



*Transitional Justice*

**POSTCOLONIAL  
TRANSITIONAL JUSTICE**  
**ZIMBABWE AND BEYOND**

Khanyisela Moyo



# Postcolonial Transitional Justice

Transitional justice processes are now considered to be crucial steps in facilitating the move from conflict or repression to a secure democratic future.

This book contributes to a deeper understanding of transitional justice by examining the complexities of transition in postcolonial societies. It focuses particularly on Zimbabwe but draws on relevant comparative material from other postcolonial polities. Examples include but are not limited to African countries such as South Africa, Rwanda and Mozambique. European societies such as Northern Ireland, as well as other nations such as Guatemala, are also considered. While amplifying the breadth of the subject of transitional justice, the book addresses the claim that transitional justice mechanisms in postcolonial countries are necessary if the rule of law and the credibility of the country's legal institutions are to be restored. Drawing on postcolonial legal theory, and especially on analyses of the relationship between international law and imperialism, the book challenges the assumption that a domestic rule of law 'deficit' may be remedied with recourse to international law. Taking up the paradigmatic perception that international law is neutral and has fixed rules, it demonstrates how complex issues which arise during postcolonial transitions require a more critical adoption of transitional justice mechanisms.

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# Postcolonial Transitional Justice

Zimbabwe and Beyond

Khanyisela Moyo

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# Contents

<i>Acknowledgements</i>	vii
<b>1 Introduction</b>	<b>1</b>
1.1 <i>Postcolonial transitional justice</i>	2
1.2 <i>Zimbabwe</i>	6
1.3 <i>Outline of the book</i>	10
<b>2 Basic concepts of the study and a postcolonial critique</b>	<b>12</b>
2.1 <i>Introduction</i>	12
2.2 <i>The field of transitional justice</i>	12
2.3 <i>The ‘justice’ part of ‘transitional justice’</i>	16
2.4 <i>Locating the critical areas of the research within the transitional justice field</i>	18
2.5 <i>Critique, transitional justice and postcolonial theory</i>	25
<b>3 Rule of law and judicial independence</b>	<b>45</b>
3.1 <i>Introduction</i>	45
3.2 <i>Normative framework</i>	47
3.3 <i>Rule of law and judicial independence in transitions</i>	50
3.4 <i>The postcolonial context</i>	51
3.5 <i>Zimbabwe: the rule of law and judicial independence</i>	55
3.6 <i>How to read Zimbabwe’s experience with rule of law and judicial independence</i>	79
3.7 <i>Insights from other postcolonial polities</i>	83
3.8 <i>Conclusion</i>	87
<b>4 Land reform and transitional justice</b>	<b>89</b>
4.1 <i>Introduction</i>	89
4.2 <i>Land reform and transitional justice</i>	90
4.3 <i>Zimbabwe: a case study</i>	93

4.4	<i>The limits of international law: how to read Zimbabwe's experience with land reform</i>	108
4.5	<i>Insights from other postcolonial polities</i>	116
4.6	<i>Conclusion</i>	127
<b>5</b>	<b>Minorities in postcolonial transitions</b>	<b>128</b>
5.1	<i>Introduction</i>	128
5.2	<i>Minorities and transitional justice</i>	129
5.3	<i>The distinctive features of postcolonial transitional minority questions</i>	133
5.4	<i>The story of the Ndebele of Zimbabwe</i>	136
5.5	<i>How to read Zimbabwe's experience with the Ndebele question</i>	143
5.6	<i>Postcolonial agency in transitions</i>	149
5.7	<i>Conclusion</i>	153
<b>6</b>	<b>Dealing with the legacy of impunity</b>	<b>156</b>
6.1	<i>Introduction</i>	156
6.2	<i>Zimbabwe: the context</i>	158
6.3	<i>How to read Zimbabwe's legacy of impunity</i>	166
6.4	<i>Insights from other postcolonial polities</i>	179
6.5	<i>Conclusion</i>	186
<b>7</b>	<b>Conclusion</b>	<b>187</b>
7.1	<i>Overview and contribution to transitional justice</i>	187
7.2	<i>The definitional issue</i>	188
7.3	<i>The limitations of international law</i>	188
7.4	<i>Hybridity</i>	192
7.5	<i>Further research</i>	195
	<i>Bibliography</i>	196
	<i>Table of cases</i>	228
	<i>Table of statutes</i>	230
	<i>Table of regulations, treaties, international resolutions and key reports</i>	232
	<i>Index</i>	237

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# 1 Introduction

Transitional justice is that which seeks to re-establish order, the rule of law and justice in the wake of armed conflict, authoritarianism or repression. Clearly, this is a huge topic, and so it is not surprising that different pundits differ about the definition and scope of the subject.<sup>1</sup> Historically, theorists have debated issues concerning peace versus justice, the legality of amnesties and whether transitional justice is the victor's justice. These types of inquiries are still part of transitional justice discourses today, but they have now been supplemented by what Dustin Sharp calls peripheral fourth generation issues.<sup>2</sup> As Sharp aptly put it:

[T]he need to account for the underlying politics of transitional justice work, the need to balance local and international agency and the need for greater economic justice now sit alongside concerns from previous eras such as debates over victor's justice and the role of amnesties.<sup>3</sup>

At the heart of these contemporary issues is the need for transitional justice to deal with the root causes of the conflict and abuses of all rights.<sup>4</sup> Arguably, the history of modern conflicts, which are the focus of contemporary transitional justice discourses, are rooted in those polities' colonial past. Fletcher et al. have noted that the legacy of a colonialism is found mainly in three areas.<sup>5</sup> First, the power is concentrated within a few elites. Second, there is a mixed legal system

1 Some of the definitions are discussed in Rosemary Nagy, 'Transitional Justice as a Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly* 275 at 276–278.

2 Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 *Harvard Human Rights Journal* 149.

3 Ibid at 157.

4 Summary and Principle 9, United Nations Secretary-General, 'Guidance Note on the United Nations Approach to Transitional Justice' (2010) <[www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)>.

Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339.

5 Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31(1) *Human Rights Quarterly* 163.

## 2 Introduction

where Western (civil) judicial structures are combined with customary law. The effect of this hybrid legal system is the use of Western standards in urban areas and the administration of customary law by chiefs in rural areas, ‘with no set standards, marked variation in punishments, gender bias, nepotism and crony influence’.<sup>6</sup> Third, there is mistrust of Western interventions.

Postcolonial contexts present both policy makers and pundits with difficult questions on the ‘transition’ element of transitional justice. In particular, the question is asked as to whether transitional justice should focus on the immediate past or encompass historical injustices, including the colonial legacy. This book contributes towards a deeper understanding of transitional justice and links to the ongoing debates in the discourse about the field’s boundaries, localized justice and the role of international law.<sup>7</sup> A deeper, more accurate understanding, particularly of the limitations and potential of international law when it comes to the concerns of postcolonial subjects, is crucial for the effective implementation of transitional justice mechanisms.<sup>8</sup>

### 1.1 Postcolonial transitional justice

[W]hile colonialism by definition is a relationship of domination and subordination; it does not entail unidirectional determinism. As Subaltern studies have brought into sharp relief, the colonized are never passive mimics of the colonial script; their strategies of resistance give rise to innovative vocabularies and relationships.<sup>9</sup>

Postcolonial legal theory is an offshoot of critical studies, which (amongst their other aspects) draw on the unequal relationships of states caused by the colonial legacy, to explore the often-sidetracked questions of the law’s consanguinity with that heritage.<sup>10</sup> Six particular untold issues are exposed in this work. The first one is the hegemonic bias of international law.<sup>11</sup> The second is the law’s inability

6 Ibid at 195.

7 See, for example, Chris Dolan, Nokukhanya Mncwabe and Chrispus Okello (eds), *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press 2012). See also Nagy (n.1).

8 Khanyisela Moyo, ‘Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends’ (2012) 2 *International Human Rights Law Review* 237, George M. Carew, *Democratic Transition in Postcolonial Africa: A Deliberative Approach* (Edwin Mellen Press 2006).

9 Tayyab Mahmud, ‘Citizen and Citizenship within and beyond the Nation’ (2005) 52 *Cleveland State University Law Review* 51.

10 See Vidya S.A. Kumar, ‘A Proleptic Approach to Post-Colonial Legal Studies? A Brief Look at the Relationship between Legal Theory and Intellectual History’ (2003) 2 *Law, Social Justice and Global Development Journal* <www2.warwick.ac.uk>.

11 Chapter 2.

to address the colonial legacy's creation of unequal economies.<sup>12</sup> Third, there is a realization that international law is blind to the fact that not all states, West or North or postcolonial, have completed the nation-building project, thereby excluding voices of the disgruntled ethnic groups within postcolonial societies.<sup>13</sup>

Fourth, international law does not attend to the decolonization process's complicity in creating a legacy of legally sanctioned amnesia, thereby creating a culture of impunity.<sup>14</sup> Fifth, there is a Western bias in international law in that it privileges civil and political rights over economic, social and cultural rights. Finally, international law is steeped in liberalism's public versus private dichotomy, which has the effect of excluding harms that are peculiar to women and other persons who occupy a subordinate position.

A number of approaches to transitional justice can be drawn out from post-colonial legal studies' analysis of how international law relates to imperialism. The first view is the neo-colonialist notion that the doctrines and institutions of international law have always been circumscribed, by and for the use of the powerful states in order to serve their interests.<sup>15</sup> Consequently, transitional justice is rejected as it is seen as a tool by which the '*Self*' flexes its power over the '*Other*'. The fact that the West funds most transitional justice projects in postcolonial societies seems to support this viewpoint.<sup>16</sup>

The second perception is that international law stands for universal and sovereign equality, although it is open to different cultural interpretations.<sup>17</sup> It is unfortunate that universal values are often appropriated by former colonial powers and used for purposes of oppressing the developing world. For this school of thought, the problem with transitional justice is its potential for distorted use by imperialists in their hegemonic projects. The last viewpoint is that even though international law can be complicit as a principal facilitator of exploitation and discrimination, it also has the potential to play a transformative role.<sup>18</sup> Adopting this approach, this work sees law, during transitional periods, as a ground for struggle.<sup>19</sup>

12 Chapter 4.

13 Chapter 5.

14 Chapter 6.

15 See the line of thinking in Berta E. Hernandez-Truyol, 'The LatIndia and Mestizajes: Of Cultures, Conquests, and LatCritical Feminism' (1999) 3 *Journal of Gender, Race and Justice* 6 and Makau wa Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

16 For examples of transitional justice projects funded by the US government, see Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol 1* (United States Institute of Peace Press 1995), page xxix.

17 This is the cultural relativist argument. See wa Mutua (n.15).

18 It is in some way influenced by the writings in Issa G. Shivji, *The Concept of Human Rights in Africa* (Codesria Book Series 1999), and Issa G. Shivji, 'Law's Empire and Empire's Lawlessness: Beyond Anglo-American Law' (2003) *Law, Social Justice and Global Development Journal (LGD)* <www2.warwick.ac.uk>.

19 Ibid.

#### 4 Introduction

In reaching this thesis, the study is guided by key non-legal expositions of post-colonialism evinced by the studies of Michel Foucault, Robert Young, Edward Said, Homi Bhabha and Ghatayri Spivak, among others.<sup>20</sup> The work of Foucault, for example, is the source of this study's distinction between transitional justice as a field whose contours are still to be bounded, and the discourse of transitional justice.<sup>21</sup> Thus, in this work, the discourse of transitional justice refers to a restricted ambit of knowledge, and this is the case because those with power control the dissemination of this information.<sup>22</sup>

The study then builds on Edward Said's celebrated work *Orientalism*, which through the notion of discourse makes a link between culture and imperialism to show how this creates binary divisions of the *Self* and the *Other*.<sup>23</sup> Thus, in the context of transitional justice, power and knowledge are important in the interaction between Western states and postcolonial states, and an exclusive focus on accountability and punishment is used to depict Western governments as liberators and the postcolonial leaders as criminals.<sup>24</sup>

However, Homi Bhabha's exposition of the ambivalent relationship which exists between the *Self* and the *Other* disproves this simplistic notion of a direct one-way diffusion of norms from developed countries to less developed ones.<sup>25</sup> This ambivalence is seen in that, while Western governments do want to modernize their former colonies, they do not want to make those states similar to theirs, for doing so would destroy the binary division of *Self* and *Other* which is necessary for the maintenance of the Western hegemonic power.<sup>26</sup>

In the case of Zimbabwe, this explains why developed countries would rather give the country aid than commit the United Kingdom to fund the land reform programme as such a move might stir rebellion in other former colonies.<sup>27</sup> Therefore, former colonial masters are forced to engage with the local laws, and 'hybridity' occurs.<sup>28</sup> This disrupts the bipolar relationship and creates a more complex transfer of norms than an otherwise immutable exchange. This occurrence, which is common to most postcolonial transitions, is demonstrated in

20 For a comprehensive bibliography of postcolonial theory and its criticism, see *Postcolonial Web* <[www.postcolonialweb.org/](http://www.postcolonialweb.org/)>. See also Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), *The Post-colonial Studies Reader* (Routledge 1995) and Bart J. Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (Verso 1997).

21 See Chapter 2 for a definition of transitional justice as a field. On the issue of discourse, see Michel Foucault, *The Archaeology of Knowledge, and the Discourse on Language* (Pantheon Books 1972).

22 Foucault, *ibid*.

23 Edward W. Said, *Orientalism* (Pantheon Books 1978).

24 See Chapter 2 for this analysis.

25 Homi Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' in Homi Bhabha (ed) *The Location of Culture* (Routledge 1994).

26 *Ibid*. See also Chapter 2.

27 See Chapter 4.

28 *Ibid*.

Chapters 3 to 6, which develop this main argument by way of an evaluation of Zimbabwe's challenges and prescriptions drawn from comparative materials of other postcolonial societies, which have faced similar challenges.

Further, from Bhabha the study borrows the notion that hybridity creates opportunities for agency or resistance which takes place at a 'third space of enunciation'.<sup>29</sup> The ambivalence at the origination of fixed discourses of power facilitates a form of uproar located in the inconstancy that changes paradoxical positions of power into a justification for action.<sup>30</sup>

This form of *agency* is already evident in Zimbabwe. It is fair to assume that Western support for the country's non-governmental organizations' advocacy work was largely driven by the desire to protect property rights and highlight the criminality of the Robert Mugabe regime. However, this intervention has been appropriated by a number of domestic groups not only to align themselves with either the West or the domestic authoritarian regime, but to attract a debate on a wide range of issues, which include, *inter alia*, women's rights, minority rights and redress for atrocities committed during the colonial era. It is axiomatic that when Western governments funded non-governmental organizations, their original aim was to promote a certain ideology and not these side-tracked issues.

It is also fair to state that part of the reason why *agency* is possible is because motives of Western actors are not one-dimensional. For within the West, there are some idealists who may not support government policies that are driven by aggrandizing interests.<sup>31</sup> Similarly, postcolonial resistance to the Western discourse is not always productive, since different actors within these societies can also be influenced by various motives and perceptions. Indeed, it is possible for imperialism and cultural relativism to be used by groups to either subjugate women and minorities or to deflect attention from domestic human rights violations.

Nonetheless, another key lesson which this work borrowed from the work of Bhabha is that *agency* is a form of 'negotiation' which is possible only within the contours of the Western discourse.<sup>32</sup> Thus it sees the state-led radical land reform programme of Zimbabwe which was carried out after 2000 as a direct confrontation or an attempt to dismantle the master's discourse and thus an exercise in futility. Therefore, the study is of the view that a form of connivance between the *Self* and the *Other* is necessary in transitional contexts.

29 Homi Bhabha, 'Cultural Diversity and Cultural Differences' in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds) *The Post-Colonial Studies Reader* (Routledge 1995).

30 Ibid.

31 For example, even though Saddam Hussein's ouster was in furtherance of a Western regime change agenda, Western idealists insisted on the observance of due process standards. See Miranda Sissons and Ari S. Bassin, 'Was the Dujail Trial Fair?' (2007) 5(2) *Journal of International Criminal Justice* 272.

32 Chapter 2.

## 1.2 Zimbabwe

In this work, Zimbabwe's challenges are presented as depicting a microcosm of the multitudinous complexities of transitional justice in postcolonial societies. When Zimbabwe attracted international attention during its violent land reform programme in 2000, external reaction varied and in fact rekindled the ideological debates of the Cold War.<sup>33</sup> The contemporary variance pitted postcolonial Africa, with the support of Russia and China, against Western governments led by the United Kingdom (UK) and the United States of America (USA). The former insisted that narratives of the Zimbabwean crisis should take into account the indelible mark left by colonialism. They also proposed African solutions to African problems and respect for the principle of equal sovereignty. On the other hand, Western governments focused on governance and called for tougher international action against what they perceived to be a rogue administration which does not respect property rights and the rule of law. This strain in international relations reawakened the Cold War notion that opposition parties and human rights advocates are vicarious operatives of foreign ideologies.<sup>34</sup>

The country is yet to make a clear break with the past, but a window of opportunity has now been presented by the replacement of the country's executive president with Emerson Mnangagwa in November 2017. Unlike his predecessor Robert Mugabe, whose language had the effect of isolating Zimbabwe, Mnangagwa seems keen to liberalize the economy and end the country's isolation. Quite significantly, the new president signed the National Peace and Reconciliation Commission (NPRC) Act into law on 5 January 2018.<sup>35</sup> The NPRC is an independent commission tasked with ensuring post-conflict justice, healing and reconciliation.<sup>36</sup> However, human rights violations are ongoing. For example, the security forces are said to have killed at least 12 people and injured dozens following the protests against increased fuel prices which started on 14 January 2019.<sup>37</sup> At least 700 people were also detained on trumped-up charges.<sup>38</sup>

Notwithstanding the politicians' irresoluteness, transitional justice questions have been anticipated amongst Zimbabwean political parties, academics and civic society since the country's independence from colonial rule in 1980.<sup>39</sup> The

33 See Sue Onslow, 'Rhodesia and the Cold War' Paper presented at the *First European Conference of African Studies*, SOAS, University of London, 30 June 2005.

34 See David Moore, 'Unmasking ZANU-PF Hypocrisy about NGOs' *Zimbabwe Independent* (Centre for Civil Society 2003) <[www.theindependent.co.zw/2003/05/23/unmasking-zanu-pf-hypocrisy-about-ngos-2/](http://www.theindependent.co.zw/2003/05/23/unmasking-zanu-pf-hypocrisy-about-ngos-2/)>.

35 National Peace and Reconciliation Act [Chapter 10:32].

36 S252 Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

37 Amnesty International UK, 'Zimbabwe: Brutal Crackdown Continues as Protesters Killed, Raped and Tortured by Security Forces' 25 January 2019 <[www.amnesty.org.uk](http://www.amnesty.org.uk)>.

38 Ibid.

39 Staffan Darnolf and Liisa Laako (eds), *Twenty Years of Independence in Zimbabwe: From Liberation to Authoritarianism* (Palgrave Macmillan 2003). If we are to include human rights documentation as being within the ambit of transitional justice, then Zimbabwe civic society has been handling transitional justice issues even before the country's independence.

focus in the period after independence was on restorative justice, compensation for human rights abuses, reconciliation, amnesties and the need for institutional reform.<sup>40</sup> Even though these pundits did point out that the 'forgive and forget' strategy which was adopted at independence was likely to breed a culture of impunity, there was no examination of the issue as to whether the amnesties granted to those who were individually responsible for colonial era atrocities were consistent with international law.

This issue of individual responsibility received attention only in contemporary transitional justice proposals of academics and civic society.<sup>41</sup> These can be traced to 2001, when the country could hardly be described as a transitional society since prospects of political talks or a negotiated settlement between Zimbabwe's opposition parties were still conjectural.<sup>42</sup> Indeed, possibilities for puissant change seemed remote, especially in the wake of the split and the weakening of the main opposition party, the Movement for Democratic Change (MDC), in 2005.<sup>43</sup>

Nevertheless, the existing literature on transitional justice in Zimbabwe can be roughly split into two camps. Firstly, there are the reports of human rights organizations, proceedings of civic society symposiums and statements from legal commentators and political parties.<sup>44</sup> The primary focus of these renditions is accountability for human rights abuses and the potential role for civic society in this regard.

40 See Michael Garcia Bochenek, 'Compensation for Human Rights Abuses in Zimbabwe' (1995) 26(2) *Columbia Human Rights Law Review* 483, Victor de Waal, *The Politics of Reconciliation: Zimbabwe's First Decade* (Hurst & Co 1990), Richard Carver, *Zimbabwe: A Break with the Past? Human Rights and Political Unity* (Africa Watch 1989), Richard Carver, 'Zimbabwe: Drawing a Line through the Past' (1993) 37(1) *Journal of African Law* 69, and Richard Carver, 'Zimbabwe: Drawing a Line through the Past' in N Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) pages 7–50. Restorative justice projects carried out were in the form of memorialization and exhumations; see Centre for the Study of Violence and Reconciliation (CSVR), 'Memorialisation and Reconciliation in Transitional Southern African Societies' (2005) <[www.csvr.org.za](http://www.csvr.org.za)>.

41 For a discussion of most of these initiatives, see Zimbabwe Human Rights NGO Forum, 'Exploring Transitional Justice Options in Contemporary Zimbabwe' *Special Report* (January 2006) <[www.hrforumzim.com/](http://www.hrforumzim.com/)>, and Max du Plessis and Jolyon Ford 'Justice and Peace in a New Zimbabwe; Transitional Justice Options' (2008) *ISS Occasional Paper* 164.

42 See Financial Gazette (Harare), 'Zimbabwe: UN Hopes for Negotiated Settlement' 6 July 2006 <<http://allafrica.com/>>.

43 For details on the split of these two main opposition parties see Movement for Democratic Change (UK) <[www.mdcuk.com/](http://www.mdcuk.com/)>.

44 See Zimbabwe Human Rights NGO Forum (n.41), The Redress Trust, 'Zimbabwe: From Impunity to Accountability, Are Reparations Possible for Victims of Gross and Systematic Human Violation' (2004) <[www.redress.org](http://www.redress.org)>, The Redress Trust, 'Torture in Zimbabwe, Past and Present: Prevention, Punishment, and Reparation? Survey of Law and Practice' (2005) <[www.redress.org](http://www.redress.org)>, Penny Morrel and Piers Pigou, *Civil Society and Justice in Zimbabwe: Proceedings of a Symposium Held in Johannesburg 11–13 August 2003* (Themba Lesizwe 2003).



## 8 Introduction

A key example of this approach is the ‘Civil Society and Justice in Zimbabwe’ symposium convened in Johannesburg in August 2003.<sup>45</sup> This event brought together 70 civic society organizations in Zimbabwe and South Africa, as well as transitional justice experts from other jurisdictions. Whilst this symposium made some reference to the issues of land, the rule of law and other matters, its final conclusion focused on the choice of a Truth, Justice and Reconciliation Commission (TJRC) as a mechanism for dealing with the legacy of human rights abuses. To pre-empt the criticism that the participants were conduits of imperialist ideologies, it was agreed that this TJRC would look into the abuses of both the colonial era and the postcolonial state.

In addition to securing redress for human rights violations, civic society lawyers have put considerable attention into legal and constitutional issues surrounding the transition.<sup>46</sup> There are also efforts to train domestic lawyers in transitional justice.<sup>47</sup> What has been absent in this debate is a comprehensive discussion on the judiciary, which is the key institution for interpreting the law both during ordinary times and in times of crisis.<sup>48</sup>

The second group of writings is that of academics and a number of students who have chosen to write theses on the area.<sup>49</sup> In this category, the focus of legal writings has been on the issue of how to address the legacy of human rights abuses.<sup>50</sup> Other transitional justice issues which do not necessarily relate to dealing with the legacy of past human rights violations have been considered mainly by non-legal scholars in disciplines such as land studies, political economy, developmental studies, history, peace and conflict studies and some other social sciences.<sup>51</sup>

The analysis of transitional justice in this work falls into the second tent of writings on the subject. It differs from most legal writings on Zimbabwe’s transitional justice issues in its starting premise that the law is not always a tool for justice.<sup>52</sup> It also notes that conventional transitional justice discourses do not necessarily respond to local priorities. Further, its focus is not only on traditional

45 Morrel and Pigou, *ibid*.

46 See ‘Constitutional and Legal Issues: Presentation and Group Discussion’ <[www.sarpn.org.za/documents/](http://www.sarpn.org.za/documents/)>.

47 See ‘The Zimbabwe Lawyers for Human Rights; Transitional Justice Project’ <[www.zlhr.org.zw/](http://www.zlhr.org.zw/)>.

48 This issue is the subject matter of Chapter 3.

49 See, for example, Andrew R Illiff, ‘Arresting Impunity: Toward a Transitional Justice Paradigm for Zimbabwe’ *Dissertation Prepared in Partial Fulfillment for a Degree with Honors – Bachelor of Arts* (Harvard College 2004) and Tendai Chabvuta, ‘Exploring Transitional Justice for Past Human Rights Violations: The Case of Zimbabwe’ *Unpublished LL.M Dissertation* (Transitional Justice Institute, University of Ulster 2006).

50 See, for example, Illiff, *ibid*.

51 See, for example, the range of essays in Brian Raftopoulos and Tyrone Savage, *Zimbabwe: Injustice and Reconciliation* (Institute for Justice and Reconciliation 2005).

52 See Chapter 2.

transitional justice issues of criminal justice, histories and reparations. Rather, this work adopts a holistic approach which also addresses issues at the periphery of paradigmatic transitional justice discourses, including land issues and minority rights.

In particular, the study's analytical breadth encompasses four issues.<sup>53</sup> These are: (1) rule of law and judicial independence, (2) land reform in transition, (3) minorities in societies in transition and (4) combating the legacy of human rights abuses.<sup>54</sup> Overall, the gender dimension is embraced in the spirit of the Fourth World Conference on Women in Beijing in 1995, which asserted that when attending to conflict, a progressive and ascertainable policy of mainstreaming a gender dimension into the agenda ought to be advanced, so that prior to making policy choices, it is established how such choices would impact respectively on both men and women.<sup>55</sup>

It has to be pointed out that these critical areas of the research are entwined. Pundits who have proposed a number of transitional justice mechanisms for Zimbabwe have stated that these are necessary if the rule of law and the credibility of the country's legal institutions are to be restored. Their simplistic assumptions are that the domestic rule of law deficit may be remedied by recourse to international law. In this vein, judicial independence is measured by the application of universal international legal standards. International law does contain some minimum standards which are of universal application, but its provisions are abstract, and its enforcement as well as its interpretation is often based on contemporary politics and interests rather than on shared values.<sup>56</sup> This fact is demonstrated in this work, which attends to both the complex and the context.

It may be difficult to comprehend the role which the law ought to play in dealing with Zimbabwe's past without appreciating the country's rule of law challenges as exemplified by the issue of judiciary independence which arose during the controversial land reform question. Also, while Western attention to the fairness of Zimbabwean elections, governance and human rights abuses largely followed the invasions of white-owned commercial farms in 2000, in reality widespread and systematic abuses, which claimed approximately 20,000 lives from one black minority group, occurred between 1983 and 1987.<sup>57</sup> Thus, any

53 Chapters 3–6 deal with these matters in detail.

54 Ibid.

55 Beijing Declaration and Platform for Action, Fourth World Conference on Women, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 adopted 15 September 1995 (see also the United Nations Security Council resolution 1325 (2000) on Women and peace and security S/Res/1325 (2000)).

56 For critical insights on international law, see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

57 Carver (1995) 9 (n.40) has it that in 1985 a BBC television crew was shown a mass grave in Nkayi (Matebeleland) containing bodies of people alleged to have disappeared. Allegations of six other graves in the vicinity were made.

interrogation of the country's legacy of impunity inevitably touches on the subject of minority rights.

### 1.3 Outline of the book

This chapter has set the scene for the discussion of international law and post-colonial comparative material in the chapters that follow. Chapter 2 functions as a conceptual and theoretical framework. It starts by drawing on scholarly legal treatises and political science authorities in its contribution to the debate on the definition of transitional justice. This discussion also explains how the critical areas of the research fit within the field. It takes into consideration the goals of transitional justice, grey areas in the discipline and some new developments and controversies. This is followed by a postcolonial critique of transitional justice. In this regard the chapter draws on the writings of highly qualified postcolonial theorists who challenge key assumptions in conventional thinking.<sup>58</sup> The chapter then presents the book's main argument, which is that even though the transitional justice discourse is largely controlled by those with power, it is open to seizure by less powerful states.<sup>59</sup>

Chapters 3–6 develop the main idea through engaging with context and by way of exposing the complex in discussions of international law and comparative material as they relate to the four areas of the study. For background information, and at the domestic level, these chapters take into account national constitutions, applicable legislation, domestic cases/reports of truth commission/findings of commissions of inquiry and peace agreements. Where applicable, and for comparative purposes, further reliance is placed on the basic documents, activity reports, decisions or communications, resolutions and the jurisprudence of regional human rights mechanisms, with a special attention on the work of the African Commission on Human and People's Rights. Useful insights are also taken from other social science disciplines, which include developmental studies, history, economic history, political science and land studies.

The chapters further draw from reports and conference proceedings of credible domestic and international human rights organizations that have closely monitored the Zimbabwean situation.<sup>60</sup> Concluding observations on the Zimbabwean

58 Indicative studies are those of Walter Dignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2012), Homi Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' in Homi Bhabha (ed) *The Location of Culture* (Routledge 1994) and Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

59 Moyo (n.8).

60 These include, *inter alia*, the Zimbabwe Human Rights NGO Forum's monthly and special reports, publications of the International Bar Association, Amnesty International country specific reports, relevant reports produced by Human Rights Watch, publications of the Redress Trust and those of the Institute for Justice and Reconciliation.

government's reports to the United Nations' treaty-monitoring bodies are also taken into account.<sup>61</sup>

In developing the four chapters' normative framework, the study is largely guided by the relevant provisions and *travaux préparatoires* of the core international human rights instruments. Where appropriate, the chapters also draw from the jurisprudence of these treaty-monitoring bodies. These incorporate General Comments, concluding observations on state parties' reports and cases decided by these bodies. The United Nations Security Council's resolutions and press releases on the essentials of post-conflict reconstruction, which arguably influence the evolution of international law, are also considered.<sup>62</sup> These include the resolution on women and armed conflict and the press release on restoring the rule of law in post-conflict dispensations.<sup>63</sup>

Chapter 7, the concluding chapter, sums up the main arguments and elaborates on the study's main contribution to transitional justice research. It is alive to the fact that focused research cannot cover all the issues which are identified in the process of analysis or those research questions which are products of the study. Thus, it also identifies areas which may require further exploration.<sup>64</sup>

61 See the Office of the High Commissioner for Human Rights <[www.ohchr.org](http://www.ohchr.org)>.

62 Examples are UN Security Council resolution 1325 (2000) on Women, Peace and Security S/RES/1325 (2000) and UN (2003), 'Restoring Rule of Law Absolutely Essential for Resolving Conflict, Rebuilding Secure, Humane Societies' *United Nations Press Release*, SC/7884, 30 September 2003 <[www.un.org](http://www.un.org)>.

63 Ibid.

64 Ibid.

## 2 Basic concepts of the study and a postcolonial critique

### 2.1 Introduction

Contemporary transitional justice has come to presage an array of legal and political processes that are employed to undo a past and build a better future in the passage from war to peace or from authoritarian rule to democracy. Typically, this involves four kinds of approaches, namely, criminal prosecutions, truth recovery, reparations and legal and institutional reforms to restore confidence and avert recurrence of abuses.<sup>1</sup> Of these approaches, this study concerns itself with the complexities of those processes that are geared towards restoring the rule of law and judicial independence, dealing with past land injustices, minority rights and the legacy of impunity in Zimbabwe, as an example of a postcolonial dispensation.

In order to identify the complexities of addressing these questions in Zimbabwe and other postcolonial societies, a broad overview of the field of transitional justice and its areas of oversight is necessary. With regard to limitations in the discourse, it is axiomatic that an exploration of all of the related research questions which emerge as a consequence of any such analysis is impossible, particularly in a focused study. Therefore, this chapter restricts itself to postcolonial concerns. The chapter is in three parts. The first part defines transitional justice. The second part locates the four critical areas of the study within the transitional justice discourse. The third part presents a postcolonial critique which is followed by concluding observations.

### 2.2 The field of transitional justice

#### 2.2.1 *Transition*

A widely cited definition of transitional justice is that of Ruti Teitel, who stated that it is the:

[C]onception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.<sup>2</sup>

1 Par 23 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, U.N. Doc. A/HRC/30/42 (2015).

2 Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.

Thus, the difference between ordinary justice and transitional justice is the use of law to effect regime change when a society is moving from conflict to peace. In view of this outlined complicity of the law in periods of repression, legal undertakings in transitional times are complex.<sup>3</sup> This issue has been traditionally explored from realist, idealist, critical and liberal theoretical perspectives which largely focus on the relationship between law and politics.<sup>4</sup> Teitel, however, has adopted a pragmatic approach, which points out that there is a dialectical relationship between law and politics in transitional times.<sup>5</sup> Law in times of transition is not just a product of political change; it actually provides a framework for the transition.<sup>6</sup> As Teitel notes:

[L]aw is caught between the past and the future, between backward looking and forward looking, between retrospective and prospective. Transitions imply paradigm shifts in the conception of justice; thus law's function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Ordinary predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.<sup>7</sup>

While heralding and sticking to the new liberal regime's undertaking to abide by principles of democracy and rule of law, law in transitional contexts authenticates a demarcation between the outgoing regime and the new dispensation.<sup>8</sup> Since domestic law is often politicized, international law, by virtue of its externality to the conflict, plays a significant role in the broader issues of national sovereignty.<sup>9</sup> It preserves the ordinary meaning of the rule of law, which entails notions of continuity and certainty that have often been absent from the outgoing regime.<sup>10</sup>

Indeed, law structures transitions in three different ways. First, it provides the normative basis for political transformation.<sup>11</sup> Second, legal norms and institutions

3 Ruti Teitel, *Transitional Justice* (Oxford University Press 2000). See also the discussion in Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'Justice Discourses in Transition' (2004) 13 *Social and Legal Studies* 306.

4 Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1996–1997) 106 *Yale Law Journal* 2009.

5 Ibid.

6 Ibid. See also the foreword by Lord Wright of Richmond in Michael Byers (ed), *The Role of Law in International Politics: Essays in Law and International Relations* (Oxford University Press 2000).

7 Teitel (n.4).

8 See Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press 1995) Volume 1, page xxi.

9 See Teitel (n.3) and Teitel (n.4). See also Colm Campbell and Fionnuala Ní Aoláin, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 *Human Rights Quarterly* 173.

10 See Teitel (n.4).

11 The authorities are just too many to be fully referenced here see among others: Ruti Teitel, 'How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past

## 14 *Basic concepts and a postcolonial critique*

underscore the illegitimacy of the prior regime.<sup>12</sup> Third, law is instrumental in advancing the political transition.<sup>13</sup> Put simply, different mechanisms employed in the aftermath of repression are based on international human rights convictions. Consequently, in challenging states to stop, delve into, penalize, mend and forestall human rights abuses, scholars and practitioners rely on international humanitarian law and international human rights.<sup>14</sup>

Nonetheless, another widely cited definition of transitional justice is that of the United Nations Secretary General (UNSG), which states that transitional justice

[C]omprises a full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>15</sup>

Thus, transitional societies *transition to* a reconciled and just society. The definition also states that transitional societies are those with a legacy of large-scale past human rights abuses. It is unclear whether those abuses need to be widespread or state-orchestrated and whether transitional justice concerns itself with abuses, which occurred in the immediate past. Knowledge of where transitional societies *transition from* is necessary, as it would put restrictions on when transitional justice can legitimately be applied.

### 2.2.2 *Transition from what?*

Transitional justice mechanisms are adopted after 'virtually every period of repression or civil violence'.<sup>16</sup> A pre-transition regime's illegitimacy is evident in

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Human Rights Abuses' in Neil J. Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol 1* (United States Institute of Peace Press 1995), Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1997), Juan E. Mendez, 'In Defense of Human Rights' in James A. McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997) page 5, Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 25 and Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1095.

12 Ruti Teitel, 'Paradoxes in the Revolution of the Rule of Law' (2004) 19 *Yale Journal International Law* 239.

13 Bell, Campbell and Ní Aoláin (n.3).

14 Ibid. See also Teitel (n.3) page 5.

15 Par 8, UN Security Council, 'Report of the Secretary-General – The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' S/2004/616\*.

16 Tricia D. Olsen et al., *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010) page 38.

the general discontent within the population, with its laws and institutions. It is usually characterized by widespread and largely state-orchestrated human rights abuses. Often, the state does not acknowledge the existence of these human rights abuses. Instead of respecting the rule of law, it 'rules by law', seeing the law as imposing obligations on the citizens and not on the regime itself. Clear-cut examples of transitional societies would include post-Pinochet Chile and post-apartheid South Africa.<sup>17</sup> Unclear cases include those countries which Joanna Quinn has labelled as being non-transitional states and pre-transition countries.<sup>18</sup>

Non-transitional countries which have adopted what looks like transitional justice mechanisms include Canada, Australia and the USA.<sup>19</sup> In the cases of Australia and Canada, the issue relates to the national policy put in place to deal with the forcible removal of aboriginal children in Australia and the Canadian truth and reconciliation commission on residential schools. With respect to the USA, consideration is given to the Greensboro Truth and Reconciliation Commission which was established in 2004.<sup>20</sup> This commission was intended to deal with the killing of five protestors and wounding of ten others by the Ku Klux Klan and the American Nazi Party in November 1979.

All three countries are firmly established democracies that are largely peaceful. Joanna Quinn has explained that whereas Australia, Canada and the USA may have been peaceful, firmly established democracies, the aboriginals and the Greensboro community were not afforded the same equality as non-aboriginals and the rest of the American population.<sup>21</sup> Thus, aboriginals and the Greensboro community were not living in the same peaceful democratic state as the rest of the population, hence the relevance of transitional justice. This raises the question whether transitional justice has to deal with atrocities which occurred in the immediate past, or whether it can also attend to historic injustices.

Quinn describes pre-transition countries as those in 'which there has not been a definite transition from one regime to the next, nor a clear move from conflict to peace'.<sup>22</sup> An example of a pre-transition country is Uganda, which has been

17 Cath Collins, 'Human Rights Trials in Chile during and after the "Pinochet Years"' (2009) 4(1) *International Journal of Transitional Justice* 67. See also François du Bois and Antje du Bois-Pedain (eds), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press 2009).

18 Rosemary L. Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7(1) *International Journal of Transitional Justice* 52. See also Jeff Corntassel et al., 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-determination in Australia, Canada, Guatemala, and Peru' (2008) 9(4) *Human Rights Review* 465.

19 Joanna R. Quinn, 'Whither the Transition of Transitional Justice' (2014–2015) 8(1) *Interdisciplinary Journal of Human Rights Law* 63. See also Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9(2) *International Journal of Transitional Justice* 199.

20 Greensboro Truth and Reconciliation Commission, 'Greensboro Truth and Reconciliation Commission Report: Executive Summary' (2006).

21 Quinn (n.19) 68.

22 Ibid at 72.



wracked by conflict since independence. There has never been a transition in Uganda, but Yoweri Museveni, who came to power in 1986 by means of military force, has implemented transitional justice mechanisms.<sup>23</sup> For example, two truth commissions have been convoked to deal with abuses committed between 1962 and 1986 as well as disappearances committed under Idi Amin. The International Criminal Court is also currently dealing with the crimes alleged to have been committed by the Lord's Resistance Army.

Uganda is not an exception in this regard. This seems to be a feature of most postcolonial polities. For example, as will be demonstrated in Chapter 6 of this book, Zimbabwe has been wracked by conflict since the colonial era and has adopted transitional justice mechanisms in different epochs. The country has yet to make a clean break with its past. With the exception of the period 2008–2013 when the country had an inclusive government made up of ZANU PF and the two MDC formations, Zimbabwe has been ruled by one political party (ZANU PF) in its almost 39 years of existence.<sup>24</sup>

Nonetheless, the International Centre for Transitional Justice (ICTJ) has stated that the question of whether a country is in a period of transition is not complex.<sup>25</sup> The issue is whether 'an opportunity has emerged to address massive violations, even if it is a limited opportunity'.<sup>26</sup> Opportunities have been presented by peace negotiations which have seen the incorporation of transitional justice as part of the conditions for ending conflict. Also, transitional justice mechanisms have been adopted by new governments replacing repressive regimes.

### 2.3 The 'justice' part of 'transitional justice'

To take Aristotle's distinction between corrective and distributive justice from which most discussions derive,<sup>27</sup> is transitional justice based on corrective justice or distributive justice? Does it provide for the rectification of wrongs when one person causes harm to another, or does it also require the sharing of various goods according to some relevant formula, for example, desert, need or equality? On this note the 2017 report of the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence states that:

[T]ransitional justice is a *corrective and preventive justice* tool that stands in a complex set of relations with other kinds of justice measures, including distributive justice initiatives, but that cannot replace them (emphasis added).<sup>28</sup>

23 Ibid at 74.

24 Between 2008 and 2013, there was an inclusive government made up of ZANU PF and the two factions of MDC (MDC-T lead by Morgan Tsvangirai and MDC-M lead Arthur Mutambara).

25 See International Centre for Transitional Justice (ICTJ), 'What Is Transitional Justice?' <[www.ictj.org/about/transitional-justice](http://www.ictj.org/about/transitional-justice)>.

26 Ibid.

27 Aristotle, *Nicomachean Ethics*, V, 2–5.

28 Par 86, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice (7 August 2017) A/HRC/36/50/Add.1.

However, other studies perceive transitional justice as including both corrective and distributive justice. For example, according to Jeremy Weber, transitional justice consists of three forms of justice, namely:

[t]he retrospective (backward-looking), the prospective (forward-looking), and the adjustment of contending legal and political orders.<sup>29</sup>

Of these three forms, Weber argues that the retrospective is corrective and the prospective is distributive.<sup>30</sup> Similarly, Nancy Fraser argued that one of the major dilemmas of justice projects is in striking a balance between commitments to redistribution and recognition.<sup>31</sup> Within the context of transitional justice, 'justice' as recognition may involve prosecutions, the creation of truth commissions or commissions of inquiry whose role is to recognize and acknowledge the atrocities of the past regime.<sup>32</sup> By contrast, justice as 'redistribution' seeks to re-order property or land rights and can symbolically redistribute shame, from the victim to the perpetrator.<sup>33</sup>

Another scholar, Rama Mani, identified rectificatory, legal and distributive justice as the three dimensions of justice that must all be pursued during transitions.<sup>34</sup> Rectificatory justice concerns redress for the explicit human outcomes of conflict structured in gross human rights abuses, war crimes, crimes against humanity and other injustices inflicted upon human beings.<sup>35</sup> Legal justice addresses the notion of the establishment of the rule of law that often loses its legitimacy, deteriorates or is destroyed both during and after a conflict.<sup>36</sup> Distributive justice focuses on economic and political inequalities, which are seen as the root causes of most conflicts.<sup>37</sup>

Also noteworthy is Ruti Teitel's expansive approach to the discourse, which delineates criminal justice, historic justice, reparatory justice, transitional constitutionalism and legislative and administrative responses as various legal approaches to injustices in the passage from repression to a liberal democracy.<sup>38</sup> She stated that

[a]djudications of the rule of law construct understandings of what is fair and just. Criminal, administrative, and historical investigations establish past wrongdoing. Reparatory projects vindicate rights generated by past wrongs

29 Jeremy Webber, 'Forms of Transitional Justice' (2012) 51 *Nomos* 98.

30 Ibid at 102–103.

31 Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist'* (Routledge 1997).

32 See Katherine M. Franke, 'Gendered Subjects of Transitional Justice' (2006) 15(3) *Columbia Journal of Gender and Law* 813.

33 Ibid.

34 Rama Mani, 'Beyond Retribution: Seeking Justice in the Shadows of War' (Polity 2002) page 5.

35 Ibid.

36 Ibid.

37 Ibid.

38 Teitel (n.3) 7.