitudes of citizens and officials toward the new order, marked by acceptance of the rule of law and liberal democracy, and recognition of the legitimacy of the new regime. [1] Still others advocate a mix of criteria, such as the presence of executive constraints, the openness of the media, and the formation of associations "championing civic causes."[2]

In my view, criteria for full or consolidated democracy should be derived from a conception of the kind of relationships in which citizens and officials in a democracy stand.[3] The core values such relationships express are reciprocity and respect for moral agency. Relationships express these values when premised on mutual respect for the rule of law on the part of citizens and officials, which is required for law to structure political interaction in practice and for law to define the expectations citizens and officials have of one another. Citizens must also have the positive freedom or genuine opportunity to participate in the social, economic, and political life of a community. These opportunities are influenced by both what a person has (e.g., resources) and what she can do with what she has (e.g., given the social, legal, and material environment). From this perspective, we can see that the institutional, attitudinal, and procedural criteria cited above are all relevant and must be met to a certain threshold degree. For example, the rule of law is maintained only through the cooperative effort of citizens and officials; widespread disregard by officials for the requirements of the rule of law renders futile obedience to law

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[1] Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation," *The Yale Law Journal* 106 (7) (1997): 2009-2080, at p. 2013; David L. Epstein, Robert Bates, Jack Goldstone, Ida Kristensen, and Sharyn O'Halloran, "Democratic Transitions," *American Journal of Political Science* 50(3) (2006): 551-569.

[2] Epstein et al., "Democratic Transitions," p. 555; Jeffrey Herbst, "Political Liberalization in Africa after Ten Years," *Comparative Politics* 33(3) (2001): 357-375.

[3] See Colleen Murphy, *A Moral Theory of Political Reconciliation* (New York: Cambridge University Press, 2010).

on the part of citizens since such obedience will either be difficult to determine ahead of time given the character of legal rules or irrelevant to how officials respond to one's actions. Widespread disregard of the law by citizens renders the activities of officials futile. Thus acceptance of the rule of law is critical for the rule of law to exist. The capability of participating in political, economic, and social processes requires elections that are free and fair, as well as respect for rights.

Importantly, the determination of whether a society is in transition is not always straightforward. There may be disagreement in particular cases about when an old order ended and the new order began. Similarly, with a concept like adolescence there may be disagreement about when youth ended or adulthood began in particular cases. However, despite ambiguity and disagreement about how to categorize certain moments of a given society there will be specific moments in which it will be clear that a society was in flux. Similarly, there will be specific moments in which it was clear that a society was no longer in flux or that an old regime had ended.

I The distinctiveness of transitional contexts

Most theorists interested in questions of transitional justice simply assume that transitional contexts are different from ordinary ones. Few have attempted to offer a sustained argument for or analysis of what exactly that difference amounts to. Ruti Teitel's work is the seminal and most influential in this regard and as such forms the focus of my discussion. [4] In this section I distinguish three different explanations of what makes transitional contexts distinctive. Teitel herself does not distinguish these explanations, nor has anyone in the literature formulated them as such. My account below reconstructs these explanations from discussions by and of Teitel.

Possible Explanation #1: Transitions are distinctive in virtue of distinctive characteristics of transitional contexts.

According to the first kind of explanation, transitions are distinctive because there are characteristics of transitional contexts that are not found in ordinary contexts. One feature highlighted is the "normative shift" in "the conception of justice" ordering a community that coincides with a change in political

[4] Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2002).

orders.[5] The conception of justice ordering a political community refers to the "the principles underlying and legitimating the exercise of state power."[6] During the transitional period - this period of a normative shift - standards for the legitimate exercise of power by the state are in flux, with past standards not yet completely repudiated and new standards not yet fully consolidated. By contrast, in the ordinary context of a stable consolidated democracy there is a stable conception of justice that legitimates and underlies the exercise of state power.

A different feature emphasized is the radically discontinuous character of the transitional period with both the old illiberal and the new liberal political orders. The beginning of the transitional period marks a society's radical break with an authoritarian regime or period of conflict. At the same time, the end of the transition is radically discontinuous with what comes immediately after, namely a new political order and political era marked by the consolidation of distinct institutions.[7] By contrast, in the ordinary context of a stable consolidated democracy there may be changes within the political order, but not changes in the political order or events that would constitute a radical break from the past.

Possible Explanation #2: Transitions are distinctive in virtue of distinctive moral questions and dilemmas that are inherent in transitional contexts.

The second explanation of the distinctness of transitional contexts appeals to the distinctive moral questions and dilemmas "inherent to these extraordinary periods."[8] A primary source of these questions and dilemmas is the paradoxical role of law in transitions. In stable democratic contexts the rule of law is understood to constrain arbitrary government action, in part by requiring stability in the rules governing conduct and adherence on the part of government officials to such known rules. In ordinary contexts, in other words, law provides "order and stability."[9] However, in transitional contexts law must provide order and at the same time facilitate wholesale transformation. It is because of this paradoxical role that law must play that certain questions and dilemmas arise.

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[5] Teitel, "Transitional Jurisprudence," p. 2014. There is some variation within transitional contexts. In Teitel's words, "Not all transformations exhibit the same degree of 'normative shift.' Indeed, one might conceptualize transitional long transformative continuum in their relation to the predecessor regime and value system varying in degree from 'radical' to 'conservative' change" (*Transitional Justice*, p. 6).

[6] Teitel, *Transitional Justice*, p. 213; Teitel, "Transitional Jurisprudence," p. 2013.

[7] David Dyzenhaus, "Judicial Independence, Transitional Justice, and the Rule of Law," 10 *Otago Law Review* 345 (2003): 1-27.

[8] Teitel,"Transitional Jurisprudence."

[9] Teitel, *Transitional Justice*, p. 6.

One question is whether it is possible, or even desirable, for transitional societies to respect the rule of law. As noted above, the transitional period is by definition a period of disorder and instability. Standards for legitimate government action are in flux and changing. Political, legal, and economic institutions are being transformed. In this context adherence to the rule of law, understood as stability in the rules governing conduct, becomes difficult if not impossible to achieve insofar as transformation of the legal order is itself a central aim.[10] Furthermore, even if some degree of continuity with the old legal order may be possible to maintain, the desirability of such continuity is unclear in transitional contexts. Such respect seems to entail a restraint on or barrier to the achievement of normative progress, which the consolidation of a new liberal political order aims to achieve. By contrast, in ordinary contexts there is no aspiration to achieve wholesale transformation of the legal order; the rule of law, understood as order and stability in legal rules, is both possible to achieve and desirable to achieve.

Perhaps the best way to illustrate this point is by considering the dilemma surrounding issues of criminal justice, which stems from the fact that a key principle of the rule of law prohibits retroactive punishment.[11] In transitional contexts the actions that are widely taken to be the appropriate subject of punishment were arguably legal, though clearly immoral, at the time they were committed. Thus transitional punishment often seems to involve the application of new norms, which the process of punishment itself helps to construct, retroactively. A prior regime is held accountable according to the standards of the successor regime. The violation of this tenet of the rule of law in transitional punishment seems troubling for its own sake, and calls into question the ability of transitional punishment to be successful in achieving its justifying goal. Punishment in transitional contexts is typically justified because of the role that punishment can play in the process of democratization. It is claimed that punishment "undoes" past injustice by delegitimizing the prior political order and previously sanctioned political violence, while at the same time legitimizing the new political order and conception of justice. In the process, punishment contributes to the construction of a new conception of state injustice for their community. However, to contribute to democratization trials must presumably be conducted in a way that adheres to standards of legality found in liberal democracies. In ordinary contexts, by contrast, *ex post facto* punishment is not necessary. Actions that are legally

[10] Teitel, "Transitional Jurisprudence," p. 2017.
[11] Teitel, *Transitional Justice*, pp.33-34.

sanctioned are appropriately the subject of punishment, and the standards that regulated action at the time a crime was allegedly committed are the same standards used to condemn such actions.

Possible Explanation #3: Transitions are distinctive in virtue of distinctive concepts and standards for answering moral dilemmas and questions in transitional contexts.

In addition to arguments that claim that transitional contexts are distinct because of their defining features or their inherent dilemmas, a third kind of explanation can be discerned in the literature. According to this account, the concepts and standards used to respond to the inherent dilemmas and questions in transitional contexts are distinct. That is, in this view it is a mistake to apply ordinary moral intuitions or standards, and indeed our ordinary understanding of certain concepts, to actions in the context of transitions.

For example, Teitel argues that we need to change our understanding of what ruling by law means in transitional contexts. Rather than thinking that stability and continuity in law captures the essence of ruling by law, we should consider the rule of law "as a normative value scheme that is historically and politically contingent and elaborated in response to past political repression often perpetrated under the law. "[12] That is, what it means to rule by law in a given society will depend on the character of the political injustice that preceded the transition period.[13] To illustrate, in Hungary ruling by law is best understood as security of individual rights once granted; of particular though not exclusive interest is the security of property rights. It was necessary for the government, during and after the transition period, to demonstrate that there would be a domain for individuals that would be protected by the state, and in which the state would not interfere, even during the economic and legal transitional period.[14] By contrast, a central source of injustice during the Nazi period was the extent to which authorities operated outside of law and used legal processes to persecute groups of individuals. Thus the meaning of the rule of law in that transitional context is best understood as "equal protection in the administration of justice" and a concern for ensuring that the law was indeed used to administer justice.[15]

[12] Teitel, *Transitional Justice*, 7.
[13] Thus Teitel rejects the usefulness of thinking of the rule of law as an abstract ideal norm (*Transitional Justice*, p. 7).
[14] Teitel, "Transitional Jurisprudence," p. 2023.
[15] Ibid., 2025.

Similarly, the standards for justice in responding to wrongdoing must be defined relative to the transitional context.[16] Justice in transitions is ultimately *instrumental*. A just response to wrongdoing is one that will promote the transformation of a community into a liberal democratic order. In Teitel's words, "legal responses should be evaluated on the basis of their prospects for democracy."[17] Importantly, justice in transitions is also *contextually defined*. What counts as transformation in any given society is contingent on the character of prior injustice, specifically the character of state sponsored violations of human rights. Thus what counts as successful transformation of the political order will also be context specific. Third, transitional justice is ultimately *pragmatic*. Justice requires a pragmatic resolution to the dilemmas involved in responding to wrongdoing in transitional contexts; "the idea of justice always a compromise."[18] Thus in response to the dilemmas involved in criminal punishment, we might adopt the limited criminal sanction in which prosecution processes do not automatically result in full punishment. Rather, the establishment and punishment of wrongdoing are treated separately. By prosecuting wrongdoing, establishing wrongdoing, and ascribing responsibility, criminal justice is able to separate the predecessor regime from its successor and also condemn wrongdoing. By avoiding the actual infliction of punishment, however, the limited criminal sanction avoids ascribing individual responsibility for systematic wrongdoing. Thus "the transitional limited sanction offers pragmatic resolution of the core dilemma of transition, namely, the problem of attributing individual responsibility for systematic wrongs perpetrated under prior repressive rule."[19] By contrast, in ordinary contexts the standards for justice are taken to represent principled rather than pragmatic considerations. Furthermore, the demands of justice are characteristically taken to be noninstrumental, but rather deontological in nature.[20]

I have explicated three different accounts of what makes transitional contexts distinctive. One question that these accounts raise is whether it is necessary for all three kinds of distinctiveness to obtain in order to demonstrate that the justice that applies in these contexts, transitional justice, is a distinctive kind of justice. Consider the first account, that transitional contexts are distinct. That explanation

[16] Ibid. and Teitel, *Transitional Justice*, p. 6.
[17] Teitel, "Transitional Jurisprudence," p. 2011.
[18] Ibid., 2016.
[19] Teitel, *Transitional Justice*, p. 50.
[20] There are debates about the exact nature of deontology in discussions about justice and there are nondeontological standards of justice even in ordinary contexts. However, the above captures a general understanding of the commonly reviewed wisdom about justice in stable, modern, liberal democracies.

alone does not seem sufficient to show that transitional justice is distinctive, in part because this explanation does not demonstrate why the distinctive characteristics make a moral difference. To make the distinctive characteristics of transitional contexts morally relevant, one might show that the distinct context generates distinctive moral questions or standards for addressing moral questions. In other words, it seems as if the first account needs to be supplemented with either the second or third account in order to explain why justice is different in transitional contexts. However, it may be that it is not necessary for both the second and third accounts to be true. The moral questions or dilemmas that arise in transitional contexts may not need to be distinct, only that the standards for answering these questions are different. Perhaps it is sufficient that the questions and dilemmas that arise are distinctive. At this point I will not attempt to resolve these questions; rather, I want to turn in the next section to a different question, namely whether any of the accounts of the distinctiveness of transitions articulated above are correct and so whether transitional contexts *are* in fact distinctive in any important sense.

II Skeptical challenges

In this section I consider arguments advanced by skeptics of transitional justice. The arguments are designed to show that the explanations of what makes transitions distinctive considered in the previous section all fail because they fail to explain anything that is distinctive to transitions. That is, we can find similar characteristics or questions and dilemmas that we find in transitional contexts in ordinary contexts. Furthermore, skeptics argue, the standards for justice in ordinary contexts are sufficient for addressing the moral issues that arise in the contexts of transitions. Below I present the skeptical challenge, drawing primarily on arguments advanced by legal scholars David Dyzenhaus, Eric Posner and Adrian Vermeule.[21] After reviewing the skeptical case, I argue that skeptical challenges provide an important insight that advocates of transitional justice must acknowledge and account for, but that skeptics have *not* indisputably shown that transitions are not distinctive.

In the first kind of explanation considered in the previous section, different features of transitional contexts are claimed to be distinctive to transitions: the normative shift that occurs during transition and the radically discontinuous nature of the transitional period. However, as critics point out,

[21] Dyzenhaus, "Judicial Independence"; Eric A. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (2004), 762-825.

normative shifts are not distinctive to changes in the political order; such shifts also occur in stable consolidated democracies.[22] Consider the United States. Intrapolitical order normative shifts have occurred following contestable elections such as the 2000 election, the recognition of new constitutional rights by the Supreme Court, and important policy shifts such as the Civil Rights Act. In each case there was a significant change in the conception of justice ordering and enforced by the state. Thus attempts to base the distinctiveness of transitional contexts on the basis of a normative shift fail.

Nor is it correct, skeptics argue, to view the transitional period as radically discontinuous with the old and new political order.[23] It is true that substantial changes occur during the transitional period. The transitional period does differ from the old illiberal order. However, in many respects there is continuity between the old order and the transitional order. Whole areas of law can remain unmodified. Personnel holding roles in the judiciary, legislative, and security forces are often largely identical. Similarly, there is substantial continuity between the transitional period and the consolidation of the new political order. Institutions and political processes, such as elections, initiated during the transition may be continued during the posttransition period. Legal reform achieved during the transition is maintained following a transition. Many personnel holding office in the transitional period remain once the transition has ended.

According to the second kind of explanation, transitional contexts are distinctive in virtue of their distinctive moral questions and dilemmas. However, critics argue, the dilemmas and questions supposedly inherent in the transitions also arise in the context of stable democracies. All normative shifts give rise to similar questions and dilemmas. Consider the dilemma surrounding retroactive punishment discussed in the previous section. This dilemma arises because in the aftermath of a normative shift, there is often a general demand that immoral, though legal, actions should be subject to punishment. One way of framing the general issue such punishment raises is in terms of the permissibility of sanctioning or censuring past conduct, either by officials or citizens, on the basis of a different conception of justice than that which defined the contours of permissible conduct at the time of the conduct itself. This issue arises in stable democracies whenever norms or legal rules undergo significant change. Politicians may lose elections because of statements they made in the past, which were sanctioned at the time and reflected the norms of the period. In effect, politicians are being

[22] Posner and Vermeule, “Transitional Justice.”
[23] Dyzenhaus, “Judicial Independence.”

sanctioned retroactively in such cases. Judicial nominees may not be appointed because of legal decisions or commentaries on legal decisions they advanced in a previous era. Justice Rehnquist, for example, faced considerable resistance to his nomination due to a memo he had written in 1954 while a clerk for Justice Jackson arguing for the constitutionality of racial segregation. At the time the memo was written, the correctness of the decision in *Brown v The Board of Education* was widely contested. However, by the time of his nomination as Chief Justice in 1986 the decision in *Brown v The Board of Education* was taken as settled. To secure his nomination, Rehnquist had to renounce the memo he had written and state that it did not represent his personal views at the time.[24]

The third kind of explanation cites the distinctive standards and concepts that should be used to address moral questions and dilemmas in transitional contexts. Skeptics argue, however, that it is a mistake to think we need to revise either our concepts or our ordinary standards of justice in order to resolve the dilemmas and questions that arise in transitional contexts. Consider the concept of the rule of law.[25] If we draw on the correct general conception of the rule of law, we avoid the necessity of adopting multiple, highly contextualized conceptions. Take the conception of the rule of law articulated by legal scholar Lon Fuller. In Fuller's view, the rule of law obtains when certain principles that constitute the inner morality of law are systemically respected. These principles, such as clarity, prospectivity, and congruence between declared rules and their enforcement, capture the character that legal rules and their enforcement must have for laws to govern the behavior of citizens and officials in practice. In this view, law is a collaborative achievement, requiring constant effort on the part of members of the government and legal profession to maintain the vision of civil society that the ideal of the rule of law represents. Using this framework, we can identify where the erosion of legality occurred during periods of repression by identifying, for example, how judges failed to draw attention to the violation of principles of the rule of law in their rulings and so failed in their capacity as judges, or we can highlight the extralegal character of the enforcement of laws.

[24] Posner and Vermeule, "Transitional Justice," p. 782. Of course, there are disanalogies between the examples of sanctioning considered here and those considered in the previous section. In particular, cases of the grudge informer raise the specter of formal sanctions for past actions, while the case of Judge Rehnquist involves informal sanctioning, or the prospect of such sanctioning, for past legal views. However, these differences do not detract from the general moral issue that both kinds of case raise, namely, whether it is permissible to sanction or censure retroactively.

[25] Dyzenhaus, "Judicial Independence."

Moreover, concepts of justice from ordinary contexts, including, importantly, the justice of the rule of law, provide the requisite theoretical resources for evaluating and justifying different responses to transitional dilemmas and moral questions. Distinctive or separate "transitional justice" standards are unnecessary. Consider the question of whether it was morally justified for the South African Truth and Reconciliation Commission (TRC) to grant amnesty to perpetrators of gross human rights abuses. Dyzenhaus argues that the best justification that can be offered is in terms of the role that the TRC played in promoting the justice of the rule of law. The TRC demonstrated the consequences of violating the rule of law, which systematically occurred during apartheid insofar as equal recognition of all responsible agents was "grossly distorted." The TRC also demonstrated that the sense of justice among South Africans was corrupted insofar as justice was taken to refer to any measure that would serve the ideology of apartheid. A sense of justice is required, Dyzenhaus argues, "if the transitional government is to preserve legitimacy and a commitment to the constraints of the rule of law, constraints which make it possible for citizens to call government to account for injustice."[26] Through its contributions, the TRC aided the transformation of South African society from an unjust to a just one, where justice refers to the kind of order that is valuable and allows societies to make decisions about political issues in a civil manner.[27]

Advocates of transitional justice appeal to or try to devise distinctive standards of justification, skeptics maintain, partly because they set the bar for a satisfactory justification for transitional responses to wrongdoing unnecessarily high. [28] Typically, authors assume that in ordinary contexts the demands of justice are fully satisfied in practice. However, stable consolidated democracies in fact use a range of tools to respond to normative shifts that are taken to be justified on moral and pragmatic grounds, despite failing to fully satisfy the demands of justice. For example, governments rarely offer full restitution following periods in which property is confiscated. Consider Japanese-Americans interned during World War II. The United States government offered a lump sum of reparations, which was not taken to fully rectify the property and wages that such Americans had lost. However, the amount was considered justified, given a concern for protecting a stable system of property rights, which attempts to return property after a significant passage of time would have destabilized, and a concern for corrective justice. Tools like such reparations, or even limited lustration, are not taken to be especially morally or institutionally dubious in democratic contexts; they should not be viewed as prima facie dubious in

[26] Ibid., p. 50
[27] Ibid.
[28] Posner and Vermeule, "Transitional Justice."

transitional contexts either. Indeed, the same justification offered in democratic contexts should suffice in transitional contexts; such justifications reflect the need to balance liberal commitments against political precautions in a democracy.

One way of viewing skeptical arguments is as a radical critique of the very *idea* of transitional justice, that there is no such thing as "transitional justice" where that term is taken to denote a distinctive kind of justice. Instead, "transitional justice" simply refers to ordinary justice applied to transitional contexts. For the purposes of this paper I will bracket the strong skeptical argument, which would stop a conversation about transitional justice simply by denying that there is any distinctive justice called transitional justice. Given that my interest is in considering the best explanation of the distinctiveness of transitions, I assume for the sake of argument that there is a satisfactory answer that can be given to the radical skeptical critique.

However, I think that there is an important insight in skeptical arguments. Skeptics correctly point out that the literature on transitional justice makes the case for the distinctiveness of transitional contexts on the basis of an overly simplistic, sanitized, and idealized understanding of ordinary justice in stable consolidated democracies. The skeptic shows, convincingly, that things are not nice and clean in stable democratic contexts. By preventing an overly utopian vision of stable democracies, the skeptical arguments serve as a useful corrective. They also highlight, for example, that there may be similar questions and dilemmas that arise in both transitional and nontransitional contexts.

The question that lingers, then, is whether there is something distinctive about transitions and what the source of that distinctness is. In the next section I argue for a new account of what makes transitions distinctive. My starting point is the conception of stable democratic societies articulated by the skeptics. My thesis is that there is indeed something distinctive about the normative shift that occurs in transitions, which stems from the uncertainty that accompanies normative shifts in transitional contexts but not in stable democratic contexts.

III An alternative account of the distinctiveness of transitional contexts

In my view, to understand what makes transitional contexts distinctive we should take as our starting point the normative shift in the conception of justice that organizes and structures a political community

that occurs during transitions. Skeptics correctly note that transitional communities are not distinctive in experiencing a normative shift. Within a political order, the conception of justice may be modified after especially momentous policy decisions or constitutional changes. If we are to distinguish transitional contexts, it cannot be on the basis of the occurrence of a normative shift; rather, it must be on the basis of the *character* of the shift that we find in transitions. I argue below that the key to the distinct character of the normative shift in transitions is the particular kinds of uncertainties that accompany a transition from an illiberal to liberal political order, but that do not accompany a shift within a liberal political order. There are two kinds of uncertainty that are of interest in this context: what I call "existential uncertainty" and "uncertainty about authority". I discuss each kind of uncertainty in turn below.

Part of the reason for the intense interest in transitional justice is that successful and lasting transitions to a liberal order are not the rule. Studies of civil war and civil conflict reveal an astonishing number of societies, 43 percent, return to civil conflict within five years of negotiating a peace settlement.[29] During the "third wave of democratization" eighty-five authoritarian regimes collapsed; only thirty of these regimes became stable democracies. [30] An increasing percentage of societies constitute "partial democracies," from 3.6 percent of 169 countries studied in 1976 to 26.1 percent in 2000. [31] Political scientists describe transitional societies as "'bouncers' or 'cyclers' that move back and forth between autocracy and democracy on multiple occasions."[32] Regional studies confirm the same pattern. Military coups remain prevalent in sub-Saharan Africa, "despite democratization trends since 1990." [33] "Jean-Germain Gros goes as far as to argue that 'there is no country in sub-Saharan Africa today, including South Africa where democratization cannot be rolled back."[34] In postcommunist countries in Eastern Europe and Eurasia, the record includes "a handful of successful transitions and easy consolidations, several incomplete transitions, a few transitions followed by reversion to authoritarian politics, even some transitions that never really began at all."[35] What these figures suggest is that in any given transitional context there is enormous uncertainty about whether or not a normative shift will in fact

[29] Andrew Mack, *Global Patterns of Political Violence* (New York: International Peace Academy, 2007).
[30] Epstein et al., "Democratic Transitions," p. 555.
[31] Ibid.
[32] Ibid., p. 556.
[33] Patrick J. McGowan, "African military *coup d'etat*, 1956-2001: Frequency, trends, and distribution," *Journal of Modern African Studies* 41(3): 2003, 339-370, at 339.
[34] Herbst, 2001, 358.
[35] Charles King, "Review: Post-Postcommunism: Transition, Comparison, and the End of 'Eastern Europe,'" *World Politics* 53(1): 2000, 143-172.

occur.[36] That is, in many transitional contexts what the future holds is deeply uncertain. Perhaps there will be a return to sustained conflict. Perhaps elections will be held. If elections are held, perhaps they will be credible. Perhaps the results will be respected by all parties to the elections. Perhaps politicians will act in ways that are significantly different from the actions of politicians past, or perhaps they will seek to amend the constitution to broaden the powers they enjoy. I call this particular kind of uncertainty *existential uncertainty*.

This acute existential uncertainty that accompanies the normative shift in transitions from authoritarian orders and civil conflict is obscured by the implicitly teleological view that Teitel advances. In Teitel's account, transitions are described in a teleological fashion, ordered linearly from an illiberal to a liberal political order. What is missing is an acknowledgement that the teleological projection is in most cases profoundly aspirational. The teleological picture of transitions depicted by Teitel reflects the deep hope that a given transition, and its accompanying normative shift, will be successful. However, it does not capture the actual political trajectory it is reasonable to expect in any particular case. A shift in the political order might occur without having the character that advocates of transitional justice desire. Deep inequalities might persist or be entrenched in new ways in the new political order. Schisms may develop within communities that were not present before. There is a real risk that peace will not stick and violence will return. In sum, there is substantial uncertainty surrounding whether the trajectory presupposed by accounts of transitional justice will be achieved, and if achieved, whether the attainment of a normative shift narrative will represent a stable and lasting achievement.

By contrast, within a stable consolidated democracy the same kind of existential uncertainty does not characteristically accompany a normative shift. Normative shifts do not typically pose a threat to the stability of the political order. While there might be resistance to the enforcement of new rights or to shifts in policies, characteristically there is no robust threat that a shift will undermine or destabilize a liberal political order. Consolidated democracies withstand such normative shifts. This fact is reflected in the stability of full democratic orders in the short and long term. In a study of the stability of democratic regimes, Epstein et al. found 98.2 percent of democracies remain democratic over a given year. Over a five-year span only 7 percent of full democracies change, compared to 40 percent of partial

[36] Unsurprisingly, there is widespread interest, and disagreement among political scientists, in the factors that influence the likelihood of success for transitions and what undermines the prospects for success.

democracies.[37] One factor that decreased the likelihood of a coup in sub-Saharan Africa was institutionalized democracy.[38]

This is not to suggest that normative shifts are always welcome; they are not, and are often vigorously, and sometimes violently, resisted. Nor does it suggest that normative shifts will occur immediately or even that potential normative shifts always occur. However, it is often not a genuinely open question whether a normative shift that does take place will be enforced. In the United States, for example, it remains an open question whether the current military policy of "Don't Ask, Don't Tell" will be repudiated, and so a normative shift will occur. However, it is not an open question whether, if the change in official policy occurs, it will be implemented. Indeed, the military has already stated that they will enforce this change in policy. Indeed, the military is currently preparing for such changes in policy.

Part of the reason why normative shifts in democracies are not accompanied by existential uncertainty stems from the absence of a second kind of uncertainty that we find in transitional contexts: *uncertainty about authority*. That is, there is no stable framework of authority that delimits who has the standing to resolve the dilemmas and questions to which a normative shift gives rise and what the principles regulating such authorities are. Specifically, within transitional communities the issue of who gets to decide how past wrongdoing will be dealt with by the state and the criteria that should guide such decision makers is frequently contentious.

The primary source of the uncertainty about normative authority stems from the mixed character of transitional political orders. Transitional societies are by definition periods between authoritarian and democratic orders; thus their political orders include characteristics of each period. As legal scholar H. Kwasi Prempeh notes, "Postauthoritarian constitutions may leave in place (i.e., unreformed) certain aspects of the *ancien regime*, notably those that have low salience at the moment of transition or that are not considered among the gravest problems of the immediately preceding regime."[39] During the transitional period there is no immediate overhaul of authoritarian institutions and practices. Thus transitional societies have elements of liberal political orders coexisting with aspects of authoritarian legacies. To illustrate, consider the following description of political orders characteristic of

[37] Epstein et al., 2006, 555.
[38] McGowman, 2003, 358.
[39] H. Kwasi Prempeh, "*Marbury* in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," *Tulane Law Review* 80(1): 2006, 1-84, at 53.

contemporary sub-Sahara Africa: “It is legitimately hard to characterize the current situation in many African countries. They are not one party states because parties are allowed…They do not prohibit elections, even if elections are not always free and fair…while the press is not free, it is not as constrained by formal and informal censorship as before…it is critical to accept the current fuzzy and indeterminate condition of many African countries as a (potentially long-lasting) set of regime type.”[40]

The coexistence of laws, practices, and institutions from the authoritarian period with reformed laws, practices, and institutions reflecting the emerging liberal democratic order complicates the question of authority. It implies that multiple standards of authority may operate at the same time within a transitional community. Some standards may derive from the authoritarian past, either as an authoritarian standard of authority or as authority based on resistance to the authoritarian period; other standards may derive from democratic reforms. At times these standards may conflict. Furthermore, important social, institutional, and moral conditions implicitly presupposed by democratic standards for authority, and often taken for granted in stable democratic contexts, may be absent in transitional contexts; their absence can be traced precisely to the legacy of the authoritarian order or period of conflict.

The following examples illustrate these general features of authority in transitional contexts. The authority of many politicians in transitional contexts stems from the role that they played in resisting oppression and repression during the authoritarian period. The authority of office holders in a liberal democratic order characteristically stems from procedural criteria, such as being elected or appointed by someone who was duly elected according to specified procedures. However, in transitional contexts little weight may be given in practice to the fact that such politicians were elected or little attention paid to the character of such elections. Rather, weight may be placed on their role in enabling a revolution or change in the political order, and so politicians who lack this kind of authority may not be viewed as authoritative in virtue of being elected.

Judges often occupy a complicated role during transitions. In democratic contexts the authority of the office of judges stems in part from their independence from political influence, interference, and/or manipulation. Judicial authority is also based on judges being appointed or elected in due manner,

[40] Jeffrey Herbst, “Political Liberalization in Africa after Ten Years,” *Comparative Politics* 33(3) (2001): 357-375, at p., 359.

according to carefully laid out procedures. However, in transitional contexts the appointment of judges and their role in the transition itself is often deeply political. New judges are frequently appointed on the basis of a political role they played prior to a transition in resisting oppression, such as by serving as human rights lawyers. The many judges who retain their positions following a transition are often seen as compromised, given their role in the previous regime. In many cases judges from the old order are perceived as having failed to be independent and rendering verdicts on the basis of what the law required rather than what political officials desired. In many cases this perception is warranted, and can undermine the legitimacy that the judicial branch enjoys among a population.

For example, debates about the grounds on which punishment of grudge informers was justified in post-Nazi Germany appealed to the general view of the judiciary held by the population. The term "grudge informers" refers to individuals who, during periods of conflict or repression, report personal enemies to authorities in order to get rid of them. One kind of justification for punishment highlights the way courts erred in interpreting statutes under which the individual reported by the grudge informer was charged in an unreasonable manner, given the language of the statutes at issue. This justification also highlights that it was widely known that the courts based their judgments not on the law, but in response to administrative pressure to suppress dissenting voices and terrorize the population. This allowed grudge informers to use the law and flawed courts to rid themselves of enemies.[41] Similarly, during the TRC, Archbishop Desmond Tutu, chair of the TRC, argued that judges failed as judges by failing to prevent the law from becoming anything more than a mere instrument or tool in the implementation of apartheid policy instead of an instrument of justice. Judges failed as judges insofar as they swore an oath to "administer *justice* to all persons alike without fear, favour or prejudice."[42]

An examination of the challenges facing many judiciaries in sub-Sahara Africa (SSA) highlights the profound implications that the weakness of judges during an authoritarian period and the lack of legitimacy of judges within a population have for the possibility of satisfying democratic criteria for authority. According to Prempeh, during the postcolonial authoritarian period, as in the colonial period, the judiciary in SSA has characteristically failed to act as a constraint on executive exercise of power, instead becoming a tool for the implementation and enforcement of government policy.[43] In the postcolonial period the constitution contained limits on government power, but those limits coexisted

[41] David Dyzenhaus, "The Grudge Informer Case Revisited," *New York University Law Review* 83: 1000-1034.
[42] Dyznenhaus, "Judicial Independence," p. 6.
[43] Prempeh, "*Marbury*," pp. 5-6.

with the legal order largely left untouched from the colonial period, which had provisions for the extensive exercise of power by the executive. The courts were rendered impotent in enforcing constitutionally protected rights and limiting the government's power. This was partly a function of the fact that the constitution was discredited by political rulers, who grounded their legitimacy in their ability to satisfy the material needs of the citizens rather than their status as elected officials, and who viewed the constitution as an impediment to the promotion of the development of their community. Rulers also dismissed judges who became too active in challenging executive authority.[44] Consequently, "as far as the majority of Africans were concerned, the courts existed only to enforce the criminal law against the poor and socially disadvantaged."[45]

During the transitions from authoritarian rule in the 1990s, a central concern became establishing the formal conditions for judicial independence found in stable democracies, including powers of judicial review and safeguards from political interference. The problem, Prempeh maintains, is that such guarantees are not sufficient to ensure that the judiciary will have independence and the authority based on this independence. For one thing, the postauthoritarian judiciary continues to lack legitimacy among the general population. "Large sections of the population, however, continue to perceive Africa's courts as remote and irrelevant…Add to this the longstanding public perception of the judicial system as corrupt and biased in favor of the powerful, and the result is an African public that is both distrustful of judicial power and doubtful of the relevance of courts to the lives of the ordinary citizen."[46] The sense of the judiciary as manipulatable by politicians, especially given the corruption of the judiciary, remains. This perception is not unfounded, Prempeh notes. The legislative and executive branches control the resources required for courts to function. The judiciary remains chronically underfunded, which creates an incentive for judges to do whatever is necessary to secure the requisite funding and makes judges more vulnerable to political interference.[47]

The lack of legitimacy among the population also undermines the capacity of courts to demonstrate their independence and to strengthen the constitution and rights that are constitutionally guaranteed. In fact, there is "chronic under-enforcement of constitutional guarantees in contemporary Africa." The sources of this under-enforcement are multiple. The public often lacks awareness of rights guarantees

[44] Ibid., pp. 25-32.
[45] Ibid., p. 31.
[46] Ibid., pp. 60-62.
[47] Ibid., p. 66.

and knowledge about the possibility of suing the government to enforce rights. The legislative branches have done little to reform the laws that remain from the authoritarian period and that were used as a weapon of repression, due to a widespread sense that it is the role of the courts to declare such laws unconstitutional when a suit is brought and not the role of the legislature to first overturn such legislation. As a result, "the existence in a postauthoritarian era of a large stock of repressive legislation from the past that remains unchallenged in the courts, confronts courts in contemporary Africa with a paradox of a potentially large supply of justiciable cases, on the one hand, and a substantial deficit of demand for judicial review, on the other. This shortfall in demand for judicial review cannot persist too long without reinforcing perceptions of the courts as useless in the face of governmental abuse."[48]

In a context in which competing standards for authority coexist, disputes can arise over who has the standing to decide how past wrongdoing will be addressed and in what manner. For example, in the cases of the grudge informer there was deep disagreement about whether the judiciary or legislative branch was authorized to retroactively declare certain statutes from the Nazi era unconstitutional.[49] Insofar as it is the role of judges to decide how the legacy of wrongdoing will be confronted, there may be disagreement about the kinds of considerations it is legitimate for judges to take into account. In other words, it remains an open question who has the standing to decide, and whether, if claimed, that standing will in fact be recognized and acknowledged by the transitional community.

By contrast, in the context of stable consolidated democracies the sources of uncertainty about authority do not obtain. Standards for authority derived from a democratic constitutional framework are well entrenched and without substantial challenge from competing sources of authority. The social and institutional conditions required for such standards to be satisfied in practice by and large obtain. Furthermore, there is widespread social acceptance of the authority of branches of government, including the judiciary. Thus the question of who has the standing to address the questions to which normative shifts give rise and what constitutes a legitimate exercise of authority are, importantly, settled. The framework of authority for deciding contested questions and dilemmas is not up for grabs in the way that it is in transitional contexts. For example, though substantial disagreement exists among judges, members of the legal community, and ordinary citizens about the principles that should guide judicial interpretation, few contest the authority of judges to decide what the law is, and so the basic

[48] Ibid., pp. 58-60.
[49] Dyzenhaus,"Judicial Independence."

principle of judicial review. The recognition of this authority is reflected in the fact that judicial decisions are taken by members of the legal community and the community as a whole as legally binding, even when individuals may view a particular decision as incorrectly decided.

In this section I have demonstrated that, contrary to skeptical claims, there are in fact two distinctive features of transitional contexts. Transitional societies are characterized by two kinds of uncertainty that are not present in the same way in stable democratic societies. The first kind of uncertainty is an existential uncertainty about whether the transition will lead to democracy and whether any democracy achieved can be maintained. By contrast, the future trajectory of stable democracies, even in the midst of a normative shift, is more secure. The second kind of uncertainty found in transitional contexts is an uncertainty about authority. This arises because of the ambiguous character of the political order of transitional communities that are characterized by both democratic and authoritarian features. It also arises because of the absence of important social and institutional conditions required for democratic standards of authority to be satisfied. By contrast, in stable democracies the standards for authority are settled, largely accepted, and do not face serious competing alternatives.

Conclusion

This paper has focused on a general presupposition of debates about and discussions of transitional justice, namely, that transitional justice is distinctive. My objective has been to articulate an account of what makes transitions themselves distinctive, which does not fall prey to the skeptical objections. The central claim I have defended is that there are two kinds of uncertainty present in transitional contexts, which are not present in ordinary contexts. This account of the distinctiveness of transitions themselves, I believe, will open new avenues for understanding what justice demands in transitions. I want to end by pointing out some of the potential ways that my account of the distinctness of transitional contexts may provide resources for showing that transitional justice is not simply ordinary justice applied to transitional contexts.

Consider first existential uncertainty. The presence of such uncertainty may exert an important influence on our understanding of how the legacy of past wrongdoing should be dealt with, and in what way. In ordinary contexts, responses to wrongdoing by the state do not have deep ramifications for the stability of a political order. Thus it seems appropriate to concentrate primarily on what is owed to an

individual victim and perpetrator when articulating what justice demands. This focus can include a concern for the social dimensions of the wrong, and the message such wrongdoing communicated to the broader public. However, typically this societal dimension is relevant for cashing out why it is important for wrongdoing to be addressed and be addressed by the state. By contrast, given the presence of existential uncertainty, it seems intuitively plausible that our understanding of what justice demands in transitional contexts needs to foreground not just the individual victim and perpetrator, but also the implications and ramifications of different responses for society as a whole. In other words, it seems plausible to think that the fact that a transition is fragile should have *some* bearing on what a justified response to wrongdoing looks like, though it is not exactly clear precisely what this bearing should be.[50] This societal dimension does not arise when addressing past wrongdoing in stable democracies because the success and longevity of the political order is not at issue.[51]

Furthermore, the absence of a stable framework of authority in transitional contexts means that when transitional communities respond to wrongdoing they do so in a context in which the kind of legitimacy that characterizes stable democratic regimes is absent, and indeed trying to be established. Uncertainty about authority implies that there is no authoritative conception of who has standing to address issues like past wrongdoing and there are no settled standards for the appropriate exercise of authority, i.e., what counts as a legitimate legal or moral reason to respond to wrongdoing in a particular way. This raises the question: what can count as a source of authority in transitional contexts and standards for the legitimate exercise of authority? In transitional contexts the justice of responding to past wrongdoing requires an articulation of who has the authority to so respond and on what grounds. The standards or accounts offered for why the state, and who within the state, has the standing to respond to wrongdoing developed in the context of stable democracies cannot be used for transitional contexts, given that the democratic framework of authority is precisely what does not obtain.

[50] Should, for example, the justifiability of a response be wholly dependent on its contribution to the success of democratization, or is the contribution to the success of democratization one of multiple considerations to take into account?

[51] Existential uncertainty about authority might also provide criteria for identifying when the circumstances of transitional justice obtain- ie when it is the case that the question of responding to a legacy of wrongdoing arises. It may, for example, that there has to be a certain threshold of probability of success for a transition before the demands of transitional justice by way of responding to a legacy of wrongdoing.