CHAPTER ONE

The Rule of Law in Transition

This chapter explores the various legal responses to illiberal rule and the guiding rule-of-law principles in these times. The attempt to adhere to the rule of law during periods of political upheaval creates a dilemma. There is a tension between the rule of law in transition as backward-looking and forward-looking, as settled versus dynamic. In this dilemma, the rule of law is ultimately contingent; rather than merely grounding legal order, it serves to mediate the normative shift in values that characterizes these extraordinary periods. In democracies, our intuition is that the rule of law means adherence to known rules, as opposed to arbitrary governmental action.[1] Yet revolution implies disorder and legal instability. The threshold dilemma of transitional justice is the problem of the rule of law in periods of radical political change. By their very definitions, these are often times of massive paradigm shifts in understandings of justice. Societies are struggling with how to transform their political, legal, and economic systems. If ordinarily the rule of law means regularity, stability, and adherence to settled law, to what extent are periods of transformation compatible with commitment to the rule of law? In such periods, what does the rule of law mean?

The dilemma of the meaning of the rule of law transcends the moment of political transformation and goes to the heart of the basis for a liberal state. Even in ordinary periods, stable democracies struggle with questions about the meaning of adherence to the rule of law. Versions of this transitional rule-of-law dilemma are manifest in problems of successor justice, constitutional beginnings, and constitutional change.[2] The rule-of-law dilemma tends to arise in politically controversial areas, where the value of legal change is in tension with the value of adherence to the principle of settled legal precedent. In ordinary periods, the problem of adherence to legal continuity is seen in the challenge posed by political and social change over the passage of time. Accordingly, the ideal of the rule of law as legal continuity is captured in the principle of stare decisis, a predicate of adjudication in the Anglo-American legal sys-

tem. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[3] In transformative periods, however, the value of legal continuity is severely tested. The question of the normative limits on legitimate political and legal change for regimes in the midst of transformation is frequently framed in terms of a series of antinomies. The law as written is compared to the law as right, positive law to natural law, procedural to substantive justice, and so forth.

My aim is to resituate the rule-of-law dilemma by exploring societal experiences that arise in the context of political transformation. My interest is not in idealized theorizing about the rule of law in general. Rather, the attempt is to understand the meaning of the rule of law for societies undergoing massive political change. This chapter approaches the rule-of-law dilemma in an inductive manner by resituating the question as it actually arises in its legal and political contexts. It explores a number of historical postwar cases, as well as precedents arising in the more contemporary transitions. Although the rule-of-law dilemma arises commonly in the criminal context, the issues raise broader questions about the ways in which societies in periods of intense political change reason about the relation of law, politics, and justice. As shall become evident, these adjudications reveal central ideas about the extraordinary conception of the rule of law and of values of justice and fairness in periods of political change.

The Rule-of-Law Dilemma: The Postwar Transition

In periods of substantial political change, a dilemma arises over adherence to the rule of law that relates to the problem of successor justice. To what extent does bringing the ancien régime to trial imply an inherent conflict between predecessor and successor visions of justice? In light of this conflict, is such criminal justice compatible with the rule of law? The dilemma raised by successor criminal justice leads to broader questions about the theory of the nature and role of law in the transformation to the liberal state.

The transitional dilemma is present in changes throughout political history. It is illustrated in the eighteenth-century shifts from monarchies to republics but has arisen more recently in the post–World War II trials. In the postwar period, the problem was the subject of a well-known Anglo–American jurisprudential debate between Lon Fuller and H.L.A. Hart, who took as their point of departure the problem of justice after the collapse of the Nazi regime.[4] Such postwar theorizing demonstrates that in times of significant political change, conventional understandings of the rule of law are thrown into relief.[5] Although the transitional context has generated scholarly theorizing about the meaning of the rule of law, that theorizing does not distinguish understandings of the rule of law in ordinary and transitional times. Moreover, the theoretical work that emerges from these debates frequently falls back on grand, idealized models of the rule of law. Such accounts fail to recognize the

exceptional issues involved in the domain of transitional jurisprudence. Recognition of a domain of transitional jurisprudence, however, raises again the issue of the relation of the rule of law in transitions to that in ordinary periods.

The Hart-Fuller debate on the nature of law focuses on a series of cases involving the prosecutions of Nazi collaborators in postwar Germany. The central issue for the postwar German courts was whether to accept defenses that relied on Nazi law.[6] A related issue was whether a successor regime could bring a collaborator to justice and, if so, whether that would mean invalidating the predecessor laws in effect at the time the acts were committed. In the "Problem of the Grudge Informer," the issue raised is set out in a hypothetical somewhat abstracted from the postwar situation: The so-called Purple Shirt regime has been overthrown and replaced by a democratic constitutional government, and the question is whether to punish those who had collaborated in the prior regime.[7] Hart, an advocate of legal positivism,[8] argued that adherence to the rule of law included recognition of the antecedent law as valid. Prior written law, even when immoral, should retain legal force and be followed by the successor courts until such time as it is replaced. In the positivist position advocated by Hart, the claim is that the principle of the rule of law governing transitional decision making should proceed—just as it would in ordinary times—with full continuity of the written law.

In Fuller's view, the rule of law meant breaking with the prior Nazi legal regime. As such, Nazi collaborators were to be prosecuted under the new legal regime: In the "dilemma confronted by Germany in seeking to rebuild her shattered legal institutions . . . Germany had to restore both respect for law and respect for justice . . . [P]ainful antinomies were encountered in attempting to restore both at once." Whereas the rule-of-law dichotomy was framed in terms of procedural versus substantive ideas of justice, Fuller tries to elide these competing conceptions by proposing a procedural view of substantive justice.[9] According to the German judiciary, there is a dichotomy within the rule of law between the procedural legal right and the moral right. In "severe cases," the moral right takes precedence. Accordingly, formalist concepts of the law, such as adherence to putative prior law, could be overridden by such notions of moral right. The natural law position espoused by the German judiciary suggests that transitional justice necessitates departing from prior putative law. For Fuller, however, it would not imply such a break, because past "law" would not qualify as such for failure to comply with various procedural conditions.[10]

The above debate failed to focus, however, on the distinctive problem of law in the transitional context. In the postwar period, this dilemma arose as to the extent of legal continuity with the Nazi regime: To what extent did the rule of law necessitate legal continuity? A transitional perspective on the postwar debate would clarify what is signified by the rule of law. That is, the content of the rule of law is justified in terms of distinctive conceptions of the nature of injustice of the prior repressive regime. The nature of this injustice affects consideration of the various alternatives, such as full continuity with the prior

legal regime, discontinuity, selective discontinuities, and moving outside the law altogether. For positivists, full continuity with the prior legal regime is justified by the need to restore belief in the procedural regularity that was deemed missing in the prior repressive regime; the meta-rule-of-law value is due process, understood as regularity in procedures and adherence to settled law. The natural law claim for legal discontinuity is also justified by the nature of the prior legal regime but according to the conceptualization of past tyranny. On the natural law view of the rule of law, Fuller's approach appears more nuanced, as it attempts to offer a procedural understanding of substantive justice values. Given the predecessor regime's immorality, the rule of law needs to be grounded in something beyond adherence to preexisting law.[11]

To what extent is adherence to the laws of a prior repressive regime consistent with the rule of law? Conversely, if successor justice implied prosecuting behavior that was lawful under the prior regime, to what extent might legal discontinuity instead be mandated by the rule of law? The transitional context fuses these multiple questions of the legality of the two regimes and their relation to each other.

In the postwar debate, both natural law and positivist positions took as their point of departure certain presumptions about the nature of the prior legal regime under illiberal rule.[12] Both positions draw justificatory force from the role of law in the prior regime; nevertheless, they differ on what constitutes a transformative principle of legality. The positivist argument attempts to divorce questions of the legitimacy of law under the predecessor and successor regimes. The response to past tyranny is thought not to lie in the domain of the law at all but instead in the domain of politics. If there is any independent content given to the rule of law, it is that it ought not serve transient political purposes. The positivist argument for judicial adherence to settled law, however, relies on certain assumptions about the nature of legality under the predecessor totalitarian regime.[13] The justification for adhering to prior law in the transitional moment is that under prior repressive rule, adjudication failed to adhere to settled law. On the positivist view, transformative adjudication that seeks to "undo" the effect of notions of legality supporting tyrannical rule would imply adherence to prior settled law.

The natural law position highlights the transformative role of law in the shift to a more liberal regime. On this view, putative law under tyrannical rule lacked morality and hence did not constitute a valid legal regime. To some extent, in this normative legal theory, collapsing law and morality, the transitional problem of the relation between legal regimes disappears. Insofar as adjudication followed such putative law, it, too, was immoral in supporting illiberal rule. Thus, the cases of the informers are characterized as "perversions in the administration of justice."[14] From the natural law perspective, the role of law in transition is to respond to evil perpetuated under the past administration of justice. Because of the role of judicial review in sustaining the repression (this topic was discussed in the Hart-Fuller debate),[15] adjudication as in ordinary times would not convey the rule of law. This theory of transfor-

mative law promotes the normative view that the role of law is to transform the prevailing meaning of legality.[16]

In the postwar debate, the questions arose in the extraordinary political context following totalitarian rule. Yet, the conclusions abstract from the context and generalize as if describing essential, universal attributes of the rule of law, failing to recognize how the problem is particular to the transitional context. Resituating the problem should illuminate our understanding of the rule of law. I now turn from the postwar debate to more contemporary instances of political change illustrating law's transformative potential. Those instances exemplify the tension between idealized conceptions of the rule of law and the contingencies of the extraordinary political context. Struggling with the dilemma of how to adhere to some commitment to the rule of law in such periods leads to alternative constructions that mediate conceptions of transitional rule of law.

Shifting Visions of Legality: Post-Communist Transitions

The "velvet" revolutions' rough underside has been revealed in courts of law, where debates about the content of the political transformation continue to simmer. A number of controversies over successor criminal justice exemplify the transitional rule-of-law dilemma. Here, I focus on two: In the first case, a Hungarian law allowed prosecutions for offenses related to the brutal Soviet suppression of the country's uprising in 1956;[17] in the other, unified Germany prosecuted border guards for shooting civilians who were attempting to make unlawful border crossings along the Berlin Wall. The cases involve weighty symbols of freedom and repression: 1956 is considered the founding year of Hungary's revolution, whereas the Berlin Wall and its collapse are the region's central symbols of Soviet domination and demise. The cases illustrate the dilemmas implied in the attempt to effect substantial political change through and within the law. Although the two cases seemingly suggest diverging resolutions of the rule-of-law dilemma, they also reveal common understandings.

After the political changes of 1991, Hungary's Parliament passed a law permitting the prosecution of crimes committed by the predecessor regime in putting down the popular 1956 uprising. Despite the passage of time since these crimes were committed, the law would have lifted statutes of limitations for treason and other serious crimes,[18] effectively reviving these offenses. Similar legislation reviving the time bars elapsing during the Communist regime was also enacted elsewhere in the region, as in the Czech Republic.[19] The problem of statute-of-limitations laws commonly arises after long occupations when societies attempt to prosecute crimes committed under predecessor regimes. Thus, in the postwar transitions in Western Europe, the rule-of-law problem posed by the passing of statutes of limitations did not arise in the immediate postwar period but only later in the 1960s.[20] The controversy over the statute-of-limitations law raised a broader question: To what extent is a successor regime bound by a prior regime's law?

Hungary's Constitutional Court described the dilemma in terms of familiar antinomies: the rule of law understood as predictability versus the rule of law understood as substantive justice. So framed, the choices seemed irreconcilable; yet, ultimately the statute-of-limitations law and the proposed 1956-era prosecutions were held unconstitutional. The principle of the rule of law required prospectivity in lawmaking, even if it meant the worst criminal offenses of the prior regime would go unpunished. The opinion begins with a statement of the court's characterization of the dilemma it confronted: "The Constitutional Court is the repository of the paradox of the 'revolution of the rule of law.'" [21] Why a paradox? "Rule of law," the court said, means "predictability and foreseeability."[22] "From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation, especially ex post facto . . . directly follows. . . . Only by following the formalized legal procedure can there be valid law."[23]

The dominant vision of the rule of law for the Constitutional Court was "security."[24] "Certainty of the law demands . . . the protection of rights previously conferred." The proposed law, which would have opened the way to ancien régime prosecutions, was classically ex post and, as such, threatened individual rights to repose. In its discussion of the meaning of security, the court analogized the right of repose at issue to personal property rights. Although protection of personal property rights could generally be overridden by competing state interests, such interests, the court maintained, ought not override an individual's criminal process rights to repose. By protecting the rule-of-law value of "security" from invasion by the state, the Constitutional Court sent an important message that property rights would be protected in the transition.

In ordinary times, the idea of the rule of law as security in the protection of individual rights is frequently considered to be a threshold, minimal understanding of the rule of law basic to liberal democracy. Yet, in the economic and legal transitions of East and Central Europe, this understanding represented a profound transformation. If the totalitarian legal system abolished or ignored the line between the individual and the state, the line drawn by Hungary's Constitutional Court posited a new constraint on the state: an individual right of security. Insistence on the protection of individual rights, said to be previously acquired, was constructed in the transition. This ruling sent an important message that the new regime would be more liberal than its predecessor.

Compare a second case. In its second round of successor cases in this century, Germany's judiciary once again confronted the transitional rule-of-law dilemma when East German border guards were put on trial for Berlin Wall shootings that occurred before Unification. The question before the court was whether to recognize defenses that relied on the predecessor regime's law. The Berlin trial court framed the dilemma in terms of the tension between "formal law" and "justice" and rejected former East German law because "not everything is right that is formally right." Comparing the Communist laws to those of the Nazi period, the court relied on postwar precedents holding that evil legislation lacked the status of law: "Especially the time of the National Socialist regime in Germany taught that . . . in extreme cases

the opportunity must be given for one to value the principle of material justice more highly than the principle of legal certainty." Procedurally, legal rights were distinct from moral rights. Characterized as "extreme cases," the border guards cases were analogized to those of the postwar collaborators and accordingly guided by the same adjudicative principle.

The transitional courts of East and Central Europe, despite facing different legal issues, confront a problem common to successor regimes: What are the rule-of-law implications of prosecuting for actions that were "legal" under the prior regime? As the earlier postwar debate suggests, this question raises (at least) two questions, one about the legitimacy of law in both predecessor and successor periods and another about the relation between the two. The juxtaposition is always between the rule of law as settled norms versus the rule of law as transformative. In the contemporary cases, as in the postwar debate, what emerges are new transitional understandings of the rule of law. Considered together, the two decisions present an interesting puzzle. For the Berlin court, the controlling rule-of-law value was what was "morally" right, whereas for the Hungarian court, the controlling rule-of-law value was protection of preexisting "legal" rights. In one case, the rule of law requires security understood as prospectivity, with the consequence of forbearance in the criminal law. In the other view, justice is understood as equal enforcement of the law. Can the two approaches be reconciled?

Probing the language of the successor cases exposes a conception of the rule of law peculiar to the transitional moment. Judicial rhetoric conceptualizes the problem in terms of multiple competing rule-of-law values in seemingly intractable conflict: one value deemed relative, and the other essential. The transitional judiciaries in these cases characterized the dilemma they confronted as involving a balancing of two senses of the rule of law: the rule of law as it is ordinarily understood versus a transformative understanding. Which of these values will dominate the transitional balance will depend on distinctive historical and political legacies. Accordingly, after totalitarianism, the dominant vision of the rule of law in Hungary is to draw a bright line of positive security on which individuals can rely and which is beyond the reach of state power. In unified Germany, the transitional rule of law is defined within a preexisting jurisprudence, which continues to respond to legality under Fascism. When the German judiciary ruled that the border guards cases constituted "extreme cases" it analogized Communist rule to that of National Socialism. In this way, the legal response to World War II injustice continued to guide contemporary adjudication in the transitions out of Communist rule. As in the postwar period, the post-Communist Berlin court invoked overriding principles of natural law. After Nazi rule, under which a repressive security apparatus functioned outside the law and the legal machinery was itself used to persecute, the dominant sense of the rule of law was of equal protection in the administration of justice. These are transformative understandings.

Despite idealist theorizing to the contrary, the transitional precedents suggest that no one rule-of-law value is essential in the movement toward construction of a more liberal political system. Transcendent notions of rule-of-

law values in transitional societies are highly contingent, depending, in part, on the states' distinctive political and legal legacies and, in particular, on the role of law in the predecessor regime. There has been a lively scholarly debate on this question and recent comparative work concerning the role of adjudication under oppressive rule in Germany under Nazi control, Latin America under military rule, and South Africa under apartheid rule. Despite substantial theorizing about the potential role of various adjudicative principles under tyrannical rule, to the extent that there has been empirical study of the judiciary's role in repressive periods, neither positivist nor natural law adjudicative principles correlate with greater rule of law in such periods. In varying contexts, scholars come to disparate conclusions, suggesting that variations in interpretive strategies, whether of positivist or natural law, do not in and of themselves explain the judiciary's role under repressive rule. Thus, some claim Nazi judges' free-ranging principle of interpretation led to support of repressive rule, while others emphasize the positivist jurisprudence understood as the separation of law and morality.[25] The meaning of the rule of law is highly contingent in relation to the social meaning of injustice in the region and its response.

This transitional perspective on the rule of law offered here sheds light as well on the puzzling gulf between American and Continental philosophers over the putative associations of various legal philosophies with repression or, conversely, with liberal rule. That positivism is associated with repression and with liberalism—on opposite sides of the ocean—clarifies its contingency as a transitional response to its use by evil judges. Thus, in the United States, positivism is frequently associated with the jurisprudence that upheld the slavery regime, whereas in Germany, it is not positivism but the natural law interpretation that is associated with the Reich judiciary.[26] Whereas the conventional understanding of the conception of tyranny is the lack of the rule of law as arbitrariness, the transitional rule of law in the modern cases illuminates a distinctive normative response to contemporary tyranny. From its inception in the ancient understanding termed "isonomy," the ideal of the rule of law emerges in response to tyranny. In ancient times, isonomy is forged in response to tyranny understood as arbitrary and partial enforcement of the law. Because prior tyranny is associated with lawmaking that is both arbitrary and unequal, the ancient understanding of the rule of law comprehended both values of security in the law and equal enforceability of the law. As in ancient times, the contemporary ideal of the rule of law is forged in the context of the move from repressive to more liberalizing rule.[27] Where persecution is systematically perpetuated under legal imprimatur, where tyranny is systematic persecution,[28] the transitional legal response is the attempt to undo these abuses under the law.

Transitional Constructions of Legality

The discussion above leads to a more differentiated understanding of the rule of law, and it illuminates an understanding of legality that is distinctly transi-

tional. These understandings of the rule of law bridge the discontinuity from illiberal to liberal rule; as such, one might consider these values and processes to mediate the transition. The discussion focuses on three such mediating concepts that follow. These are the social construction of the rule of law, the role of international law in transcending domestic legal understandings, and, finally, the core rule-of-law value: to transcend the passing politics of the times.

The Role of Social Construction

One mediating concept of the transitional rule of law is its social construction. What matters in establishing the rule of law is legal culture, not abstract or universal ideas of justice.[29] The socially constructed understanding of the transitional rule of law is evident in the post-Communist adjudications. In the border guards cases discussed above, the prevailing social understanding of law was used to justify the rejection of prior legal defenses. The validity of prior law depended on the social practices of the time, such as the norm's publication and transparency.[30] "In the then-GDR, too, justice and humanity were illustrated and represented as ideals. In this respect, generally sufficient conceptions of the basis of a natural lawfulness were set out."[31] The border policy, which was generally secret and covered up whenever foreigners were in the country, lacked the transparency ordinarily associated with law. The Berlin court found not only that the border policy did not comport with the prevailing social understanding of law but also that the prior understanding of law was consonant with that of the West. The guards stood at a geographical and juridical border. This treatment signaled an illegitimacy of regulation of the border in its legal culture. A similar concern animated Hungary's Constitutional Court when it emphasized the rule-of-law value of security as continuity in the law. In the transitional context of political upheaval, the judiciary constructed the understanding of legal continuity. The perception of rule of law is created by that court's own adherence to procedure.

What makes law positive? Prevailing theorizing about the rule of law posits that among the conditions for law is that it be known.[32] Is knowledge of law equated with publication? In transitional periods, there is commonly a large gap between the law as written and as perceived. What makes law positive is the popular perception in the public sphere. This understanding broadens, indeed democratizes, sources of legality with societal involvement in the constitution of legal culture. Indeed, in the contemporary media age, at any one time there may well be multiple sources of law, as well as numerous forms of publication that overshadow the written law.[33] Social understanding in the public sphere is a rule of recognition by which the legal systems of illiberal regimes are evaluated, an understanding of law that stands independent of the sovereign's decrees and, as such, is less affected by political upheaval. Guided by this mediating principle of transitional legality, the legitimacy of the predecessor regime's law would depend on popular understandings of legality in the ambient culture.

Understanding the rule of law as socially constructed offers a principle for evaluating legality in periods of movement between dictatorships and democracies. Recognition of a legitimacy gap between the law as written and as socially perceived offers a useful way to explain law's construction under illiberal rule. Indeed, as public belief in prevailing political systems wanes, one might expect this gap to widen, leading to the transition.

The Role of International Law

Another mediating concept of the transitional rule of law is international law. International law posits institutions and processes that transcend domestic law and politics. In periods of political flux, international law offers an alternative construction of law that, despite substantial political change, is continuous and enduring. Local courts rely on these international understandings. The potential of this understanding of international law gained force in the postwar period. A jurisprudential debate arose, particularly in the United States, over whether postwar trials convened at Nuremberg and Tokyo were in keeping with the rule of law. International law served as a mediating concept to mitigate the dilemma of the rule of law raised by successor justice in transitional times and to justify the legality of the Nuremberg trials against concerns over retroactivity.[34] In the contemporary moment, international law is frequently invoked as a way to bridge shifting understandings of legality. In the post-Communist cases discussed above, the controversy over the attempt to revive old political prosecutions was ultimately resolved by turning to concepts of international law. For example, in its review of a law proposing to reopen political cases related to the 1956 uprising, the Constitutional Court of Hungary reasoned that reopening such cases was discontinuous with prior law. Such discontinuity, the Constitutional Court said, threatened the understanding of legality in the successor period; there was no principled way to break selectively with prior law. "The legitimacy of the different (political) systems during the past half century is irrelevant . . . ; from the viewpoint of the constitutionality of laws it does not comprise a meaningful category."[35] In a second round of judicial review, the court upheld a new statute authorizing 1956 prosecutions based on offenses constituting "war crimes" and "crimes against humanity" under international law.[36] The rule of law required continuity. Such continuity was considered to exist in international legal norms, such as the postwar Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[37] which norms overrode domestic law. A similar decision was taken in Poland invalidating the extension of statutes of limitations, other than for those offenses considered violations to international human rights.[38] The notion that international law took precedence over domestic law was by no means clear, as Hungary's Constitution was silent on the relative priorities of domestic and international law. The Constitutional Court nevertheless indicated that it would interpret the constitution guided by international norms, declaring that "generally recognized rules of international law took precedence." Some constitutions explicitly provide for such priority

ranking.[39] Throughout the region, international law would become the basis for judicial interpretation of punishment policies, because these norms were thought to transcend the past regimes' politicized law. In Germany's border guards cases, the judgment explicitly rests on international law.[40]

In periods of political flux, international law offers a useful mediating concept. The framing of the rule-of-law dilemma easily shifts from the antinomies of positivism and natural law. Grounded in positive law, but incorporating values of justice associated with natural law, international law mediates the rule-of-law dilemma. Positive international law norms are defined in conventions, treaties, and customs.[41] Moreover, in its circumscription of the most heinous abuses, international law offers a source of normative transcendence. An illustration is the concept of crimes against humanity, discussed further in the chapter on criminal justice, suggesting conceptually opposite and yet related values, in the universalized normative response to persecution epitomizing evil in varying cultural contexts.[42] Whereas international law preserves that ordinary understanding of the rule of law as settled law, it also enables transformation. In so doing, it mediates the transition. International law principles serve to reconcile the threshold dilemma of law in periods of political transformation.

The Rule of Law as Limit on Politics

The defining feature of the rule of law in periods of political change is that it preserves some degree of continuity in the legal form, while it enables normative change. The previous politicized nature of law and adjudication partially justifies nonadherence during the transition. This understanding of the rule of law as antipolitics is a common theme throughout the contemporary transitional controversies discussed above. The border guards trials were characterized as "extreme cases," justifying departure from ordinary rule-of-law considerations.[43] The German court elevated what was morally right over the political. Other cases in the region suggest similar judicial interpretations of the rule of law. Hungary's invalidation of the 1956 prosecutions law presented a limit on politicized anti-Communist policies. In elevating a law that would have extended the time for prosecution of crimes committed under prior rule, the Czech Constitutional Court upheld it on the basis that it would serve the goal of undoing past politicized punishment policy and administration of justice. The law would suspend the time limitations for forty-one years (the time between February 25, 1948, and December 29, 1989) for acts previously not prosecuted or punished for "political reasons."[44] If under repressive rule the administration of justice was conducted purely as an exercise of political will,[45] this understanding is most clearly disavowed when the successor regime adopts the overriding rule-of-law value that most clearly expresses a principled normative vision independent of transitory politics.

The construction of the transitional rule of law as independent of politics shares certain affinities with the understanding of the rule of law applicable in ordinary times. Yet, controversies over transitional justice in highly politicized contexts present hard cases for adherence to the rule of law. Despite radical po-

litical change, the aim is rule of law not primarily motivated by politics. Transitional jurisprudence reveals a shining vision of the rule of law as antipolitics.

The Transitional Judiciary

In periods of political transformation, the problem of legality is distinct from the problem of the theory of law as it arises in established democracies in ordinary times. There is a working out of core questions about the legitimacy of the new regime, including the nature and role of the transitional judiciary. The choice of the principles of adjudication implies a related question about where, as an institutional matter, the work of transformation should lie: judiciary or legislature? This is the question to which I now turn.

The transitional justice dilemma arises during periods of substantial political change. When a legal system is in flux, the challenge to ordinary understandings of the rule of law is surely at its greatest. The challenge was less severe of the postwar transitions than of the contemporary movements from Communist rule, periods of simultaneous economic, political, and legal transformation. In these periods, newly founded constitutional courts have borne the institutional burden of establishing new understandings of the rule of law. The burden of transformation to a rule-of-law system has to some extent devolved on the judiciary, chiefly the new constitutional courts. A similar transformative response can be seen in other recent transitions, such as in South Africa. South Africa's transitional constitution creates its new Constitutional Court.[46] One might question whether continuity with the prior regime is a determination properly for the transitional judge or a political question properly subject for broader public debate. When this question arose in the contemporary post-Communist transitions, the judiciary assumed the decision-making responsibility. The issue began as a political question in unified Germany, but in its consideration of the question of the validity of German Democratic Republic (GDR) law in the border guards cases, the Berlin court elided the political agreement of the two Germanys. The Unification Treaty contemplated continuity in former GDR criminal law, providing that East Germany's criminal code should be applied to criminal acts committed before reunification. However, the court rejected the border guards' defenses grounded in GDR law.[47] In so doing, the court demonstrated its independence from the legislature and its political agenda. However, that transformative response to the political was less necessary in unified Germany than elsewhere in the region because of the nature of the transitions. Similarly, when Hungary's Constitutional Court overturned the 1956 prosecutions law, it sent a clear message of judicial independence to the country's political branches.[48] These decisions reveal a core understanding of rule of law forged by a transitional judiciary striving for some independence from politics.

Political theorists often distinguish liberal from illiberal regimes by their constitutions; the role of transitional constitutionalism is discussed more fully in chapter 6. Yet, the inquiry undertaken here suggests that what distinguishes

liberal political systems depends less on the specifics of any one institutional arrangement and more on the degree to which there is a sense of meaningful enforcement and understanding of the rule of law. Although the Communist-era constitutions enumerated rights, these were largely rights on paper that were rarely enforced. So it was that, after Communism, the mere passage of new rights charters would not produce a sense of transformation in the rule of law. Responding to this distinctive legacy of injustice are the dozen constitutional courts to enforce the new constitutions.[49] This role for the judiciary is the "critical" legal response that affirmatively signals a transformative turn toward the constitutional systems of liberal democracies.

The constitutional courts assist in the transformation to rule-of-law systems in a number of ways. First, the courts emerge out of systems of centralized state power; as new forums specially created in the period of political change and transformation, their very establishment defines a break from past political arrangements. Second, access to constitutional courts through litigation enables a form of participation in the fledgling democracy. Over time, access to the courts could enable popular input into constitutional interpretation, developing a societal understanding of limited government and individual rights protection. Popular access to courts for individual rights enforcement is a potent symbol of a new governmental openness.[50] Third, to the extent the constitutional courts have explicit mandates to engage in judicial review they are the guardians of the new constitutional order. In much of the region, broad jurisdictional rules allow abstract judicial review and access to review by political actors, such as the president of the country, or by minority factions of the legislature.[51] The courts in the region are active in interpreting new constitutional norms under preexisting constitutions, under general mandates to uphold the rule of law. An example is the Hungarian Constitutional Court's review of the law concerning the state's prosecutions policy previously discussed.[52] The constitutional courts have the potential to delineate state power and to redefine individual rights, thus creating a rights culture. Through transformative adjudication, the transitional judiciary deploys activist principles of judicial review toward normative change and a more liberal rule-of-law system.

Transformative adjudicatory practices raise a crucial question: Insofar as the transitional judiciary bears the burden of the transformation of the rule of law, to what extent are such practices compatible with the role of the judiciary in established democracies? In democracies in ordinary times, activist judicial decision making is generally considered illegitimate, largely for two reasons. First, retroactivity in judicial decision making challenges the rule of law as settled law.[53] Second, judicial decision making is thought to interfere with democracy; unlike legislative decision making, judicial decision making lacks the legitimacy associated with democratic processes.[54] The question is whether these objections relevant to ordinary times apply to adjudication in transitional times.

Our intuitions about the appropriate site of lawmaking depend on implicit assumptions about democracy and democratic accountability that ought not be automatically applied to illiberal regimes nor to regimes moving away from such

rule. In established democracies in ordinary times, our intuitions are that transformative lawmaking should occur by legislation rather than by adjudication. The judiciary is constrained from creating law, for such lawmaking is considered a departure from the general predicate of democracy, majoritarian lawmaking.[55] In transitional times, the problem of illegality is far more prevalent; indeed, it is often pervasive. Periods of political transformation are frequently accompanied by radical legal change. The most recent wave of political change correlating with economic transformation (in the post-Communist changes) implied major reforms of preexisting law. The conventional concern of the absence of democratic accountability posed by judicial lawmaking seems less apt in periods of political flux. In such periods, the transitional legislature frequently is not freely elected and, further, lacks the experience and legitimacy of the legislature operating in ordinary times.[56]

Another reason the judiciary is not ordinarily seen as the proper lawmaking body is its ostensible lack of institutional competence and capacity. This concern was raised, for example, in the postwar debate over the establishment of the rule of law. In the positivist position, the burden of legal transformation was thought properly to fall on the legislature, while the natural law position assumed a transformative role for adjudication. Yet, the postwar debate did not sufficiently take account of the transitional context. As periods of political change are also periods of legal flux, controversies in such times are often characterized by a lack of relevant law.[57] Moreover, controversies in such extraordinary periods often necessitate speedy considerations. Whereas in ordinary times, making law in a case-by-case fashion may well appear too slow and too variable, in transitional times, judicial decision making is often relatively faster than the legislative process, which may be slowed down by a compromised past or political inexperience. Moreover, in the context of political flux, the judiciary may well be comparatively more competent for nuanced, case-by-case resolution of transitional controversies.[58] Indeed, judicial decision making allows for substantial change and is characterized here as the ambivalent directionality of the law in such periods. The question of what institution is most competent and legitimate is contingent and will depend on the particulars of predecessor legacies of injustice in that country.

Finally, transformative adjudication is self-regarding. By changing adjudicatory principles and practices, institutions compromised by their decision making under prior rule can transform themselves. In high-profile cases, a compromised judiciary can transform itself by changing its principle of adjudication. This self-regarding institutional mechanism is particularly pertinent when the judiciary supported prior repressive rule.[59] Yet, even where the judiciary is not the successor to a compromised institution, there are other beneficial implications of transformative adjudication.

Theories of adjudication associated with understandings of the rule of law in ordinary times are inapposite to transitional periods. Our ordinary intuitions about the nature and the role of adjudication relate to presumptions about the relative competence and capacities of judiciaries and legislatures in ordinary times that simply do not hold in unstable periods. The cases dis-

cussed above demonstrate an extraordinary role for courts exercising principles of transformative adjudication. In periods of political change, the very concerns for democracy and legitimacy that ordinarily constrain activist adjudication may well support such adjudication as an alternative to an even greater politicization of the law.

Transformative Adjudicative Practices: Some Conclusions

This chapter began by positing that there is a special dilemma in the adherence to the rule of law in periods of political change. The ordinary understanding of the rule of law as adherence to settled law is in tension with transformative understandings of the rule of law. I now consider what normative rule-of-law principles are associated with adjudication in periods of political change.

In these extraordinary periods, as discussed above, rule-of-law norms do not constitute universals. The tensions posed by adherence to the rule of law in these periods are reconciled through a number of mediating concepts. Legality in such periods is socially constructed; in some part, it is judge-made. Exploration of precedents in such periods suggests that the understandings of the rule of law are constructed within a transitional context. By cabining politicized uses of the law, this rule-of-law principle guides interim legal decisionmaking on the road to democracy.

Recognizing a principle of transformative adjudication during periods of political transition has significant implications for prevailing legal theory about the rule of law. First, recognition of such a principle throws into relief the extent to which prevailing legal theory has failed to take account of the significance of the varying normative understandings of the rule of law manifested in transitional times. Further, the transitional rule of law implies an implicit critique of the dominant theories regarding the nature and role of law. In liberal political theory, a long-standing precept of the rule of law is that lawmaking through adjudication is conceived as somehow neutral and autonomous from politics.[60] These liberal understandings are challenged by accounting for circumstances associated with the role for transformative law, in which the rule of law is defined in constructive relation to past politics.

The principle of transformative adjudication perhaps poses a more serious challenge to critical theorizing of law. Critical legal theorizing has been criticized for going too far in collapsing law and politics. As such, this theoretical approach has often lacked explanatory power for why, or in what circumstances, law has any distinctive claim on society. Although critical legal theorizing has laid claims to a diminished rule of law as a general matter,[61] the above discussion suggests that this is most true in extraordinary political circumstances of transition. Transitional rule of law clarifies a role for hyperpoliticized adjudication. From the perspective of critical legal theory, the challenge posed by the transformative adjudicatory practices discussed here is the challenge posed by the boundedness of law's political action.[62] The jurispru-

dence of these periods shapes the transition. Normative understandings of the role of law vary dramatically with the transition's political circumstances. Within transitional democracies, there is a place and a role for bounded political judgment. Legal processes enable measured rationalized change.

Beyond adjudication, normative change constructive of a new legality is also effected through other forms of law. Thus, the role of criminal sanctions ordinarily limited to punishing individual wrongdoing is greater during transitions, as such legal responses challenge past state criminality and therefore go to the core illegitimacy of past rule. These legal responses serve to condemn and delimit abuses of past state power. In the next chapter, I turn to the uses of criminal justice in transformative periods.