The Hart-Fuller Debate and Law in Transitional Societies*

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My assignment in this session is a little problematic. When Peter asked me to participate in this colloquium as commentator on Ruti Teitel’s paper, it seemed to me a very nice idea. The papers, he explained, were to ‘pick up on strands in the [Hart-Fuller] debate and re-think them,’ use them ‘as a point of departure and inspiration’ for reflection on a range of important developments over the past 50 years that he had identified. One of them, the subject of this session, was ‘law in transitional societies.’

The subject made a lot of sense. One of the central elements in the debate, and the one that gave it such moral significance and energy, was Hart’s and Fuller’s reflections on ‘the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings.’ By the end of the 1980s there were many more such messengers from all over the world. The term ‘transitional societies’ became a widely used term of art then, with reference to the scores of societies which had just lost a dictatorship and were seeking something else; I suspect it was coined then. Questions about the relationships between formally valid state laws and morality are not unfamiliar to subjects of dictatorial regimes, even if their primary interest is not often conceptual. Moreover, the collapse of so many such regimes, all of a sudden and roughly at the same time, generated a range of specific problems that figured centrally in the earlier debate – particularly those of retrospective dealings with evil past behaviours, that had often been supported by evil laws (though often they did not even need such support).

Ruti Teitel has written a very well-informed book and numerous articles on the issues of ‘transitional justice’ raised by the experience of those societies. Some of my own work had also concerned those societies and issues. I had discussed Ruti’s ideas at some length a couple of times. I was looking forward to hearing her focused reflections on the relationship of this debate to those societies, those issues, and those ideas. However, her paper has nothing to say about those societies or issues, engages little with the debate, and she isn’t here.

But her paper is. In light of that fact and the importance of the subject, Peter and I decided I should discuss the paper, but try to do something more as well. This renders my role somewhat ambiguous, perhaps suspect. I am not Ruti, and cannot plausibly speak in her

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* I am grateful for the comments of Arthur Glass and Gianluigi Palombella.

1 ‘Positivism and the Separation of Law and Morals,’ 615.


name. I can comment, but she can’t reply, at least not today. I can speak for me, but until a few days ago I was just the support-act, not the understudy. It has taken me too many words to show that such a combination of ventriloquism, polemic and impromptu pontification carries a price in terms of quality and length. For that I apologise. If I had merely to comment I would have been mercifully briefer. With time I would of course have been cleverer (and probably briefer as well).

I will try to summarise what I take to be Ruti’s argument. I found that argument hard to discern, though I believe there is one. In case I have misconstrued it, I will quote heavily, to make plain the sources of my interpretation. I will then discuss the relationship, which does not seem to me close, between her paper and the Hart-Fuller debate. I will then draw on some earlier ideas of hers and mine to suggest some other links between the two putative subjects of this session.

1 Humanity Law

Teitel’s paper begins by suggesting a connection between the debate and what she proposes to discuss: transition. Hart and Fuller were debating at a period of transition following World War II, we are in a new ‘moment of world transition,’ in which ‘[g]lobalization and the end of the Cold War have set the scene for a renewed debate on the meaning of law, rooted in and reminiscent of the debate that occurred at the end of that century’s great conflict, World War II.’ The subject of this debate and the vehicle of legal transition is what she calls ‘humanity law’.4

‘Humanity law’ is Teitel’s term for the international law represented by the ‘growing convergence of human rights and humanitarian law.’ This law ‘is addressed not merely to states and state interests and perhaps not even primarily so. Persons and peoples are now at the core. A non-sovereignty based normativity is manifesting itself, one which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality.’ This new combination ‘might be viewed as the dynamic “unwritten constitution” of today’s international legal order.’ What has to be grasped, and is not yet generally grasped, is the significance and legal status of this new hybrid.

Teitel situates her own view in contrast to two competing ‘mainstream’ views of these current developments. On the one hand, cosmopolitans, ‘global legalists’, ‘idealists’, see in them the development of a ‘higher positive law beyond the state’ with individuals rather than states at its core. They view this developing law as expression of ‘a faith in the possibility of international law to reflect and realize foundational social morality.’ Indeed they see it as ‘a step in the direction of perpetual peace.’ Cosmopolitans view ‘the mere existence of juridical developments – the expansion, thickening and deepening of law ... [as] a sign of universal citizenship in the offing’, but this is gilding the lily somewhat, since these developments are occurring at the same time as the world is riven, perhaps increasingly riven, by political dissensus. Cosmopolitans, with their idealistic view of universal individual citizenship fail to accommodate the complexity of the sources of, and tensions within, humanity law. Moreover, they tend to view as the revelation and legalisation of timeless moral truths what are often the contingent results of particular politics, and they overrate the capacity of law to tame those politics.

In the other corner are ‘law skeptics’, ‘realists’, who ‘see the present post Cold war movement merely in terms of a reassessment and realignment of state interests and interstate power relationships.’ This ‘positivist view of international law’ fails, in turn, to account for ‘changing political realities: namely the “hollowing out” of the state with ramifications for the interstate system, particularly for the development of the public and private spheres.’ It also, I think Teitel believes, underrates the truly lawlike nature of the emerging discourse of humanity.

The mainstream debate, then, is over whether the world is moving in the direction of a new, individual-and-peoples-focused, cosmopolitan international legal order, - which would indeed be a transition - or whether nothing has changed, which wouldn’t. There are problems with both views, but Teitel insists that something important is going on, indeed a ‘paradigm shift’ in which ‘greater international interconnection – yet without greater consensus - … have been shifting the project of politics in significant measure to alternative adjudicative institutions and processes to provide important independent dimensions of global rule of law. It is in this particular context that such alternatives offer a legitimating normality that permeates and diffuses itself through interpretation of our complex realities.’

This novel conjuncture is not to be illuminated by a dichotomous choice between law and non-law, particularly where that choice is supposed to turn on whether international law shares all the properties of a state-centric domestic legal order. It doesn’t but that doesn’t necessarily mean it is not in some significant sense legal.

So one question has to do with the legal status of this new and developing congeries of norms, practices and institutions, particularly adjudicative. Another question, which it is not clear that Teitel distinguishes from the first, is ‘the central and overarching question: what is the principle of rule of law today? And what is its relation to the present politics associated with the globalizing project? … this question, how entangled ought the law be in politics?’ This looks like three questions to me, and, more important they have to do with ‘the rule of law’, not merely with law, but I guess they have in common that they are all questions about the contribution of the new (legal?) order to the rule of law, and the extent to which it can/should be distinguished from the politics of globalization and from politics tout court.

The key lies with the tribunals that interpret and develop ‘humanity law.’ They generate ‘norms that are now reinforced by transnational parameters … governed by interpretive principles.’ Are we witnessing an ‘expansion’ or ‘fragmentation’ of international law? And does it strain plausibility to call the plural messiness of all this ‘transitional’ and increasingly plural bunch of tribunals and decisions, law? And what of the rule of law?

Teitel believes there is law, and apparently rule of law, here not because there is some international counterpart or analogy to a domestic legislative/executive/judicial apparatus, but rather on the ground of convergent interpretive judicial practice: ‘the perspective here is praxis driven, as it views interpretation as central to the construction and evolution of legal order, whether domestic or international;’ ‘a system characterized by diffused and decentralized interpretation, nevertheless, can be considered to have the requisite coherence and integrity of a legal system, because there is a common idiom, one recognizable by lawyers as legal and therefore distinguishable from other modes of normative discourse … Given multiple actors engaging in normative conversation while there may well be no clear line between the is and the ought, the interpretive project is nevertheless bounded by the parameters of the adjudicative enterprise, ie, the need to
resolve conflicts, the associated aims of the preservation of the state, together with that of other actors as well as the absence of normative hegemony in the global order.’

I believe this fairly represents some central elements of Teitel’s account of the present ‘transition’ and its significance for international law. There are other things in the paper, but I am not sure where they lead. That may be because I know little international law, but I suspect there are other reasons as well.

II The Hart-Fuller Debate

What, in any event, has this to do with the Hart-Fuller debate? Well, according to Teitel, that debate too occurred in a time of transition, of ‘substantial political flux’, though she concedes that the protagonists didn’t thematise it or even discuss that fact; ‘[i]ndeed, this contextual dimension seems to have been glossed over in the debates, although it plays a bigger role in Fuller’s response. As the debate is characterized as one of law/morals rather than what the transitional phenomena suggest, which is a dramatization of law/politics debates’.

In other terms, they didn’t get it. Nevertheless ‘it may well be that what is particular to such moments really goes to the scope of change and hence the conspicuousness of these dilemmas at such moments.’ So since we are in transitional flux too we should recognise the peculiarity of that predicament, and perhaps see that it puts larger questions into high relief. Transition and flux are doing a lot of work here, and I will return to that.

In this new transition we are again forced to ponder ‘the foundation question of what makes law, law?’ But what sort of question is that? Here again, it appears, we draw upon, but transcend, what Hart and Fuller ostensibly had in mind: ‘Properly understood, the controversy now underway transcends the essentializing antinomies which as in the Hart-Fuller debate have tended to dominate – of law versus morals, -? Realism versus idealist/ cosmopolitan, positivism versus natural law.’ So whatever Hart and Fuller thought they were arguing about, it was really something else.

Partly, apparently, following Gertrude Stein, the real question at issue was what the real question was: ‘“The real issue (as Fuller observed): How should we state the problem? What is the nature of the dilemma in which we are caught?” To what extent are there political dimensions of this debate and the site of normative shift?” I don’t fully understand this last part, but putting it all together I think it means the question is not a timeless one about the nature of law or the relationship between law and morals or law and politics, but a particular one about the relationship between law and politics, specifically within or at least highlighted at this time of normative shift, and to which answers will vary as our norms, politics, arrangements, do.

How do we answer whatever the question turns out to be? Well, apparently many would think that a positivist like Hart would side with the skeptics and perhaps (though this is implied rather than stated) Fuller would be on the side of the cosmopolitans. Why? Well, there is an ‘oft given characterization of Hart’s position’ according to which we should expect him to be with the skeptics/positivists/realists in ‘the debate about the status of international law in its contribution to rule of law’. For according to that characterization Hart’s position ‘is one of arch positivism i.e of rule of law in terms of the “command of the sovereign.”’
Now Hart has observed that ‘[t]he nonpejorative name “Legal Positivism,” like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins,’ and it appears to be so. As he patiently, unrepentantly, and frequently explained – in the debate as much as in The Concept of Law and elsewhere – Hart is a positivist about law; he might even admit to being ‘arch’, if that means ‘very’. Perhaps not everyone would agree to the amplification, because he concedes a minimum content of natural law, but it was not a huge concession and he still looks pretty arch to me. It is therefore a quite remarkably novel interpretation, for which no argument is suggested and to my knowledge no evidence exists, that ‘in the original Hart Fuller debate, Hart was not really arguing for the strict separation of law and morals, but rather more of a political theory with an institutional claim that legislatures rather than judges ought to be the appropriate institutional actors for aligning morality and law.’ (p.18)

In any event, none of this has anything to do with what matters to Teitel: that if Hart were a positivist, even if his arch had fallen, he would be committed to a concept of law, still less the rule of law, as ‘the command of the sovereign’. What is there to say, other than that Hart spent his whole jurisprudential life denying both the truth of such a claim or identification of positivism with it?

According to Teitel, however, the good news is that after the debate Hart modified or abandoned his ‘positivism’, or at least its imperativist core; in The Concept of Law ‘Hart distances himself from the view that the sine qua non of a legal system is commands backed by threats and coercive sanctions’ and this is the substantive lesson she takes from him. However ‘oft given’ the characterisation, his (re-) ‘considered view on international law developed later’ where he offers ‘a far richer understanding of the materials that make up such a system, an understanding that is illuminates [sic] contemporary understanding of global rule of law.’ And this is important because that is ‘the central and overarching question: what is the principle of rule of law today? And what is its relation to the present politics associated with the globalizing project?’ So, while one might have thought from the debate, and Teitel apparently did, that Hart was an imperativist about law and therefore couldn’t see international law as law, he does better in The Concept of Law where he ‘elides the positivist answer; but instead, goes on to raise the question of where law lacks a centralized command structure, as it does in international law that it nevertheless, can be distinguished from morality, that it is a distinctively juridical system of normative communication with legal sources, arguments and claimsmaking.’

And that is precisely where humanity law comes in: ‘rather than impose itself from above on these controversies, humanity law inserts itself as interpretative practice. It rules from within, through interpretation, rather than from above. As we shall see, this redirection of the current characterization of the question of the status and role of law in international affairs today to the status and role of subjects and practices such as adjudication in establishing a sense of rule of law draws upon my understanding of what was at stake in the Hart/Fuller debate.’

6 Fuller of course was well aware of this: ‘There is no need to dwell here on the inadequacies of the command theory, since Professor hart has already revealed its defects more clearly and succintly than I could.’ ‘Positivism and Fidelity to Law – A Reply to Professor Hart,’ 1958) 71 Harvard Law Review 639.
Now it might be true that this contemporary development is illuminated by Hart’s later chapter on international law. In particular, he seeks there ‘a key to the understanding of law,’ including international law, that evades the standard choice between ‘the simple idea of an order backed by threats and … the complex idea of morality,’\(^7\) Teitel draws on his discussion of international law to show how humanity law might sensibly evade that choice, though she makes more than Hart does of the importance of interpretive practices, a minor point in his argument, and rather less of his conclusion that ‘that there is sufficient analogy of ‘function and content, not of form,’\(^8\) which is its major point.

More important, she nowhere notes that there might be distinctions between three concepts she invokes – law, the rule of law, and, as we will see in a moment, fidelity to law. Hart believed he was addressing the first question in the chapter she invokes: is international law law? That is not for him the same question as: is there an international rule of law? Nor does it, for Hart, tell us anything of itself about fidelity to law. What he considers it fundamental to separate, she elides. Moreover, one thing that was not at stake in the debate was whether international law is misdescribed because it is not the command of the sovereign. Hart never thought that was a relevant test, nor did Fuller. No debate.

Teitel offers another piece of guidance we can draw from the Hart-Fuller exchange, as we ‘reconsider the debates regarding the meaning of global legalism in light of the paradigm shift above and the salient elements of the proposed humanity-law scheme. This reconsideration is illuminated by the postwar debate reframing that takes us beyond the issue of the facticity of the law, instead, to its meaning, i.e., what is the significance of the fidelity to law? Indeed, on this point, both Hart and Fuller agree. “One of the chief issues is how we can best define and sense the idea of fidelity to law.”’ But notoriously this was not a point of agreement between Hart and Fuller, since whatever Fuller said, Hart never considered this to be what the debate was about. As Liam Murphy has noted, commenting on Fuller’s claim: ‘Yet Hart’s essay … nowhere uses the phrase “fidelity to law” … Not only is it not part of Hart’s project to provide an account of law that makes “meaningful the obligation of fidelity to law,” it is essential to Hart that his account of law leave open the question of whether there is any such obligation.’\(^9\)

Nevertheless, from that allegedly agreed position one apparently learns where, institutionally, to look: ‘As became clear in the postwar debate, once the problem at stake is reconceptualised in terms of “fidelity to law”’ “it becomes a matter of capital importance what position is assigned to the judiciary in the general frame of government.”[Fuller]’ And this happily leads us away from legislatures and executives, of which humanity law can boast few, to the tribunals of humanity law which are all over the place: their ‘humanity-law based interpretation offers to the possibility of a ground of shared meaning that can afford basis for conflict resolution. … since interpretive practices arise in real cases of individual rights, this ensures that the enterprise is not about an essential ideal, but rather, concerns the evolution of a norm to guide and manage conflict.’ And this again leads us back to the Hart-Fuller debate, or at least to Hart, if not quite Fuller or the debate: the potential of such practices as sources of legality was already ‘assayed by Hart in his writing following the debate in The Concept of Law, where conceding that this form of law lacked the usual state-

\(^7\) The Concept of Law, Oxford UP, 1961, 208.

\(^8\) Ibid., 231.

centric bases, there were other bases for legitimacy including judicial decisionmaking in the mix.’

I am not competent to assess Teitel’s argument about the law-like character of ‘humanity law,’ and I don’t doubt that important connections between such current developments, with their tendencies to ‘moralise’ international law, and the issues in the debate can be made. However none is made here. I see nothing in the Hart-Fuller debate that serves as a ‘point of departure and inspiration’ for this argument or this article. Perhaps that is not surprising, since the question whether international law is law, while a very old question to which both authors later respond, is no part of the debate. International law is never mentioned there, Hart’s discussion of it in *The Concept of Law* has nothing to do with the issues in the debate or the ‘transitional’ circumstances said to have generated it, and Fuller’s own discussions in his Reply to Critics, though unmentioned by Teitel, are quite close to her own. And though directed against top/down views of law, they are quite compatible with Hart’s views of international law in *The Concept of Law*. And virtually every important thing that the debate was about has no echo, resonance, or development in Teitel’s discussion. True, there is some reference to Hart and Fuller purporting to be arguing about the relationship between law and morals, but it appears they got that wrong and failed to see that they were really debating other more transitional political questions. So that relationship is not addressed by Teitel, and indeed none of the issues that were pressing for Hart and Fuller, nor even one argument of the fair few that constitute the debate, is engaged with here.

### III Transitional Justice

That is a pity, for Teitel’s substantial earlier work informs us about many issues in many countries that raise just the questions Hart and Fuller were debating, most particularly the third criticism of the separation of law and morals that Hart considers, that which stemmed from that ‘Hell created on earth by men for other men.’ The specific occasion of the question, of course, was the predicament of post-Nazi judges forced to consider abhorrent Nazi laws and abhorrent behaviour that they might, if recognised as valid, have authorised. Judges and other officials in many transitional societies have faced precisely parallel dilemmas, at times leading to diametrically opposed decisions. Beyond the specificity of that context and those specific parallels, as both Hart and Fuller agreed, the implications – conceptually, morally, institutionally and politically – were large.

Teitel’s view about the issues in that debate appears on the second page of *Transitional Justice*. There, like here, she emphasises the exceptional character of transitions, and claims that mainstream scholars have ignored it: ‘[a]lthough the transitional context has generated scholarly theorizing about the meaning of the rule of law, that theorizing does

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11 ‘Positivism and the Separation of Law and Morals,’ 616.
12 See the decisions of the Hungarian Constitutional Court, refusing to override a statute of limitations which protected murderers from the Soviet suppression of the Hungarian revolt in 1956, on the grounds that that would involve retrospectivity, with the Czech Court which refused to be deterred by such ‘formalism’. See David Robertson, ‘A Problem of their Own, Solutions of their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity,’ in Wojciech Sadurski, Adam Czarnota and Martin Krygier, eds., *Spreading Democracy and the Rule of Law?*, Springer, Dordrecht, 2006, 73-96.
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.13

Teitel briefly summarises Hart’s and Fuller’s arguments about the Grudge Informer cases, but she doesn’t spend much time with them either in exposition or criticism, since she believes that in arguing abstract questions about law and morals in universalistic terms Hart and Fuller:

failed to focus ... on the distinctive problem of law in the transitional context ... 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 various alternatives, such as full continuity with the prior legal regime, discontinuity, selective discontinuities, and moving outside the law altogether ...

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.14

And this might explain Teitel’s reluctance to engage with the Hart-Fuller debate: she doesn’t think it was relevant even to the issues they did discuss, let alone those she transported it to. At least in ‘transitional’ contexts - all of them, it appears - all this abstract conceptual stuff is beside the point.

That is, to repeat, because transitions are special. Clearly Teitel believes that about the current transition in international law, but she amassed even more argument about the earlier ones, for they were transitions of a specific sort. When people talk of societies in ‘transition’ there has been a widespread tendency to attribute direction to them.15

‘Transitions’ have been thought of, not merely as from somewhere but to somewhere else. And so it has been since 1989. Post-dictatorship transitional societies are not just wandering, but they are often alleged to have an inscribed destination, a telos, which they may or may not reach, but where the hope is they will find democracy and the rule of law, among other good things. What should they do to get there, and how will they know they have arrived?

Wojciech Sadurski has distinguished between two styles of theorising about the matter: simplistic and fancy.16 Simplistic theorists, among whom he includes himself, judge local developments in the light of existing models taken to have been successful elsewhere. Fancy

theorists take transition to be a journey quite sui generis in character, one that will necessarily be travelled in sui generis ways.

Teitel’s theory of transition is very fancy. According to her, ‘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 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.’ 17

Why so? Post-dictatorial transitions Teitel suggests, are ‘extraordinary’ periods. First, they are - like it seems all legal transitions - periods of great ‘flux,’ unlike times of ‘ordinary’ politics when business goes on more or less as usual. Second, at least when the transitions are from dictatorship, the flux is not just tumultuous but directed, that is it aims (more accurately, some actors within it aim; many others don’t care; and other still want to go back home) to move away from the past and to something different. Third, not just different, but different in a specific way. They involve ‘normative shift’, that is, roughly a shift from a now-derided despotism to a now-desired democracy and the rule of law.

According to Teitel, in such periods law has a special role which is an ‘extraordinary constructive’ one, in that it doesn’t merely provide settled guidelines for the present but exercises its ‘transformative potential’ to engender the putatively different future which will come at the end of a ‘bounded period, spanning two regimes’. The tension between these two functions Teitel calls the ‘rule-of-law dilemma’. Law is involved in this dilemma because legal institutions are peculiarly apt to ‘mediate normative shift’ in a gradual, measured and non-violent manner and so, unlike the law of ‘ordinary times’, become preferred sites and vehicles of social, political and ideological transformation. Thus ‘[i]n modern political transformation, it is through legal practices that successor societies make liberalizing political change, for, in mediating the normative hiatus and shift characterizing transition, the turn to law comprises important functional, conceptual, operative, and symbolic dimensions.’ 18

This has profound consequences for the nature of ‘transitional justice’, according to Teitel. Since the transition is special it should not be judged according to presuppositions derived from ‘normal’ conditions. On the contrary, circumstances of transition generate ‘a distinctive conception of justice and rule of law in the context of political transformation.’ Where ‘ordinarily’ the rule of law is prospective, transitional rule of law ‘is both backward- and forward-looking, as it disclaims past illiberal values, and reclaims liberal norms.’ Where punishment is traditionally conceived as an individualized response to individual wrongdoing, ‘[i]n the transitional context, conventional understandings of individual responsibility are frequently inapplicable, and have spurred the emergence of new legal forms: partial sanctions that fall outside conventional legal categories.’ Where traditional rule of law stabilizes expectations in an existing liberal order, transitional rule of law is often intended to destabilize existing expectations in order to construct a future order; ‘the hope of change is put in the air’.

All these elements and special tasks, Teitel insists, make it wrong to assimilate the role of law in such periods to ‘ideal’ models of legality drawn from flux-free moments.

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18 Transitional Justice, 221.
In consequence of all these variable peculiarities, Teitel does, and by implication we should, eschew ‘idealized theorizing about the rule of law in general’\(^{19}\) and instead recognize ‘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, constructions that mediate conceptions of transitional rule of law.’\(^{20}\) We must recognise that in transitions, ‘the rule of law is ultimately contingent’,\(^{21}\) partial, contextual, and situated between at least two legal and political orders’.\(^{22}\) So much so, that ‘in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.’\(^{23}\)

Teitel’s emphasis on the specificity of the moment of post-dictatorial transitions alerts us helpfully to the inevitable and specific tensions faced by many actors, including legal actors, in such circumstances. In particular, and this is more of a reproach to Hart than to Fuller, she forces us to consider the extent to which, and many of the ways in which, participants, and particularly officials, in the very special circumstances of post-dictatorial transitions (and though special, there have been many such circumstances, each with its own peculiarities) are not merely in the position of English officials with a distasteful caseload. A lot of what such officials have done and have to do can be explained and often justified (though often it is easier to explain than justify) by where they sit.

Nevertheless, something more is relevant in the appraisal of transitions from evil, appraisal both of what should be done and what has been done, beyond where you came from and what you need to do, to make a success of where you are going. In her book, Teitel several times acknowledges that transitions do not raise unique issues, or rather, as she puts it, ‘these periods are not fully discontinuous [from the normal, I presume] but, instead, vividly display in exaggerated form, problems that are ordinarily less transparent in more established justice systems’.\(^{24}\) She does little with this point, however, which indeed cuts across the grain of much that she says elsewhere. But the observation has implications.

The point is not that the particular ‘transitional’ considerations that fancy theory addresses are of no account. They are important and one learns a great deal about them from writers, such as Teitel. It is rather that, in reacting against an impoverished ‘off-the-shelf blueprint’\(^{25}\) approach to the rule of law one must guard against so boosting the uniqueness of transitions that one severs their moorings in institutional possibilities and limitations, and more broadly in the human condition and more general human purposes. That not only needlessly limits the repertoire of possibilities and risks time-consuming attempts to reinvent old wheels, but it also makes it hard to know when purposes are achieved or criticism is appropriate.

Transitions, like many aspects of life, indeed have distinctive characteristics, and Teitel has

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19. Ibid., 12.  
20. Ibid., 15.  
21. Ibid., 11.  
22. Ibid., 9.  
23. Ibid., 6.  
alerted us more than most to the impact of those characteristics on attempts to do justice afterwards. But none of that implies either that there is nothing larger to learn from them about non-transitional circumstances, or that we have no larger moral or conceptual frames in which to judge what people do in them. As Gianluigi Palombella wrote to me once about the inapplicability of our ‘ordinary’ intuitions to transitions, ‘I would accept this as a matter of self restraint by judges or judicial activism and so forth. But it has little to do with the general thinking of matters like humanity law, morality of law, normativity of law, and finally with the rule of law. We decide these issues on some ground before transitions come. It is the crucial moment when it comes to the surface. So is the rule of law.’

In the particular context of appraising transitions, fancy talk faces a characteristic danger, of a sort I have mentioned in an earlier discussion of Teitel’s work, among others: ‘What threatens is a sort of circle, common and tempting in a lot of functionalist explanation. One postulates an overarching social need or function-necessary-to-be formed, say transition to the rule of law. People do whatever they do, what happens happens. And one concludes that whatever they do, even if shit happens, occurs to fulfil that function for the transition, so it is what the law does and it is the reason law does it. This circle is even more tightly closed by the assumption that transitions are sui generis, indeed each transition is in its own way, since that robs an observer of standards with which to assess what’s going on.’

IV Facing Facts

However, one need not simply join the familiar anthropologists’ chorus, ‘This is all very well, but it doesn’t apply to the Bongo-Bongo.’ to worry, as Teitel has and for many of the reasons she has, about the excessively abstract and universalistic character of some of the debate. In particular, the way in which Hart’s discussion in particular surveys and smooths over the difficult conceptual, moral, political and institutional terrain on which the debate takes place. There are ways to extend Teitel’s apprehension that too much that is specific to particular situations is rendered invisible and insubstantial by the crisp and apparently exhaustive choices – legal questions/moral questions – that Hart poses in the debate.

One way is to follow Niki Lacey’s suggestion that ‘philosophical analysis of key legal and political concepts needs to be understood both historically and institutionally and that Hart’s relative lack of interest in this sort of contextualization marks a certain limit to the insights provided by his legal and political philosophy.’

Contextualisation involves attention to empirical particularity and variation. In a book, fortuitously for us but aptly entitled Law and Society in Transition, Philip Selznick recommended that many central jurisprudential issues could and would pay to be viewed ‘in a social-science perspective,’ the hallmarks of which were attention to variation and to context. There are several reasons to do this, central among them that it is ‘important for scholars to appreciate the full range of legal experience’ and in particular ‘to grasp the significance of variation.’ Questions about the nature of law, the relations between law,

26 ‘Rethinking the Rule of Law after Communism’, in Czarnota, Krygier and Sadurski, eds., 271.
30 Ibid., 2.
31 Ibid., 8.
morals, politics, and so on, so often treated as unique questions with unique answers, could benefit from immersion in the ways these relationships vary, often systematically, within and between different legal orders.

But while sociologists are good at observing variations and attending to context, there is one sort of variation that they are often reluctant to deal with, and about which philosophers have a lot that is interesting to say: differences between ‘qualitative states’ of affairs. They are ill at ease dealing with variations in such qualitative states, and positively queasy more generally about messing with values.32 As Selznick, whose point this is, once put it: ‘some of our keenest minds in social sciences didn’t know what to do with an ideal except handle it gingerly and view it with alarm.’ That is one reason why issues too important to be left to philosophers should not be abandoned by them to sociologists either. After all, it matters to us whether an institution is just surviving or thriving. Shouldn’t we have concepts that register the difference?

Fuller thought so. When he suggests that ‘[t]hroughout his discussion Professor Hart seems to assume that the only difference between Nazi law and, say, English law is that the Nazis used their laws to achieve ends that are odious to an Englishman,’33 he is not just recommending that Hart get out more. Fuller details several of the many ways in which Nazis had undermined the character and role that an Englishman might expect law to play, had corrupted the instrument, not merely wielded it for unsalutary purposes, so that Nazi law was frequently not merely perverse in its effects but perverse at its core and in its character. And this, of course, was not true merely of Nazis. ‘Law’ under communism was riddled with similar perversities, at times greater since in the worst periods there was not even a ‘Dual State’ of the sort Ernst Fraenkel34 and Fuller attributed to the Nazis, but rather a deliberately disordered despotism, as under Stalin, Mao, and if one continues the alliteration, ‘deranged’ under Ceausescu. A transitional judge has not merely got the luxury of reflecting on the uses to which the previous law was put, but more deeply on the nature of that law as law. There is a lot to reflect on, as David Dyzenhaus, among others has reminded us.35 Hart could at times have done with that reminder.

Incidentally, another question at issue in the debate – whether it would have been better for people to keep the sturdy and independent Englishmen’s distinction between legal and moral obligation, rather than excessive Teutonic deference to law – also has an empirical component. However, it is commonly beside the point in the recent societies of transition: no English, no Teutons. The problem in many of those societies is that no one hitherto had connected legal and moral obligation at all, and they still don’t. Law, in the Bulgarian proverb, was ‘like a door in the middle of an open meadow. Of course, one could go through the door, but only an idiot would think to.’ A major ‘transitional’ problem is to get people to notice the door, let alone go through it; an ‘internal attitude’ deficit of some considerable proportions.

And this raises Fuller’s question about ‘fidelity to law’ and a larger one about the rule of law. If you believe that fidelity to law and what generates the rule of law really matter in the world, how would you know what might encourage them? There are issues of empirical and theoretical sociology here, that might usefully be explored. One of them, on which Hart and Fuller speculate, is why so many Germans obeyed Nazi law, and officials enforced it.\textsuperscript{36} Another, that Fuller discusses, is what were the pressures facing post-Nazi officials, and what would be the social significance of one way of dealing with a case compared to another. Intelligent speculation abounds in the debate; consideration of evidence, or even thought that a search for it might be relevant, is rare.\textsuperscript{37}

Fuller was far more warmly disposed to social investigation than was Hart; he had a strong sociological sensibility,\textsuperscript{38} which served him well at times but left him underpowered in argument against Hart’s formidable analytical armoury. He also knew more about what they were both discussing in the debate over Nazi law. And yet his accounts of what might lead to fidelity to law, and more broadly to the rule of law, or what is the connection between the ‘internal morality of law’ and the likelihood of state evil, all of them so important to him for the differences they made \textit{in the world}, are a curiously investigation-free zone: altogether richer in assumptions than in evidence. Yet observation of variation in the ways in which law exists, and in its role and significance between and within societies can tell us a lot about the sources of fidelity and the rule of law, and relationships between principles of legality and the (external) morality of law. And transitional societies, where concern with precisely these things (by some) is explicit and urgent, offer us many lessons about what they require, if only about how hard they are to achieve from a standing start, and how many are the ways they can fail to be achieved.

\textbf{V The Rule of Law}

The ‘rule of law’ is often referred to in Teitel’s paper and in her book and other writings. One problem with the paper is that she nowhere makes clear what she means by the rule of law, or the relationship between it and law itself. That becomes particularly problematic when she suggests that its nature varies with every transition and transitional location. We can understand why the \textit{adjective} in ‘transitional rule of law’, but why the nouns?

Hart and Fuller are clearer. Jeremy Waldron has argued persuasively that Hart was ‘equivocal’ in discussing what the rule of law (more usually ‘principles of legality’) was worth, preferring to avoid and occasionally to evade such discussion.\textsuperscript{39} However, it was clear what he thought it was. Fuller was unequivocal about its worth - it was central to law properly so-called; its ‘internal morality’ - and they both agreed that it could be summed up

\textsuperscript{36} Cf. Lacey 1072: ‘the question of whether a positivist or a naturalist attitude toward law would best equip a society to resist tyranny is itself historically contingent to some degree.’

\textsuperscript{37} For discussions of that evidence as it pertains to judges, see the works referred to in Teitel, \textit{Transitional Justice}, chapter 1, n.25: including Ingo Müller, \textit{Hitler’s Justice: The Courts of the Third Reich}.


in the famous eight (or thereabouts)\textsuperscript{40} principles of legality that Fuller enunciated. In the light of the contingency and variety of which Teitel writes, is this the best way to think about these matters?

Here again, Lacey’s observation, which overlaps in part with Teitel’s position, is telling:

Is the striking contrast between natural law and positivist positions that forms the centrepiece of the Hart-Fuller debate best understood as a philosophical disagreement? Or is it rather – or equally – a moral and practical disagreement about which institutional arrangements are likely to maximize the realization of valued social ends or ideals under specific social and historical conditions? Does the debate between Hart and Fuller center on a timeless conceptual distinction? Or is the debate’s lasting significance due to the vivid context in which it framed one of the most pressing moral and political questions confronting post-Enlightenment constitutional democracies: how to develop legal arrangements capable of constraining abuses of power and of addressing such abuses?\textsuperscript{41}

The questions Lacey refers to are much older than the Enlightenment, and this is significant, but otherwise this is how I read much of the debate as well. Or at least, I would support Lacey’s second version of the question, ‘rather – or equally’; since the conceptual issues are crucial, and were clearly important to Hart if perhaps less central for Fuller (though it is not clear he realised that). And I further take the question ‘how to develop legal arrangements capable of constraining abuses of power and of addressing such abuses?’ as asking how to develop the rule of law.

Elsewhere,\textsuperscript{42} I have suggested that in exploring the rule of law, we do better to start teleologically and only then move to the anatomy of law (and other sorts of anatomy as well.) That is to say, we should begin by asking what we might want it for, by which I mean not external ends that it might serve, such as economic growth or democracy, but something like its telos, the point of the enterprise, goals internal to, immanent in the concept. Only then does it make sense to move to ask what we need in order to get what we want, because the means are more contingent and variable than the ends. That latter question, the bottom line, as it were, will of course involve particular legal institutions and arrangements, but they will vary, and it will involve many other things as well. Indeed, the question cannot be answered without looking beyond legal institutions to the societies in which they function, the ways they function there, and what else happens there which interacts with and affects the way of law. For the rule of law to exist, still more to flourish and be secure, many things beside the law matter, and since societies differ in many ways, so will those things. How much the ‘principles of legality’ make a difference, and what sorts of differences they make, will also vary.

\textsuperscript{40} Joseph Raz also lists eight elements, but he says the list is incomplete; ‘The Rule of Law and its Virtue,’ in The Authority of Law, Clarendon Press, Oxford, 1979, 210-29. If you want more, see Geoffrey de Q Walker, The Rule of Law. Foundations of Constitutional Democracy, Melbourne University Press, 1988. He has twelve.

\textsuperscript{41} ‘Philosophy, Political Morality, and History,’ 1072.

So first, what do we want? Second, what do we need to get it? The usual practice in discussing the rule of law is to go the other way. If one starts with the question Lacey puts (or a question of some such sort; this could be developed), however, then the practical problem is how that question might be answered. Since societies, histories, practices, traditions, institutions, differ and many such differences have effects, so too will the answers that make sense at one time or another, one place or another, vary. That, at least, is a lesson that might be gleaned from failed attempts to build the rule of law in ‘transitional’ societies, and from the less common success stories as well. The goal can be clear, but means vary. Unfortunately, too much discussion of the rule of law has started and stopped with a particular set of means.

Given that we can do what we like with words, the rule of law is a notoriously contested concept, and no one’s *fiat* travels far, why does this matter? Well partly because what you think the rule of law is can affect where you look for it, and what you might do to find it, still more to nurture it. In much of my ‘transitional’ observation, I have been struck by the extent to which RoL practitioners, as promoters of the rule of law in benighted countries are called, are obsessed with imitating metropolitan legal arrangements, while they ignore all that matters around them. Many of those things have great significance for social fidelity to law, for legal culture, and for the feasibility of the rule of law, but they have no obvious institutional connection to the legal system, and therefore, alas, are not within the purview of the proud builders of the rule of law. Even were these latter to manage to graft a perfect set of all eight of Fuller’s principles onto legal institutions, so much else, I have felt, would lie untouched that nothing would be likely to change in the world.

But whether or not it is true that the principles of legality could be observed by institutions in circumstances where it doesn’t make sense to speak of the rule of law, there are certainly circumstances in which it makes good sense to speak of the rule of law, but where Fuller’s criteria are not satisfied by the law, not merely in the sense that the world is never ideal but rather that the criteria don’t deal with the case. Lacey has mentioned several such cases; 43 let me conclude with two more, one older than hers, one younger.

Within Britain, and inherited by its dependants, the concept of the rule of law is deeply embedded and very old indeed. Dicey believed so, and it has has recently been well demonstrated by the American legal historian, John Philip Reid. 44 Reid shows that in English tradition until the eighteenth century, law was identified with misty, murky but ages-old custom, traced to a time when ‘the memory of man runneth not to the contrary.’ He writes, ‘the medieval constitutional law out of which today’s rule of law developed would not have met the requirements of clarity or precision. There was always an air of indefiniteness, a smoky vagueness surrounding this all-embracing restraining “law” of English constitutionalism. Even its authority as law was shrouded in immeasurability.’ 45

On the old view, as Reid puts it, ‘what mattered was not its intrinsic qualities but that it was customary practice, not deliberative decision.’ 46 The rule of law tamed unruly exercise of power, because even the sovereign was not above it, indeed not sovereign in Cromwell’s or Blackstone’s or Austin’s sense, but subject to higher law. It is arguable, and Reid does argue,

43 See NYLR1072-78.
45 Reid, op. cit., 16.
46 Reid, op. cit., 13.
that there is a major shift in the English conception of law from the eighteenth century, from immemorial custom to sovereign legislation. With that shift came a change in how the rule of law was understood – from fidelity to customs allegedly continuous since ‘the memory of man runs not to the contrary’ to demands that law, even if sovereign, be public, clear, not retrospective, possible of performance, and so on. Paradoxically, the shift distanced the more old-fashioned, newly-to-be-United States, from the novel transformations of law and legal theory that were occurring in Britain. It was partly what the revolution was about.

My other example is more recent. There was a time, 1989 to be precise, when I assumed the rule of law was what the ‘transitioning’ world needed and that it was well captured in Lon Fuller’s ‘internal morality’ or something like it. And so it seemed to me that in all the excitement of the collapse of communism, this was a product ripe for export. So I was shocked in that same year to read an article by Edward Rubin which took this alleged morality apart, as it applied, or rather was argued not to apply, to ‘Law and Legislation in the Administrative State’ Rubin argues that the bulk of modern legislation is not, as Lon Fuller thought law to be, ‘the enterprise of subjecting human conduct to the governance of rules,’ but rather ‘a series of directives issued by the legislature to government-implementation mechanisms, primarily administrative agencies, rather than as a set of rules for the governance of human conduct.’ A great deal of modern legislation is ‘internal,’ that is, concerned at least initially with administrative agencies rather than individual citizens. Within ‘external’ legislation, moreover, much is ‘intransitive,’ that is, though concerned ultimately with citizens, it does not specify precisely what rules an agency is expected to apply to them. There is a vast amount of such legislation in the modern state, and it ‘did not arise out of some lapse of moral vigilance. It is central to our beliefs about the role of the government in solving problems and delivering services.’

Of this legislation Rubin argues that Fuller’s principles are unhelpful, and ‘[e]ven for transitive statutes, most of Fuller’s principles are persuasive only when the statute relies on courts as its primary implementation mechanism. When a transitive statute is enforced by an agency, our normative system simply does not make the demands that Fuller perceives.’ It still makes sense to oppose arbitrary uses of power against citizens, but a great deal of law needs to be thought about in other terms, and where the concern is appropriate, antidotes to it are often likely to be very different from those that Fuller suggests.

Now perhaps this is all wrong. Or it might be that a closer reading of Fuller than Rubin’s would reveal that he was not setting up universal measures simply to be applied, whatever the form of law, whatever the circumstance. I think that is likely, though he has often been taken in this way. But my point is different. Rubin’s analysis only threatens the claim that the rule of law exists in the United States, if the rule of law is identified with the legal institutional prescriptions summed up in the ‘morality of law’. Many lawyers and legal

50 Ibid., 406-07.
51 Ibid., 399.
philosophers think it should be, in which case to the extent that Rubin is right, the rule of law is out the window in America. Perhaps it is, but that is not the reason.

A teleological approach to the rule of law is not embarrassed by either the historical story Reid tells or the institutional arrangements Rubin reveals. And yet it does not leave us waiting for the next transition to reveal what the rule of law will turn out to be, just for that place at that time. It also allows us to say why we think, as Hart sometimes does, Fuller almost always does, and I guess I do too, the rule of law is worth a great deal.