

Idealist or Realist Transitional Justice: Which Way for Zimbabwe?¹

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ABSTRACT There are two dominant theories that elucidate the broad choice of transitional justice mechanisms available to societies with a history of gross violation of human rights, the realist and idealist theories of transitional justice. While realists advocate for the use of political processes such as the adoption of truth commissions, idealist believe in the supremacy and primacy of the law in dealing with past human rights abuses. This paper discusses the two theories' applicability to Zimbabwe while positioning endeavours of citizens who are using their everyday modes of life such as family healing mechanisms to seek historical accountability and reconciliation. When both law and politics fail to initiate mechanisms that deal with histories of gross violations of human rights, it can be said that 'natural' alternatives emerge. The conclusion of the paper is that there is need to conceptually broaden the scope of transitional justice away from presenting it as competition between peace/justice, realist/idealist, politics/law toward an inductive one that recognises an array of everyday activities that have turned into transitional justice mechanisms.

INTRODUCTION

This paper grapples with the theoretical conundrum as confronted by post conflict and post authoritarian states in their endeavour to get historical accountability for gross violations of human rights. This debate has been variously posited in binary terms such as peace versus justice (Sriram and Pillay 2009), truth versus justice (Roht-Arriaza and Mariezcurrena 2003), politics versus the law (Teitel 2005), or as this paper will argue as realist versus idealist transitional justice mechanisms (Teitel 1997). Using Zimbabwe (1980 to 2014) as a case study, the paper argues for the broadening of Teitel's (1997: 2009-2080) notion of transitional realism to encompass non-formal everyday modes of healing and reconciliation which are practised in Zimbabwe at family and community level. These mechanisms are not traditionally classified as transitional justice mechanisms yet they yield positive healing and reconciliation outcomes.

In unpacking the above complexity, Teitel (1997) analysed the competition between law and politics in the formulation of transitional justice mechanisms in transitional societies. To explain her findings, she advanced a theory that she termed 'transitional jurisprudence', according to which there are idealist and the realist mechanisms of transitional justice. Basically, idealists believe that transitional justice in its purest form

only exists when there are trials of suspects of human rights abuses. While realists believe that transitional justice requires bodies such as truth commissions to facilitate the healing process, idealists subscribe to the primacy of the law and prosecutions in getting historical accountability for human rights abuses.

While what constitutes transitional justice is general known (Kritz 1995; Lundy 2009; Minkinen 2007). It is however worthwhile to restate it so as to offer a working definition for the arguments to follow. Transitional justice mechanisms refers to an array of instruments and mechanisms used in post-conflict and post dictatorial states to deter future abuses, seek accountability, and achieve a consensus on truth and reconciliation, among other goals (Benyera 2014b: 336). Teitel (1997) divided transitional justice mechanisms into realist and idealist mechanisms. Transitional idealism is an ideal type of transitional justice mechanism in which all perpetrators of gross violations of human rights are prosecuted before competent courts of law. On the other hand, transitional realism is a broad based compromise type of transitional justice in which the victims and the perpetrators are involved in navigating their past, with the perpetrators acknowledging their wrong doing and the victims forgiving them. Realist mechanisms of transitional justice include truth commissions, reparations, lustration, museums and other forms of memori-

alisation, while idealists see trials as the primary mechanism of achieving justice. Transitional idealism and to a lesser extent transitional realism does not consider informal grassroots mechanisms in their conceptualisation of transitional justice. Yet in a country like Zimbabwe there are mechanisms being used to heal, reconcile and achieve historical accountability which can neither be clearly categorised as realist or idealist. This alludes to shortcomings in the conceptualisation of transitional justice as idealist or realist which can be attributed to the fluidity of transitional justice which is admittedly still growing both as field of study and as a practise.

Before indulging in the realist/idealist debate, a qualification of the transition in transitional justice will be briefly undertaken. A sagacious entry point into the debate is Bell's broad definition of transitional justice. For Bell, transitional justice is an ambivalent abstractions which straddles three different concepts; transitional justice as an on-going battle against impunity rooted in human rights discourse; and as a set of conflict resolution techniques related to constitution-making; and a tool for international state-building in the aftermath of mass atrocity (Bell in Castern 2012). In this regard, a political transition must be simply understood as that interval between one political regime and another (O'Donnell and Schmitter 1986). Bratton and van de Walle (1997: 10) agree and posit that a political transition is a shift from one set of political procedures to another, from an old pattern to a new one. It can therefore be proffered that Zimbabwe's political transition began on 15 September 2008, when a Global Political Agreement (GPA) was signed between the two Movement for Democratic Change (MDC) parties and the Zimbabwe African National Union Patriotic Front's (ZANU-PF). According to Masunungure (2009) the process of political transition in Zimbabwe required a movement away from ZANU-PF's political hegemony to something other than its undiluted political domination, a situation which the GPA provided. Whether Zimbabwe regressed from the political transition provided for under the now expired GPA is a debate that is beyond the scope of this paper.

Some preliminary comments on the differences between transitional realism and transitional idealism would suffice. The main difference between transitional idealism and realism is that while realism relies on political means to achieve

transitional justice, idealism relies on the law. In their grounding, the former is predominantly a political concept, while the latter is legal. Both realists and idealists agree that the effectiveness of a transitional justice mechanism lies in its prospects for realising democracy. A corrupt, captured judiciary will tolerate or even promote the impunity, while an independent judiciary will influence the adoption of idealist mechanisms to address past human rights violations. It can be observed that Zimbabwe is far from being idealist in its approach to transitional justice since politics captured the law and rendered it subservient to itself (Compagnon 2000: 449-453). This created a policy vacuum which grassroots mechanisms naturally and actively filled.

If Masunungure (2009) is correct in his assertion that Zimbabwe was a transitional state during the tenure of the government of national unity (GNU) between 13 February 2009 and 29 June 2014, a question can be rightly posed; which type of a transitional state did Zimbabwe assume? Was it an idealist or realist transitional process? If the failure of Zimbabwe's political transition during this period is a fact, can it be due to the fact that the wrong transitional model was followed? This paper unpacks these issues first by exploring the two models of political transition, namely idealist and realist transitions. This is followed by a section which critiques both idealist and realist political transitional models by arguing for the broadening of the notion of transitional realism to encompass modes of everyday healing which are not classified as typical transitional justice mechanisms (Benyera 2014b: 335).

TRANSITIONAL IDEALISM

Transitional idealism conceptualise transitional justice as a political process. It refers to those theories and practices that deal with the ideals of a 'better' world, state, politics and laws and is traceable to Plato, who is considered the father of idealism (Nightingale and McDonald 2003: 555). Plato's contribution to the philosophy of idealism is contained in his masterpiece, *The Republic* (380 CE) which is concerned with the definition of justice and the order and character of the 'just city state' and the 'just man' and examines whether or not the 'just man' is happier than the 'unjust man'. Regarding idealism, Plato posited that:

...we are inquiring into the *nature of absolute justice* and into the character of the *perfectly just*, and into *injustice* and the *perfectly unjust*, that we might have *an ideal* (1901: 163).

It can be deduced that idealism is utopian in that it deals with the nature of absolute justice and the pursuit of an ideal society. Jayapalan (2002: 119) noted that idealism sets out to understand the character of the perfectly just, which is desired, as opposed to the perfectly unjust, which has no place in the ideal society. Extrapolated to the concept of transitional justice, transitional idealism seeks notions of absolute criminal justice, not compromise justice. This ideal justice is seen to be achievable through the application of the law in an effort to create a just and ideal society. Idealism deals with 'what ought to be' and is therefore prescriptive in its view of what is supposed to occur in a (perfect) system of justice. Distilled to its basics, transitional idealism holds that all perpetrators must be held accountable for their past violations of human rights. Transitional idealism's major mechanism is prosecution, either in local courts or international institutions such as the International Criminal Court (ICC).

In its quest to attain a just and ideal society, transitional idealism addresses its obstacles by applying the letter and spirit of the law, consequences notwithstanding (Fuller 1958: 630-672). Idealism postulates that transitional justice must be induced and realised, because it resides 'elsewhere' (probably in some institutions such as the courts of law) and not in the society or in the victims and perpetrators. These transitional idealistic practices are believed to have gained prominence through the championing of the doctrine of universalism, which gained ground with the demise of communism. Its proponents argue that transitional idealism's major strengths lie in its ability to curtail vengeance by instituting individual accountability (Kritz 1995: 280; Schabas 2008: 70). Idealism's obsession with universalistic prosecutorial transitional justice is also its Achilles. Some cases of human rights abuses, their brutality and unacceptability noted, are better off dealt with using particularistic political processes. The logic being that political problems are often solvable through political process as opposed to legal means.

The strongest appeal of transitional idealism comes from its (associated) democratic peace theory, which holds that states with simi-

lar modes of democratic governance do not fight one another (Huntington 1993: 22-49). Therefore, to deter the recurrence of violence, transitional idealists argue that all transitional states must align themselves with the ideal type of democracy. One well-known proponent of idealism was the former United States President, Woodrow Wilson, whose idealistic thought was embodied in his 'Fourteen Points' speech (Rossini 2008: 63), which he delivered before a joint session of the American Congress on 8 January 1918. The address was intended to assure the country that the Great War was being fought for a moral cause and for the sake of post-war peace in Europe (Bradford 2010: 159). Wilson was also instrumental in the formation of the League of Nations, founded as a result of the Paris Peace Conference that brought World War One to an end. It was the first permanent international organisation to embody the idealist notion of collectively maintaining world peace (Duncan et al. 2008: 171).

In preparation for the next section, which explores the notion of transitional realism, it is prudent to consider some preliminary differences between transitional idealism and transitional realism by deploying the theory of transitional jurisprudence. This theory articulates the nature and extent of the competition that exists between law and politics in the formulation of transitional justice mechanisms (Teitel 2000: 3). For idealists, democracy is attained when the principle of the rule of law and the supremacy of the constitution are attained or restored (Antoine 2009: 98). In arguing for the broadening of transitional idealism beyond prosecutions, Ndulo and Duthie (2009) saw value in twinning transitional justice with broader post-conflict development programmes, rather than treating transitional justice as a stand-alone post-conflict programme. This conceptualisation forms the basis of transitional realism, which will be the focus of the next section.

TRANSITIONAL REALISM

A number of studies have broadly explored the relationship between realism and idealism (Burley 1993; Farrell 2005: 263-283; Tomuschat 2014). As espoused by Teitel (1997), transitional realism is a direct derivative of political realism. As a concept, political realism has been used in connection with theories claiming to be con-

cerned with the observance and analysis of political facts, with the 'what is' of politics and history. Philosophically, realism is traceable to Baruch Spinoza (1677) who expressed his views on realism in his work titled *Tractatus politicus* (or 'Political Treatise'), which he wrote in 1675, but which was published posthumously in 1677. The treatise deals with a range of issues, including an analysis of all forms of government, gender equality and peace. Spinoza noted that:

...on applying my mind to politics, I have resolved to demonstrate by a certain undoubted course of argument or to deduce from the very condition of human nature, not what is new and unheard of, but only such things that agree best with practice. I have laboured carefully not to mock, lament ... but to understand human actions (Spinoza in Nadler 2001: 342).

Certain tenets of political realism are observable in the above quotation. Realism does not deal with new concepts; rather, it concerns itself with what is already known to constitute general practice. Its key characteristic is that it endeavours to understand human actions. When applied to transitional justice it implies that realism is concerned with the general practices of societies, developed by these societies and used over time.

For Machiavelli, who noted in *The Prince* (1513, titled *De principatibus*), realism is the political doctrine of expediency. Transitional realism therefore deals with what is happening in post-conflict and post dictatorial societies as opposed to an absent ideal that is desirable. In reaching realistic practices and solutions, transitional realism takes cognisance of the obstacles that are or may be inherent in any rational solution. In effect, transitional realism manoeuvres around these obstacles, and does not confront them in its quest to attain transitional justice. It posits that transitional justice solutions are inherent in societal social facts and trends, which are bottom-up, less judicial, culturally relevant, reconciliatory, restorative, victim-centred, locally derived and less costly (financially) to implement (Benyera 2014: 335).

By definition, transitional realism refers to an array of mechanisms and institutions that constitute a part of everyday life, used by post-conflict communities to seek reconciliation, retrieve the truth and get reparations, *inter alia*. This represents a radical departure from transitional idealism, which emphasises accountabili-

ty, mainly through prosecutions. Thus transitional realism is a local phenomenon based on local cultures, realities, traditions, perceptions and needs. Transitional realists perceive democracy as the opening up of spaces that were previously the preserve of the predecessor regime. The opening of these spaces can take the form of electoral, media and or constitutional reforms. In addition, and in agreement with transitional idealism, realism subscribes to the need for free and fair regular elections as a basis for democracy.

Transitional realism focuses on local transitional justice mechanisms that represent a rebuke of defeatist tendencies in that they epitomise communities' initiatives to seize opportunities and initiate some form of justice. These are termed local transitional justice mechanisms and as a broader concept they are not definable in geographical terms alone, although geography is an integral part of their definition. In addition to spatial boundaries, local transitional justice mechanisms include concepts and practices of local ownership and the engagement of those most affected by the conflict (Lundy 2009: 321). They entail processes in which local inhabitants have a real and significant say in the formulation, implementation and evaluation of transitional justice mechanisms that reflect their own perceptions of reconciliation, specific cultures and values. This involves what Lundy and McGovern (2008: 1) termed the 'voices from below', local agency and popular participation and represents a departure from the legalistic, top-down, 'one-size-fits-all' idealist transitional justice framework. This broader realist conceptualisation helps to address the shortcomings inherent in idealist mechanisms, such as their inability to deal adequately with the issue of resentment, which can manifest in the form of victims who refuse to forgive those who harmed them, for instance. Idealist mechanisms have tended to impose what Derrida (2000) calls the conditional forgiveness of 'social therapy' on victims.

However, realist transitional justice mechanisms require interrogation in order to ascertain their capacity to deliver what Minkinen (2007: 513-531) terms 'just' forgiveness. This eliminates the possibility of impunity disguised as pardons and amnesties which, according to Kant (1914: 337), constitute the greatest wrong because they break the important formal link between crime and punishment. This broader realist view as-

sists in revealing transitional justice mechanisms that are used in communities which experienced what Shweder (2005: 181) terms the 'collision of cultures, rights and traditions'. Transitional realism takes into account factors such as the environment, culture, health, gender and religion, which transitional idealism rarely considers in its application of transitional justice. The exclusion of victims' voices and social practices by idealists does not permit a full comprehension of the extent of the role that the presence of material, as well as gender, socio-cultural and spiritual factors plays in the victims' perceptions and attitudes towards justice and reconciliation in post-conflict societies (Igreja 2007: 55-56).

From the above discussion, key characteristics of realist transitional justice mechanisms can be identified. They are victim-centred, locally conceived and locally implemented. The mechanisms are not alien or new to the communities, because they include everyday reconciliatory community endeavours. Most importantly, they are bottom-up and flexible in their response to the healing and reconciliation needs of the victims and the perpetrators. This contrasts with dominant theories of transitional justice, which share a common weakness in that they often presuppose foundations that are unavailable in the context of political transitions (Leebaw 2001: 364). For example, advocacy for transitional prosecutions often relies on the premises that are drawn from the manner in which prosecution functions in a stable regime. Similarly, critics of prosecution who champion reconciliation, imply a pre-existing homogenous community of victims that requires healing in order to progress toward the rule of law (Leebaw 2001: 264).

The reality is that victims and perpetrators often reside in the same communities. In some scenarios, the same individual who was a victim at one time may have turned perpetrator at another time. Transitional idealism also tends to ignore dynamics of local environments such as culture, religion and customs. Consequently, it lacks the capacity to deal with complexities such as victims who genuinely refuse to forgive, as well as the problems associated with individuals who are both victims and offenders, something that is common in communities where violence is or was recurrent. The same theories emphasise ideals that appear to be very difficult for the local communities to comprehend in the aftermath of protracted mass violence and dic-

tatorships. These ideals include such in-vogue phrases as *reconstruction*, *rebuilding*, *reuniting*, *refocusing*, *restarting*, and so on. At times, there will be no one to reunite with, nowhere to rebuild, nothing to refocus on and nowhere to restart.

The major characteristic of realism, as observed earlier, is that its various mechanisms are bottom-up processes and not events. Some of these bottom-up processes utilise the concept of the 'living dead' (Villa-Vicencio 2009: 142), which is a central pillar in African traditional belief systems. These belief systems in turn give meaning to traditional transitional justice mechanisms. As an idealist universal concept, traditional transitional justice is difficult to conceptualise, because it tends to be particularistic, both in the way it is understood and in the way it is expected to deliver by individual victims and perpetrators (Layus 2010: 93). This individualistic conceptualisation renders elements such as collective memory very difficult to employ, because gross violations of human rights affect individuals differently. The affected thus also expect different remedies and memorialise such events differently (Igreja 2007; Eppel 2001: 8). These remedies vary according to a range of factors such as culture, gender and religion.

Transitional realism emphasises the seemingly obvious fact that victims are central to the dispensation of transitional justice, because they are the primary wronged and because they are the ones requiring direct compensation and healing (although to some extent, perpetrators need healing as well). In contrast, idealist mechanisms focus mainly on the offender and insist that justice be not only done, but is seen to be done. These differences are also manifested in the manner in which the two approaches view amnesties. Idealists view amnesty as a violation of human rights (Martin 2006: 172). For them, amnesty means that victims suffer twice, because amnesty allows offenders to evade accountability for their actions or the payment of compensation. Realists, on the other hand, view amnesties as a 'necessary evil' that aids the process of truth telling and truth recovery. Idealists are concerned that transitional justice mechanisms such as amnesties are open to abuse by both politicians and perpetrators, to the detriment of victims.

Recent evidence pointing to this kind of weakness with amnesties comes from South Africa, where in 2002, President Mbeki pardoned

33 human rights abuse offenders under the Special Presidential Pardon programme (Institute of Security Studies News: 29 June 2012). Other amnesty beneficiaries such as Dirk Coetzee, the late co-founder and commander of the covert South African Police unit based at Vlakplaas, were granted amnesty as a last resort in their bid to avoid prosecution. In a television interview on SABC 2's morning show on 8 March 2013, former Truth and Reconciliation Commissioner Advocate Dumisa Ntsebeza expressed regret that perpetrators like Coetzee had managed to manipulate the amnesty procedure and received pardon. This allowed Coetzee to go to his grave with the secrets of his hit squad, which included the whereabouts of many anti-apartheid and human rights activists who disappeared during apartheid. Such manipulations of amnesties discredit transitional realism and give credence to idealist transitional justice mechanisms, especially trials. Broader transitional realism enhances the capacity to extend the scope of transitional justice to include non-formal mechanisms such as those used at grassroots level, as well as other mechanisms not traditionally classified as transitional justice mechanisms. This theory is ideal for Zimbabwe, where the scope of transitional justice is broad and citizens have employed a diverse range of innovative mechanisms to seek healing and reconciliation *inter alia*.

Elsewhere, the transitional realism theory has been applied in other scenarios of reconciliation. Thomson and Nagy (2011: 11-30) applied it in their study of Rwanda's *gacaca* community courts, which focused on the relationship between law, power and justice as they impacted on the lives of ordinary Rwandans. Their study showed that transitional idealism and transitional realism are not at the extreme ends of a continuum; rather, they can be stretched to create overlaps, which allow the benefits of both to be enjoyed. This hybridisation is evident in the 'legalisation' process which the traditional *gacaca* institution underwent as it was applied after the Rwanda 1994 genocide. It was a hybrid of the traditional process, which was 'amended' in order to cope, *inter alia*, with the complexities of modern-day justice while still being administered locally and thereby remaining accessible to citizens.

TOWARDS A BROADER REALIST THEORY OF TRANSITIONAL JUSTICE

On the basis of the preceding analysis of realist and idealist theories of transitional justice, it is important to note that a broader realist view is not only necessary, but overdue. This broader view consists of an array of traditional, community and other non-state transitional justice mechanisms. Traditional transitional justice, also known as localised transitional justice, can best be described as a notion of place, people and processes (Lundy 2009: 321). It defines local transitional justice mechanisms as a set of locally informed reconciliation and peace-building practices that emerge within a particular society, and which are different or unique to that geographical place. Lundy (2009: 329) rightly states that:

the crux of the matter is how local populations are conceptualised, as active agents of change, stakeholders, sources of knowledge and expertise, or as passive victims and mere recipients.

In the Zimbabwean context, the localised nature of broader realist transitional justice mechanisms allows for the nuanced analysis of customary practices that were turned into transitional justice mechanisms, especially in the rural areas of the Shona-speaking districts of Zimbabwe (Marongwe 2012). The advantage of broader transitional realism is that it allows for an expansion of the current understanding of impunity beyond the legal definition to include other forms such as environmental impunity, religious impunity and financial impunity, which is defined as follows. Environmental impunity is the wanton destruction of the environment during war or periods of gross violations of human rights. The most widespread form of environmental impunity is the laying of unmarked landmine fields, destruction of forests, poisoning of rivers and the use of chemicals harmful to the environment during war. An example is the alleged use of anthrax by Rhodesian government agents and the contamination of several water-courses near the Mozambique border with the cholera bacteria and warfarin, which is a blood-thinning anti-coagulant commonly used as the active ingredient in rat poison. Poaching is also another form of environmental impunity. It mainly serves two functions; to provide combatants with food and to raise money through the illicit

sale of products such as ivory and game leather (United Nations Environmental Programme 2007: 94). As a crime, environmental impunity remains under-investigated in Zimbabwe. On the other hand, religious impunity is the abuse of various religions and their aspects for political gain. It involves, *inter alia*, the manipulation of religious leaders to carry out or support certain policies, which ordinarily they would not have supported. It also involves the abuse of religious powers by the religious leaders for their personal political gain. Financial impunity is akin to embezzlement and occurs during war and similar political disturbances when individuals and organisations pilfer huge sums of money, sometimes siphoning it off into offshore accounts. This practice also involves supporting and propping up of illegal regimes in exchange for business opportunities and lucrative tenders and contracts. These factors are elusive in the dominant views of transitional justice, yet they are central to reconciliation because they inform the expectations of both victims and perpetrators.

Besides the practicalities of broadening realist transitional justice as argued above, there is also a strong theoretical motivation for undertaking this endeavour. The manner in which the idealist theory defines political transitions as postulated by Huntington (1991) and O'Donnell and Schmitter (1986) is problematic. Defining the transitional period purely as a movement towards liberal democracy or some democratic procedure limits the conceptualisation of transitional justice. The concept of political transition needs to be broadened to include other non-state (apolitical), non-legal practices that seek historical accountability for human rights abuses, especially those that succeed in reconciling and healing conflict torn communities. These practices occur as a result of a shift in both the legal and the political situation from radicalism toward a more liberal approach. This leads to the creation of an opportune moment for citizens to seek transitional justice using the various mechanisms at their disposal without necessarily waiting for the state to initiate such healing programmes. For idealists, the transitional period both constitutes and constructs the unique legal system in which it operates and in which prior injustices inform the conceptualisation of justice (Teitel 2000: 222).

Another shortcoming of transitional idealism is that it often presupposes the existence of

willing, competent and unbiased judiciaries, either domestically or internationally. The reality is that criminal accountability occurs at two levels; that of the offender and that of the criminal justice system itself. The accountability of the latter is particularly crucial as its failure leads to impunity and warlordism. In a realist world dominated by power politics, this assumption appears farfetched, because most violations of human rights happen in societies where the judiciary is either biased or not independent. This is why realists do not subscribe to the supremacy of law over politics, advocating instead for changes and amendments in laws to suit certain prevailing conditions. According to realists, transitional justice necessitates the departure from punitive and repressive laws, a move toward the moral right and away from the legal right (Hart 1958: 593-629). The next section focuses on the role of the law during transitional periods as viewed by transitional idealists and transitional realists.

THE ROLE OF THE LAW DURING THE TRANSITIONAL PERIOD

Transitional idealism is useful in understanding the relationship between the law and human rights, especially in countries where the rule of law is weak or compromised. A general characteristic of dictatorships and illegitimate regimes is the occurrence of constant clashes between human rights and the law (Kritz 1995: 97). These occur when dictatorships enact immoral laws to oppress citizens while simultaneously propping up their regimes, thereby turning citizens into subjects (Fridell 2007: 57; Ndlovu-Gatsheni 2011; Mamdani 1996). This contest is cast elsewhere as parliament versus the constitution (Eleftheriadis 2007: 1) and occurs when individual human rights enshrined in the constitution are overridden or suppressed through the deployment of institutions set up by democratic processes such as the army, intelligence and the police to brutalise citizens. Transitional realists argue that transitional periods are good time to rewrite the constitution, while idealists, as postulated by Hart (1958: 593-629), argue for the observation of all written laws, their immorality notwithstanding, until such laws are repealed or amended. In most cases, constitutions are forward-looking, but in transitional periods they are also remedial and backward-looking (Teitel 2000: 225). These

constitutions or constitutional amendments are useful in addressing past abuses and instrumental in seeking historical accountability, while deterring such abuse from happening again in the future.

Constitutions have been used to propel transitional justice as occurred in Zimbabwe and South Africa post 1980 and 1993 respectively. In South Africa, the then interim *Constitution of the Republic of South Africa Act 200 of 1993*, which was later repealed by the current *Constitution of the Republic of South Africa [Number 108 of 1996]*, stated in its preamble that:

...it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

In Zimbabwe, *Constitutional Amendment Number 19* was the legal instrument that provided for the GPA signed by the three major political parties, which in turn made provisions for the writing of a new constitution. Paper 7 of the same instrument specifically mentions and mandates the GNU to:

... give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post-independence political conflicts.

According to Teitel (1997: 2017), human rights violations are legally said to have occurred when the value of legal change was in tension with the value of adherence to the principle of settled legal precedent. This is also called 'breaking the rule of law' and it has occurred with lamentable frequency in Zimbabwe since independence. This fact was admitted by the GNU when it was inaugurated through the GPA (Preamble to the Global Political Agreement 2008). For transitional idealists, the law remains superior, whatever form the state adopts during the transitional period. This is expressed in the dominant role of the law during transitional periods and the superiority of the law in terms of the supremacy of the constitution (Teitel 2009: 2014, Khan 2003: 255). According to this view, the law has a complex role to play in periods of political transformation from human rights abuse toward democracy. Idealists are aligned to Teitel's (2003: 69)

definition of transitional justice as the conception of justice associated with periods of political change, characterised by *legal responses* to confront the wrongdoings of repressive predecessor regimes.

While the superiority of the law is unquestioned by realists during peaceful times, they question the supremacy of immoral laws enacted by dictatorships and regimes, which they argue are akin to the proverbial fruits of a poisoned tree (Bohl 2006: 571). It is these contentious laws that realists argue should be discarded during the transitional period in order to enable the democratic transition to be effective and in order to prevent the state from sliding back into gross violations of human rights (Fuller 1958: 630, National Constitutional Assembly (Zimbabwe) 2001). The centrality of the law in transitional justice is demonstrated in Teitel's (2003: 69) definition of transitional justice in which she characterised its role as 'shepherding' the state through the precarious transitional period, initially enabling judicial reform and subsequently holding those who committed human rights abuses accountable for their actions. According to Teitel (1997: 2009; 2000: 7) and Williams et al. (2012: 59), law in transitional periods is commonly conceived as following idealist conceptions unaffected by the prevailing political context. The law is seen as separate from and superior to politics as enshrined in rigid constitutions and must be obeyed in all instances (Withana 2008: 57; Slapper and Kelly 2011: 455; Hart 1985: 593). This translates to the superiority of the constitution over parliament, as is the case in a constitutional democracy.

On the other hand, transitional realism is concerned with the legislative environment during the transition period and the nature and role of law during these periods (Teitel 1997: 2009). Idealist transitional justice mechanisms that are imported into post conflict societies, such as ICC prosecutions, are legally complex, rendering transitional justice complex and elitist (Hinton 2010: 59). Sriram et al. (2012: 52) call this the 'judicialisation' of transitional justice. Realists oppose this 'judicialisation' of transitional justice, claiming that trials create fairly individualised accounts of human rights crimes which deprive the post-conflict communities of a chance to understand the full extent of the patterns of human rights abuses that they suffered (Abou-el-Fadl 2012: 10). International Law Statutes, as

interpreted and implemented by the ICC, are a complex set of procedural remedies that are too legalistic for most citizens to understand (Lahai 2012). A case in point is the prosecution of Congolese warlord Thomas Lubanga. Instead of bringing peace to Eastern Democratic Republic of Congo (DRC), it actually brought reprisal attacks by his militia. Asked by international news network Al Jazeera what they thought about the work of the ICC in ending impunity and human rights abuses in Ituri District of Eastern DRC, one respondent noted that,

'...we don't know anything about the International Criminal Court or peace. All we know is running away', (Unidentified Ituri resident: Interview with Al Jazeera, 25 February 2013).

Teitel (1997: 2014) addresses the question of the stage during the political transformation period at which the law starts to apply in an idealist transitional state. For idealists, transitional justice should be concerned with gross violations of human rights during the two regimes (predecessor and successor), ending with some objective political procedure such as the writing of a new constitution or the holding of inclusive elections (Bernal et al. 2011). Idealists believe that the acceptance of the rule of law by all major political forces signifies the end of the transition period (Teitel 2000: 214; United Nations 2006: 294). According to Huntington (1991: 65), the transition period ends when the most powerful collective decision-makers are selected through fair, honest and periodic elections.

Teitel (1997) was therefore correct in characterising the manner in which transitional realism relates to the law as 'settled and unsettled, backward-looking and forward-looking, disclaiming past illiberal norms while reclaiming future liberal ones' (Teitel 1997: 2015). According to transitional realism, through the process of transitional jurisprudence, the law is constituted by borrowing from previous experiences and using them to predict possible political trajectories in order to pre-empt any future gross violations of human rights. For realism, the law is a pre-emptive mechanism that borrows from past experiences to avert future human rights abuses. It is 'settled' in that it applies continuously across the two regimes, 'unsettled' in that it is constituted and reconstituted during the transitional period (Naqvi 2008). It is this confused, unsettled nature of the law which appears to have induced citizens to seek alternative mechanisms to seek

healing and reconciliation in a manner that is non-legal – more so when the law had previously displayed a strong tendency to be annexed and abused by the ruling elite. It can be concluded that the main difference between transitional idealism and transitional realism is the manner in which they interpret the role of the law during the transitional period.

WHICH WAY FOR ZIMBABWE, REALISM OR IDEALIST: SOME RECOMMENDATIONS

The nature of political violence in Zimbabwe can be characterised as systemic, reproduced, deep and wide. It can also be cast as racialised, tribalised, and class based. This complex nature of violence requires equally complex set of tools and mechanisms to heal and reconcile such communities divided by violence for decades. These mechanisms are broader realist transitional justice mechanisms. They are bottom up, locally sensitive to such nuances as culture and most importantly endogenous to the communities. These mechanisms can be described as inductive owing to their origin within the violated communities. Instead of describing and listing these mechanisms, this section will argue why both idealist and realist transitional justice mechanisms are not suited for Zimbabwe. Prosecutions will be used as an example of transitional idealism while the National Peace and Reconciliation Commission (NPRC) will be used as an example of transitional realism.

Both transitional realism and idealism are not suited to bring healing and reconciliation to Zimbabwe because of the distrust which the population has for the judiciary. This institution has been cast as a willing instrument of the state. According to Badza (2008: 5):

Zimbabwe's party-state system compromises the fundamental democratic principle of separation of powers among the key arms of the state that include the executive, the judiciary and the legislature. The independence of the judiciary has increasingly been compromised, especially since the emergence of the opposition MDC in 1999. Its performance record during the harmonised elections confirmed the lack of independence and autonomy of the judiciary. In fact, it is perceived to be unconditionally accountable to the executive, at the expense of upholding the rule of law. The separation of pow-

ers in Zimbabwe has seen real power being collapsed into one arm, that is, the executive.

With such a captured and distrusted judiciary, prosecutions will always be treated with cynicism if not disparagement by victims of human rights abuse in Zimbabwe. The state's perpetual belittling and mocking of international and regional justice mechanisms such as the ICC and the Southern African Development Community Tribunal (SADC tribunal) leaves the victims with no regional or international legal recourses, more so given the fact that Zimbabwe is not a signatory to the Rome statute and that it withdrew from SADC tribunal in September 2009. In such cases the constitution becomes the last hope for those who subscribe to transitional idealism. Indeed a new constitution was crafted for Zimbabwe and came into effect on 22 May 2013 when President Mugabe ascended to it. The constitution has an array of provisions to uphold human rights such as Chapter 12, Part 3 which provides for the Zimbabwe Human Rights Commission, Part 6 which provides for the NPRC and Chapter 13 Part 2 which provides for the National Prosecuting Authority. These are well meaning entities which unfortunately operate within a poisoned and divided political environment. As long the judiciary remains subservient to the executive, whatever happens at the lower levels is immaterial in terms of healing and reconciling Zimbabweans.

The state's obsession with what Ndlovu-Gatsheni and Benyera (2015: 5) termed a paradigm of war which refuses to die and perpetually stifles any well-meaning realistic or idealist transitional justice mechanisms is a worrying fact. They noted that:

A paradigm of war refuses to disappear in Zimbabwe and Chimurenga emerges as the prime and most preferred solution to most national questions. Zimbabwe has just emerged from a violent Third Chimurenga that was used to resolve the land question. Closely tied to the ideology of Chimurenga is the practice of governance through military operations. This has resulted in a society that was permeated institutionally by militarism and violence. This creates more healing and reconciliation challenges while leaving previous ones unresolved (Ndlovu-Gatsheni and Benyera (2015: 5).

Thus the state's proclivity towards militarism and a *chimurenga* monologue (Ndlovu-Gatsheni 2011), emerges as the greatest threat to

any well-meaning idealist or realist transitional justice mechanisms in Zimbabwe leaving communities and families to evoke everyday modes of healing and reconciliation such as *ngozi*, (avenging spirits), *botso* (self-shaming), *chenura* (cleansing ceremonies), *nhimbe* (community working groups, and *nyaradzo* (memorials) that are central to their particular cosmology (Benyera 2014: 335-344). Another complexity in the transitional justice landscape in Zimbabwe is the presence of the political party accused of being the chief benefactor of gross violations of human rights in power. Thus ZANU PF, both as an organisation and as a collective of individuals, severally and jointly is accused, one way or the other, of perpetrating human rights abuses. This brings to the fore the challenges associated with prosecuting a ruling political party, more so given the well documented manner in which ZANU PF controls the other arms of the state especially the judiciary which is central in any prosecutorial transitional justice process. Under these circumstances genuine healing and reconciliation in Zimbabwe is only achievable through the use of broader realist transitional justice mechanism. These mechanisms need to originate from the communities and epitomise community agency in seeking a particular healing and reconciliation modicum which speaks to their peculiar historical human rights abuses. Non state transitional justice mechanisms are thus proposed as the most viable means of making substantial strides in the otherwise stagnant healing and reconciliation processes in Zimbabwe. The main reason of this is that the wronged are the best people to ascertain how they want to be healed and how they intend, if they intend, to reconcile with their abusers. This is in direct contrast to idealist transitional justice mechanisms which put the accused state as both the engineer and main implementer of transitional justice mechanisms, notwithstanding that the very state is the prime accused of perpetrating and benefiting from human rights abuses.

CONCLUSION

This paper discussed the application of Ruti Teitel's transitional idealism and transitional realism to post conflict/authoritarian states. The former theory emphasises the supremacy of law while the latter stresses the supremacy of contextual mechanisms that are sensitive to the pre-

carious nature of political transitions. An alternative, albeit broader, definition of transitional realism was also proposed. It consists of a broad range of bottom-up, victim-centred initiatives taken by communities in an endeavour to seek reconciliation and lasting peace. Such broad realist transitional justice mechanisms were identified as viable reconciliation and peace building mechanisms. These mechanisms are based on the agency of the victims and decades-old customary practices. The paper concluded by noting conditions in Zimbabwe which render both transitional idealism and transitional idealism futile in Zimbabwe. It noted the captured nature of the judiciary, the state's mistrust of any other justice mechanisms especially regional and international ones, the perpetual militarisation of the state and the proclivity towards employing *zvimurenga* as the preferred method of solving any problems in Zimbabwe as the chief threats to transitional idealism/realism. It was noted that this was exacerbated by the fact that the ruling party is the prime accused of human rights abuses in Zimbabwe. All these factors position broad realist transitional justice mechanisms as viable concomitants for achieving bottom up healing and reconciliation in Zimbabwe.

NOTE

- 1 This article was part of the author's PhD thesis, 2014, Debating the efficacy of transitional justice mechanisms: The case of national healing in Zimbabwe, 1980-2011. PhD thesis, The University of South Africa.

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