

On the Question of the Transition: Was Zimbabwe¹ a Transitional State between 2008 and 2013?*

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ABSTRACT What constitutes the transition in transitional justice is highly contested. The transition in transitional justice is generally conceptualised as constituting the demarcation period between the undesired past which is littered with human rights violations and the desired future which promises to be democratic and peaceful. This paper debates the transition in transitional justice and uses Zimbabwe as a case study to argue that the transition is a function of the nature of human rights abuses experienced in a particular community. The negotiated transition model and the mediated negotiation model in which the positionality of reformers, moderators and hardliners within the outgoing and incoming regimes determine the type of transition that a community undergoes are used as the theoretical framework for this discussion. The conclusion of the paper is that the fluidity and malleability of the notion of the transition in transitional justice has rendered it prone to abuse by the various stakeholders in transitional justice both as a field of study and practise of healing and reconciling communities which seek historical accountability of human rights abuses.

INTRODUCTION

After periods of gross violations of human rights¹, ordinary citizens in many countries, including Zimbabwe², delve into their own internal resources for post conflict justice and reconciliation. This often becomes the default position where governments exhibit both in action and non-action towards the peace building and reconciliation needs of their communities, especially those at the grassroots. As observed by Machakanja (2010: 6) and Mashingaidze (2010: 20), between 1980 and 2011 the Government of Zimbabwe failed to adopt any victim-centred policies to deal with gross violations of human rights such as war crimes, genocide or victims' compensation. Using almost exactly the same words as he had for the past 32 years, President Robert Mugabe exhorted the nation to let 'bygones be bygones', pleading particularly with victims not to seek historical accountability for the sake of peace (Mugabe 1980: 2012).³ This precedent of letting past human rights abuses go unaccounted for was set during Mugabe's inaugural speech as Zimbabwe's leader at Rufaro Stadium in Harare, on 18 April 1980, where he

urged Zimbabweans to forgive each other unconditionally (van Binsbergen 2003: 542). This policy adopted by Mugabe of pressing Zimbabweans to forgive and forget past violations of human rights has, over the years, necessitated the emergence of an indigenous African civil society to fill this policy vacuum by setting up and implementing its own transitional justice agenda.

Two broad models namely Negotiated Transition Model and the Mediated Negotiation Model are used to assess whether Zimbabwe was in a transitional state between 2008 and 2013. These two typologies of transitional justice mechanisms were posited by Teitel (1997: 2009-2080). However, before venturing into the two theoretical typologies of transitional models, it is imperative to define what is meant by political transitions, which will be undertaken in the next section. This paper is organised into the following sections; the first part characterises the transitional period. In the second section, the debate on the trajectory of transitional states is explored by answering the question, transition from where to where? This is followed by a theoretical section in which the negotiated transition model and the mediated negotiation model are used to assess whether Zimbabwe was in transition between 2008 and 2013. The nature of human rights abuses which occurred in Zimbabwe are presented as a precursor to the discus-

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sion on Zimbabwe's transition. The final section before the conclusion is a critique of Zimbabwe's transitional period.

Transitional Justice: General View

What it is that constitutes exactly the totality of transitional justice is not generally agreed upon and remains very much a contested area of study (Teitel 2002). Equally problematic is the categorisation of the various definitions of transitional justice that have been proffered by a plethora of organisations, scholars, institutes and governments. These challenges notwithstanding, transitional justice possesses certain defining characteristics such as the concepts of justice, reconciliation, reparations and political transition, normally from one regime to another, from authoritarianism or repressive rule to more democratic governance (Benyera 2015). In the transitional context, the concept of justice refers to the seeking of justice for victims by holding those accountable for past human rights abuses responsible for the wrongful actions. Over time, different definitions of transitional justice have been employed, usually in response hitherto contemporary developments.

There are three distinct periods in the conceptualisation of transitional justice. Founding transitional justice scholars associated the subject with 'periods of political change' and 'confronting wrongdoings' (Teitel 2000: 9; Hamber and Kelly 2009: 2; Forsythe 2011: 82). According to this view, transitional justice is implemented long after the human rights abuses were committed, such as in the case of the Japanese comfort women. In this case, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery convened on 8 December 2000 to gather testimonies from victims of Second World War abuses of women taken as sex slaves (Shoh 2008: 1-97). In effect, the former comfort women waited for justice for two generations (61 years). However, after the Balkan wars and the Rwandan genocide the definition of transitional justice began to focus on 'post conflict justice' implemented immediately after the violations (Nabudere and Velthuisen 2013: 3).

The most recent definition of transitional justice is one which conceptualises it as occurring during and in the immediate aftermath of atrocities, as is the case in Egypt, Libya, Kenya and Ivory Coast (Cobban 2007: 22-44; Lyck 2009: 218).

According to this view, transitional justice is part of broad mechanisms that could be employed to end impunity and establish democratisation to bring lasting peace and respect for human rights (Schabas 2008: 581; Hinton 2010: 96).

It can be argued that an analysis of primary trends in Zimbabwe between 1980 and mid-2011 leads to four broad categories of definitions of transitional justice. These are the statist, the international, the civil society and the broader realist definitions. Three definitions, the statist, international and the civil society definitions, are dominant in literature. This paper will postulate a fourth definition for transitional justice in Zimbabwe, to be termed the broader realist perspective. The major difference between the dominant and the alternative definitions lies in their respective perceptions of who is at the centre of transitional justice. The dominant definitions put the offender as the central figure in transitional justice, while the alternative view advocates for the centrality of the victims and victimhood. The alternative view is aligned with transitional realism while the dominant views are aligned with transitional idealism.

This paper endeavours to offer a broader realist perspective of transitional justice, rooted in the needs and expectations of victims and capable of going beyond the perception of transitional justice as merely a movement towards the liberal type of democracy as advocated by the USAID (1998) and the Charter Foundation (Kritz 1995: 42). This perspective is useful in analysing deeper structural patterns of exclusion and domination that characterise transitional justice. The paper will introduce new frontiers to be accessed through the interrogation of the likely outcomes of transitional states by examining the confusion brought about by the end of ideological bipolarity, which saw 'transition' being used to imply movement from communism towards liberal western type of democracy (McFaul 2002: 212-244). In the midst of this confusion, two categories of transition emerged; one from violence and another from communism, both assumed to be moving towards western liberal democracy.

Broadly defined, transitional justice refers to an array of both objectives and instruments of broad social transformation and rests on the assumption that societies need to confront past,

come to terms with it and move on (Andrieu 2012: 2). As alluded to earlier on, to while not widely agreed upon, the transition in transitional justice is generally understood to refer to movement from an authoritarian regime towards a liberal market oriented democracy. The most applied definition of transitional justice refers to the theories and research programmes that explain, justify, compare and contest specific practices of moral and social repair, and to the political and social movements dealing with the past. These include practices such as Truth and Reconciliation Commissions (TRCs), prosecutions, administrative reorganisation, nation building, commemoration and reparation (Roht-Arriaza 1990: 449-513; Mendez 1997b: 255-282; Crocker 2000: 99; Teitel 2003: 69-94; Elster 2004: 181). The concept of transitional justice has since broadened to include wider societal processes for dealing with legacies of violent conflicts and repression such as kleptocracy (financial impunity), religious impunity and environmental impunity (Muvingi 2011: 4).

Defining Political Transition

At the core of transitional justice lies the fundamental issue of the relationship between the treatment of a state's past and the prospects of such a process leading to a democratic future (Teitel 2000: 34-37; Igreja 2007: 20-33). This period constitutes what is termed the transitional period or political transition. Transitional justice, in this regard, refers to the programmes and actions used during and after the transitional period to seek historical accountability for past human rights abuses in a bid to foster reconciliation and build a more democratic future in the post conflict state. Loosely defined, a transition implies the act of passing from one phase, style or place to another.

While it is difficult to prove the impact of relationships in defining the transition in transitional justice, it could be argued that there are certain characteristics that define this transition. For example, the transition of water from liquid to gas is characterised by the change in the nature of the molecular structure of hydrogen (H) and oxygen (O) which make up the compound water (H₂O). In sport, transition is characterised by a team's change in tactics and player positions from defensive to offensive and *vice ver-*

sa. Likewise, the transition in transitional justice is characterised by the attainment of goals desired by those victims and communities who experienced gross violations of human rights. These aspirations must be those of the violated communities predominantly and not of any other external body or institution (Barsalou 2008: 6).

Characterising the Transitional Period

The nature of a political transition is that there is a past littered with human rights abuses to address (Kritz 1995: 226; Mendez 1997a; Doxtader and Villa-Vicencio 2004: 153). Theorising on the nature of political transitions and the possible obstacles, Bohl (2006: 561) contends that there are four obstacles likely to be faced by transitional states. Firstly, transitional states will most likely inherit a virtually non-existent criminal justice system. Secondly, international assistance for rebuilding or creating of an effective criminal justice system will not be sufficient to cover the whole post conflict judicial reform process. Thirdly, states in transition are forced to pursue justice in times of extremely fragile peace, often resulting in a limited ability to impose criminal sanctions. Finally, transitional settings often shape a civil society whose interests and objectives conflict with the policy and resource limitations of the newly elected leadership.

Notwithstanding Bohl's four markers for transitional states, transitional justice scholars (Teitel 2000: 5; Bizos 2005) and practitioners (Mindzie 2009) differ on what defines the transition in transitional justice. This has led scholars such as Sooka (2009: 21) to theorise about transitional politics as opposed to transitional justice. The general norm, especially for the period between the Nuremburg trials (20 November 1945 to 1 October 1946) and the South African TRC (15 April 1996 to 31 July 1998), was that transitional justice mechanisms were instituted when the period of gross human rights violations ended. It needed the violations of human rights to end before any investigations could commence.

This view prescribes, for example, that transitional justice mechanisms should be put in place in Libya since Colonel Gaddafi's rule ended with his assassination on 28 October 2011. This practice is consistent with imported models of transitional justice such as TRCs which, according to Mamdani, in *Reconciliation with-*

out justice (2000), treat transitional justice as a story of racism and individual violations, rather than one of long-term, structural, well thought out systemic abuses. Increasingly, the need to recognise the evolving imperative to institute national healing and reconciliation programmes even in the midst of violations of human rights has grown in urgency. Current trends point towards an evolving practice of addressing gross violations of human rights even during more violations; leading to what Attafuah (2009: 187) terms the politicisation of transitional justice. When reduced to its essential terms, a political transition is regime change or regime transformation from human rights abuse to a more stable democracy (Masunungure 2009: 1). For Teitel (1997: 2077), political transitions are characterised by an inherent contradiction in the relationship between law and politics in a period marked by what Leebaw (2001: 264) terms institutional and ideological fluxes. In this regard a political transition can be simply understood as the interval between one political regime and another (O'Donnell and Schmitter 1986: 6-7). For Bratton and van de Walle (1997:10), a transition is a shift from one set of political procedures to another, from an old political pattern to a new one.

The above characterisation of political transition necessitates a clarification of when a country is in transition. This will be attempted in the following section as an introduction to the discussion on whether Zimbabwe was a transitional state between 2009 and 2011, as argued by Masunungure (2009: 2), or between 1980 and 2011 as posited by Muzondidya (2011: 7). The perception of political transition as a period when violations are still occurring, as opposed to when they are over, is also evident in imported mechanisms of transitional justice. In an unprecedented move in the history of international law⁴, the International Criminal Court (ICC) issued warrants of arrest for two sitting presidents, Gaddafi of Libya (28 June 2011) and Omar al Bashir of Sudan (4 March 2009). In this regard, the transitional period is viewed as occurring during the violations of human rights.

The International Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law (2008: 8) conceded that transitional justice is a complex concept in which each word carries a number of implications. According to these two institu-

tions, 'transitional' seems to suggest that there is a specific legacy of large-scale gross human rights violations resulting from a conflict or another situation that is at an end by the time the mechanisms are established. The two institutions noted the increasing use of imported transitional justice mechanisms during conflicts and periods of gross violations of human rights as a practice which was becoming particularly common, thereby altering the implications of political transition. Any attempt to prosecute Mugabe while he is still the President of Zimbabwe must be viewed in this light. It can therefore be argued that transitional justice has evolved to a point where it is used as a tool to end gross violations of human rights.

From the above, the transition referred to in transitional justice appears, in fact, to be multiple transitions. For example, transition from a period of violence and gross human rights abuses to one of a new democratic dispensation, or a period of transition from one violent phase of history to another, such as the transition in Uganda during the reigns of Idi Amin (1971 to 1979), Milton Obote (1963–1971; 1980–1985) and Yoweri Museveni (1986 to date). The presence of the noun 'transition' in the term transitional justice has caused difficulties when interpreting the meaning attached to the term. Transition can be viewed as the movement towards the establishment of a liberal democratic regime, both politically and economically, a regime where pluralist views coexist and where no one is given preferential treatment based on their political or ethnic origins (Kim 2011: 57). This interpretation leads to more attention being paid to human rights abuses linked to physical violence, at the expense of cultural, environmental, economic and other various forms of violence and abuse.

Transition to Where?

During the decades between the Nuremberg trials and the Rwandan genocide (1945-1994), transition was used to refer to a society's movement from dictatorship, war and gross violations of human rights towards democracy (Muro and Alonso 2010: 71). In the period after the Rwandan genocide, transition evolved and began to refer simply to the movement away from these gross violations of human rights. In most situations, transitional justice programmes are now being implemented whenever and wherever there

are gross violations of human rights, regardless of the absence of regime change. From a customary law point of view, this does not constitute a new phenomenon as communities have constantly fought and reconciled since pre-colonial times (Mazarire 2010: 4). This is illustrated by an array of traditional transitional justice and reconciliation mechanisms in most parts of Africa, such as Uganda's *mato oput*⁵, Rwanda's *gacaca*, Mozambique and Zimbabwe's *magamba spirit*⁶, *ngozi* and *kuputisana fodya*⁷. Generally, criticism of these mechanisms is of their inability to deal with gender related crimes, which unfortunately make up the bulk of war crimes.

Carothers (2002: 6) posits that transition is generally a movement away from gross violations of human rights with multiple possible destinations. He dissects what he terms the transitional paradigm and speculates that the meaning of 'transition' is largely influenced by the perception of major western institutions, singling out the United States-dominated democracy promotion community led by the United States Agency for International Development (USAID) (1998: 51). These 'democracy promoters', as Carothers calls them, designed an analytical framework for responding to what Huntington (1993) termed the third wave of democracy. He noted that this 'predictable, sequential process of incremental steps is vividly exemplified in USAID's Managing for Results assessment system', contained in the *Handbook of Democracy and Governance Program Indicators* (August 1998). The model outlined in this 1998 handbook influenced the design of most transitional justice mechanisms including the marrying of transitional justice to broad post conflict development aid. Carothers (2002: 7) urges that this model be discarded on the grounds that none of the countries categorised by the model as 'transitional', such as the Democratic Republic of the Congo (DRC), followed the predictions of the model. In particular, he disputes the model's assumption that any country moving away from a dictatorship moves towards democratisation (Carothers 2002: 6-9). He concludes that democratic transition occurs in three stand-alone phases, namely, opening, breakthrough and consolidation. The consolidation phase is the most crucial and he characterises it as:

A slow but purposeful process in which democratic forms are transformed into democratic

substance through the reform of state institutions, the regularization of elections, the strengthening of civil society, and the overall habituation of the society to the new democratic rules of the game (Carothers 2002: 7).

Carothers' observation that democratic transition occurs in three distinct phases is given credence by the fact that some countries actually move from one dictatorship to another while others simply stagnate within the transition period. Other countries fail to move from the opening phase into the breakthrough phase. Uganda is a good example of a country that 'transitioned' from one dictatorship to another when it moved between the regimes of Milton Obote (1966-1971), Idi Amin (1971-1979), Obote (1980-1985), Tito Okello (1985-1986) and Yoweri Museveni (1986 to date), punctuated with violence attributed to Joseph Kony and the Lord's Resistance Army. In these cases, the various openings brought by regime change did not materialise in democratic breakthroughs. Some transitional countries fail to fully democratise by regressing from the breakthrough phase backwards through the opening phase and into the zone of violence. Zimbabwe risks being classified as a country which took a step backwards from the breakthrough to the violence phase if the opportunity offered by the GNU is not utilised as a vehicle to carry the country into the crucial democratic consolidation phase.

Despite Carothers' three democratic transition phases, and as depicted by Table 1, it can be argued that political transition is not unidirectional, that is, it is not movement from violence towards democracy only. There are as many possible routes which transitional states may follow as there are transitional states themselves.

Table 1: Movement of countries in transition and the possible outcomes

<i>Transition from</i>	<i>Transition to:</i>	<i>Example</i>
Gross violations of human rights	Democracy Stagnation/grey zone Worse violations of human rights	South Africa DRC Uganda, South Sudan

According to the USAID model, any country that experiences a condition between dictatorship and liberal democracy is in transition.

Carothers (2002: 9–10) refers to these countries as grey zone states. The conclusion that can be reached from the above discussion is that the categorisation and characterisation of transitional states is still very fluid with porous boundaries. For this reason, no categorisation will be attempted beyond the analytical categorisation postulated above. Such categorisation deserves a more detailed analysis which cannot be undertaken in this paper. The strength of Carothers' argument, however, is that it induces rethinking and even doubt in some regarding the 'transition' paradigm, both as an analytical framework and as a pragmatic characterisation of transitional states. Most importantly, it liberates the transitional justice discourse from the curse of the 'transition' paradigm, allowing for the communities in transition to be studied as individual analytical units as opposed to parts of a collective of transitional communities.

An alternative theoretical view of political transition was offered by Skaar (1999: 1109–1128). This theory postulates that a society is in transition when the following three constants are present: identifiable victims of gross violations of human rights; an outgoing regime and an incoming regime. This view will be employed in the next section to debate whether Zimbabwe was a transitional state between 2008 and 2011.

Negotiated Transition Model and the Mediated Negotiation Model

The issue of Zimbabwe's political transition warrants further probing, as it does not fit perfectly into the categories of dominant theories of transition to democracy (O'Donnell and Schmitter 1986: 37; Huntington 1993: 22–49; Skaar 1999: 1109–1128; Carothers 2002: 5–21). Basically, these theories all hold that the degree of economic development and power of the state are correlated with democratisation. O'Donnell and Schmitter (1986: 37) suggested two non-revolutionary transitions that might apply to Zimbabwe's case; transition from above and transition by negotiation. According to this theory, an authoritarian regime liberalises its control over a society due to the emergence of reformers within the regime (Huntington 1993: 14). Central to this theory is the existence of reformers within the ranks of the authoritarian regime who believe that continuing their strong dictatorship

will not help them maintain power or improve the regime's legitimacy (Kim 1997: 2). When reformers adopt liberal policies, the result is the opening up of space for society, especially groups in civil society, who immediately and effectively seize the opportunity to mobilise their members and push for genuine bottom-up democratisation. This can be diagrammatically represented in Table 2.

Table 2: Transition from above and transition by negotiation

	<i>Transition from above</i>	<i>Transition by negotiation</i>
Authoritarian regime	Reformers	Hardliners
Opposition	Moderates	Radicals

McFaul (2005: 16) agrees with the above categorisation of hardliners and soft-liners (reformers) in the regime, moderates and radicals in the opposition and posits that the political interplay between these four groups results in particular modes of political transition. According to this model, when appointing negotiating teams, both the opposition and the regime nominate their hardliners to represent them. On the other hand, transition from above is quasi legal, piecemeal and is led through the joint efforts of the reformers in the regime and the moderators in opposition who take the lead in lobbying their respective parties to accept the changes.

Huntington (1991: 141) supports this view arrives at a different result in the forms of transition. For him the result is one of the following three types of transition: transformation, replacement, and transplacement. Unlike McFaul, Huntington's transitional outcomes are determined not by the political interplay between groups from the opposition and the regime but by any one group of the three which takes the lead role in the transition process. Huntington argues that a transformation occurs when the soft-liners in the regime take the lead in bringing about democracy, while a replacement occurs when radicals in the opposition take the lead and the authoritarian regime collapses or is overthrown. The third category, called a transplacement, occurs when democratisation emanates largely from joint action by the regime and the opposition, usually through negotiations (1991: 114).

The major actors in transplacement as identified by Kim (1997: 2) are the reformers in the authoritarian regime and the moderators in the opposition. The success of transplacement depends on the ability of the reformers and the moderators to control the hardliners in the authoritarian regime and the radicals in the opposition (Kim 1997: 3). This relationship is diagrammatically represented in Table 3.

A successful transplacement occurs when the dominant groups in both the regime and the opposition eventually realise that they are incapable of unilaterally determining the nature of the future of the political system in their society (Huntington 1991: 154). Huntington (1991: 114) further contends that the initial stages of a transplacement transition are characterised by denial on both sides with the regime believing that it can control or oppress the opposition effectively, while the opposition believes that the regime cannot hold on to power for long. However, when the opposition mobilises people and becomes strong enough to threaten the regime, the situation changes. The result is that the regime has to decide, either to take a risk and oppress the opposition further, or to negotiate with the opposition to draw up a new political pact (Huntington 1991: 114). Similarly, the opposition needs to believe that it can overthrow the regime with its mass mobilisations (Kim 1997: 4).

Therefore, before a successful negotiation between the regime and the opposition can be established, a delicate balance of power must be attained in which neither is in control but where the situation cannot result in a revolution or the regime's unilateral victory (Guo: n.d.). Shapiro (1995: 267) agrees and notes that there should be a rough equality in power between the regime and the opposition in order for negotiations to start. As Huntington (1991: 153) points out, there should be, 'a seesawing back and forth of strikes, protests, and demonstrations, on the one hand, and repression, jailing, police violence, states of siege, and martial law, on the other'.

With this stalemate, in which the opposition could mobilise support while the government

contains and withstands opposition pressure, a transplacement transition can occur (Kim 1997: 4). To some great extent, the transition in Zimbabwe resembled a transplacement because for long periods there was a delicate balance of power between the opposition and the regime. Strikes, demonstrations and repression were common features with the opposition sensing victory and the regime feeling that it could still hold on to power. This delicate balance of power was more pronounced after the announcement of the 2008 Presidential election results in which neither candidate garnered enough votes to be appointed president.

The second type of transition is a negotiated settlement and occurs when there is the presence of a third party who wields power over either or both other parties. As Meyer (1960: 37) points out, the mere existence of a third party mediator may positively affect the outcome of the negotiation. The power and resources of the third party can facilitate negotiation more directly (Zartman and Touval 1985: 27). By participating in the dispute, the third party changes the bargaining structure from dyadic to triadic (Kim 1997: 4). Since Zimbabwe's transition possessed characteristics of both the transplacement and the negotiated settlement, its transition can therefore be termed a 'negotiated transplacement model' because of the negotiations that resulted in the transition and the balanced relationship that existed between the regime and the opposition. A more nuanced debate regarding the type of transition that ensued in Zimbabwe will be proffered in the following section, which attempts to determine whether Zimbabwe was a transitional state and if so, when?

The Nature of Human Rights Abuses in Zimbabwe

Zimbabwe is a country which was colonised through the use of violence, it was decolonised through the use of violence and continue to be ruled though the threat of or actual violence. Violence has therefore emerged the state's pre-

Table 3: Transformation, replacement and transplacement transitions

	<i>Transformation</i>	<i>Replacement</i>	<i>Transplacement</i>
Regime	Soft-liners		Reformers
Opposition		Radicals	Moderates
Resultant mode of transition	Gradual transformation	Regime overthrow	Negotiations

ferred tool for statecraft. State institutions in Zimbabwe such as the military, police, prison services and the intelligence have been accused of violating human rights. The state was not only the sole perpetrator of human rights abuses in Zimbabwe, but so were other non-state actors such as political parties and vigilante groups which may or may not be linked to political parties. Human rights abuses in Zimbabwe are well documented with a plethora of Non-Governmental Organisations (NGOs) dedicated to the documentation of such cases. The NGOs include the Zimbabwe Human Rights, Lawyers for Human Rights, Legal Resource Project, inter alia. These NGOs analyse and interpret the human rights violence in accordance with the second and third generation categorisation. This paper departs from this norm and deploys Slovak Zizek's (2009) three typologies of violence as informing the type of human rights abuses that victims have suffered in Zimbabwe. For Zizek there are three types of violence namely systemic, subjective and symbolic. The nature of the transitional period that at a post dictatorial/community undergoes is informed by the nature of the violence that it experienced.

According to Zizek, subjective violence is the most visible form of violence. It is the most visible, predominant and most analysed of the three and is often performed by clearly identifiable social and political agents (Ndlovu-Gatsheni 2011). These agents include members of repressive state apparatus and partisan crowds. Symbolic violence is non-contact violence and often takes the form of hate speech (Zizek 2009). It is hidden in habitual forms of speech such as party slogans, songs and narratives (Ndlovu-Gatsheni 2011). According to Ndlovu-Gatsheni (2010: 2), systemic violence is an invisible form of violence hidden in economic, political and ideological systems which sustains relations of domination and exploitation. The manifestation of this type of violence is material deprivation and dispossession, underdevelopment, poverty and even malnutrition.

DISCUSSION

Zimbabwe's Transition

As noted in the discussion of the transition models above, there are certain characteristics that mark a transitional state. The model that

best describes Zimbabwe's transition is one characterised by a delicate balance of power between the opposition and the regime. Huntington (1991: 153) notes that this delicate balance will be characterised by regular strikes, protests, and demonstrations spearheaded by the opposition and repression, jailing, police violence, and repressive laws used in response by the regime. This adds weight to Teitel (2000: 54) and Forsythe's (2011: 85) views that political transitions occur during periods of altered relations between law, politics and justice. There is ample literature to support the existence of the markers of Huntington's transitional state in Zimbabwe. This includes work by scholars such as Bratton and Masunungure (2008), Bond and Manyanya (2002), Kasambala (2006) and Moyo and Yeros (2007: 103-121). The existence of these markers in Zimbabwe is therefore not an issue of debate, as evidenced by the admission of the Government of National Unity in the preamble to the Global Political Agreement (GPA) where it is stated that:

Dedicating ourselves to putting an end to the polarisation, divisions, conflict and intolerance that has characterised Zimbabwean politics and society in recent times (GPA: Preamble).

What is questionable is the exact moment when Zimbabwe entered into the transitional phase (Ndlovu-Gatsheni and Benyera 2015: 10). In that regard, Masunungure (2009) contends that Zimbabwe entered into the transitional phase when ZANU PF ceased to be the sole political party in power by entering into a power sharing agreement with its two biggest rivals, the two MDC formations. According to Masunungure (2009: 1), political transition in Zimbabwe is transition from ZANU PF's political hegemony to something other than its undiluted political domination. According to this view, Zimbabwe's transitional period began on 15 September 2008 when the three main political parties in Zimbabwe, namely, the two MDC factions and ZANU PF, signed a power sharing agreement otherwise known as the Global Political Agreement.

In contrast to the above, it can be argued that Zimbabwe's transition originated in early 1960's with the fight to end white minority rule. This view argues that Zimbabwe did not observe the basic tenets of democracy after its independence in 1980. Major proponents of this view are Murithi and Mawadza (2011) who ar-

gue that Zimbabwe had complex political problems with interlocking national, regional and international political dimensions rooted in both historical and contemporary factors and developments. For them, this is not unique to Zimbabwe as most post-colonial African states such as DRC, Central African Republic, Uganda, Rwanda, Burundi, Angola, Mauritania and Swaziland were in transition and blundering towards democracy. From 1990, 34 of the (then) 47 African states were in this phase of transition and making some moves towards democracy (Bratton and van de Walle 1997: 219). Bratton and van de Walle (1997: 77) argue that Zimbabwe was among the many countries that failed to transform into a fully-fledged democracy and stagnated instead in the transitional zone.

Other scholars such as Bamu (2008) are convinced that Zimbabwe was a transitional state which entered into transition through a negotiated settlement between the three main political parties. Bamu does, however, concede the improbability of Zimbabwe becoming a fully-fledged democracy based on ZANU PF's continued presence in power. He argues that as long as ZANU PF remained in power, chances were good that it would block meaningful efforts at accountability for past violations. This view therefore supports the notion that a political reform and not a democratic transition occurred in Zimbabwe. Bamu further contends that political reforms short of democratic transition was the likely scenario in Zimbabwe, because negotiated settlements rarely bring about complete democratic transition as complete transition would mean the highly unlikely dismantling of the ZANU PF edifice. It can be argued therefore that Zimbabwe was in a political transition phase, but with no transition towards democracy occurring as long as ZANU PF held substantial power which allowed it to stop any form of transitional justice that would mean the punishment of its own.

Eppel and Raftopoulos (2009) take a more simplistic view of Zimbabwe's transition debate. They note that a transitional state is, *inter alia*, characterised by its efforts to seek historical accountability for its violent past. For them, the absence of a concrete clause dealing with transitional justice in the GPA is indicative enough of the absence of transition in Zimbabwe. The same view is shared by Muvingi (2009: 139) who

argues that as long as ZANU PF was in power, one way or the other, there was definitely no transition to debate. Transition here is taken as transition to democracy through the implementation of official transitional justice programmes. If the transitional period does not have any potential to enable the implementation of transitional justice then it is a pseudo transition. Muvingi's analysis is premised on the conceptualisation of transitional justice which envisages transitional justice as involving the following key components: accountability, truth recovery, reconciliation, institutional reform and reparations. In an attempt to prove that Zimbabwe was not in transition, Muvingi (2009: 139) took each of these transitional justice options in turn and tested their likelihood, concluding that it was clear that none of them could be envisioned in Zimbabwe, before a radical political transformation.

Mashingaidze (2011), also noted the impossibility of transitional justice in Zimbabwe in the absence of a genuine transformation. Iliff (2009: 162) articulates an alternative view of the debate that resonates with the objective of this paper. His position is that the excessive focus on the assumption that a nation is in transition when individuals most responsible for rights violations cease control of crucial state functions, is an oversimplification of reality. He argues that the expectation that a nation is in transition when there is regime change may be attributed to the detriment of more modest, local strategies that focus on community level reconciliation, dialogue and accountability. For Iliff (2009: 162-163), the situation in Zimbabwe presented a propitious moment for the analysis of existing and emerging grassroots reconciliation strategies, which suggest that in situations of on-going violations and in which international criminal accountability for gross violations of human rights remains out of reach, transitional justice advocates should bracket international crimes until more propitious circumstances prevail.

Those who advocated for non-state transitional justice mechanisms believe the period around the formation of the GNU was ideal for the promotion of non-state, locally developed programmes to promote community healing and reconciliation. The aim of such programmes would have been to initiate the national healing process from the grassroots going up. Whatever strategies or mechanisms would be adopted by the state at a later stage would have their work reduced, thereby making reconciliation and

national healing a reality. The non-state community based transitional justice mechanisms, which Iliff advocated, include the Tree of Life programme. This is a programme implemented in rural areas and involves the healing of all forms of trauma of victims of gross violations of human rights. Other measures include traditional transitional justice mechanisms such as *ngozi*, *botso*, *chenura* and *nhimbe* (Benyera 2014: 335)

Zimbabwe's Transitional Period

When a country is in transition, there are certain demarcatory political and legal imperatives that were only briefly introduced in the above debates. These include legislative changes such as the amendment or the writing of new constitutions and the holding of referenda or elections. Participation in these political processes should be widespread and should include those political entities that were disenfranchised prior to the commencement of the transitional period. The drafting and passing of Zimbabwe's new constitution (Constitution of Zimbabwe (No. 20) Act, 2013) is evidence that Zimbabwe was in deed in transition. One contentious issue regarding the position of the rule of law during the transitional period is how the law should be treated (Teitel 2000: 24; Isser 2011: 121). The need to uphold the rule of law during transitional periods leads to alternative mediative constructions which Teitel (1997: 2021) termed transitional rule of law. Transitional rule of law addresses the dilemmas implied in the attempt to effect substantial political changes through and within the law during the transitional period. In other words, it helps transitional states to amend the law while remaining within the law and therefore not committing new injustices.

The inclusion of Articles 6, 7 and 11 in the GPA were central in ensuring Teitel's transitional rule of law, which in turn opens up socio-political spaces. Articles 6 dealt with the drafting of a new constitution, Article 7 addressed issues of equality, national healing, cohesion and unity while Article 11 was about the rule of law, respect for the constitution and other laws. These articles were clear on what needed to be done regarding the new constitution, national healing and the rule of law. If the policy framework which contained the above articles is anything to go by, Zimbabwe will not stagnate in the transitional zone, but will instead mature into something else other than hegemony by ZANU PF.

Prior to the formation of the GNU in 2009, ZANU (PF) had not existed outside the state since independence in 1980. According to Weitzer (1990: 134) ZANU PF 'captured the state'. This rendered the de-politicisation of state institutions a priority for the transitional period (Bratton and Masunungure 2008: 41-42). This process was provided for in Article 13 of the Global Political Agreement under the heading State Organs and Institutions, which stated that, state organs and institutions do not belong to any political party and should be impartial in the discharge of their duties' (GPA: Article 13, 1 and 2).

This exercise is essential if Zimbabwe is to successfully undergo political transition and emerge as a democratised state. State institutions and organs that need to be de-politicised include the army, judiciary, police, secret service and, most importantly, the National Peace and Reconciliation Commission. De-politicisation of state institutions, what Masunungure (2009: 10) aptly termed the *de-Zanufication* of the state organs and institutions will determine the success of any transitional justice programme in Zimbabwe. In Masunungure's view, given that the state in Zimbabwe was already in transition, what is debatable is how this transitional period will come to an end. The contemporary understanding of transition periods has a normative component of moving from less to more democratic regimes and evaluates the transitional period in relation to movement towards liberal democratisation (Huntington 1991: 3-5; McFaul 2002: 309). According to Teitel (2000: 54), the end of the transitional period is marked by the return of the rule of law. Teitel (1997: 2013) uses the term 'liberalising' to refer to the direction of transitional justice. By applying the deductive law of syllogism, Zimbabwe experienced gross violations of human rights; there were no state policies addressing these violations. According to Masunungure, Zimbabwe was in transition; therefore grassroots community transitional justice mechanisms were in use.

However, all these debates regarding Zimbabwe's transition can be easily solved with the application of Huntington's (1991: 45-46) forms of transition, under which Zimbabwe falls into the transplacement category. This can be further qualified by supplementing Huntington with Kim's (1997) mediated transitional versus negotiated transition model. An amalgamation of these two produces a transplacement mediated transition. This is owing to the role played by South

Africa in ending the political impasse in Zimbabwe and the seemingly endless stalemate which the two major protagonists had reached. Election results in which there was no clear winner added to the impasse. In conclusion, it can be argued that, according to Huntington (1991: 114-141), Kim (1997: 131), Skaar (1999: 1109-1128), Carothers (2000: 6-21), Masunungure (2011), Zimbabwe was a transitional state since the early 1960s. Suffice to mention that Zimbabwe's transitional process did not result in sustainable democracy but, in our view, to an initial stagnation process and then regressing back into dictatorial based human rights abuses witnessed before the National of Government Unity of 2008.

CONCLUSION

This paper debated Zimbabwe's transition process and concluded that, based on studies by Masunungure, Huntington, Skaar and others, Zimbabwe was indeed a transitional state. Political transitions were defined as periods of regime change accompanied by efforts at historical accountability for human rights abuses. The paper also considered the issue of when a state is considered to be in transition. It was noted that a nation's transitional period is usually marked by the existence of a precarious balance of power between the incoming and the outgoing regimes. Three likely outcomes for transitional states were identified as democracy, stagnation and more human rights abuses, as is the case in Uganda's various transitions since the Presidency of Idi Amin. An alternative, albeit broader, definition of transitional justice was then proposed. It defines transitional justice as a broad range of bottom-up, victim-centred initiatives taken by communities in an endeavour to seek reconciliation and lasting peace. The major difference between this view and the other major ones is that the alternative view is less justice orientated and more reconciliation biased.

Indigenous realist transitional justice mechanisms were also identified and positioned as viable reconciliation and peace building mechanisms. These mechanisms are based on decades-old customary practices and rely on the connection between the three forms of life, that is, the 'living unborn', the 'living living' and the 'living dead'. The passage of life through these three phases is accompanied by certain rites, rituals

and ceremonies, the infringement of which constitutes injustice and hence must be corrected when the political environment permits.

NOTES

- 1 According to the United Nations Code of Crimes Against the Peace and Security of Mankind, gross violations of human rights consists of committing or orders the commission of any of the following violations of human rights: murder, torture, establishing or maintaining over persons a status of slavery, servitude or forced labour, persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or deportation or forcible transfer of population.
- 2 Cognisant of the various names present day Zimbabwe has gone through such as Southern Rhodesia (1923 - 1953), Federation of Rhodesia and Nyasaland (1953 - 1965), Rhodesia (1965 - 1979), Zimbabwe-Rhodesia (1979) and finally Zimbabwe (1980 to date), the name Zimbabwe is used to refer to the country's territorial boundaries throughout its history.
- 3 See, for example, Prime Minister Mugabe's independence acceptance speech, available online at <http://blogs.timeslive.co.za/hartley/2010/04/16/robert-mugabes-independence-day-address-april-1980/> and the President's 2012 independence speech available online at <http://www.newzimbabwe.com/opinion-7753-Full+text+Mugabes+Independence+speech/opinion.aspx> (accessed on 21 June 2012).
- 4 The ICC's definition of international law is found in Article 38 of its Statute which states that the Court, in making decisions in accordance with international law, shall apply international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law 'recognized by civilized nations'; and, as subsidiary sources, judicial decisions and the teachings of the most highly qualified publicists of the various nations.
- 5 *Oput* is a tree that is indigenous to Uganda whose roots are bitter. Literally translated *mato oput* means drinking the bitter roots. Found and practised predominantly in Northern Uganda and some parts of South Sudan among the Acholi people, *mato put* refers to traditional conflict resolution practices and ceremonies marking the admission of guilt and reconciliation and occurs at clan level. During the *mato oput* ceremony the tree's bitter roots are mixed with a local brew and drunk by both sides to the conflict while their hands are tied to their backs. This is said to symbolise their willingness to swallow and wash away all the bitterness that once existed between them. *Mato oput* is voluntary and based on remorse and the readiness to accept responsibility for one's actions and does not involve courts of law.
- 6 *Magamba* is a Shona word which means heroes. As a practice, *magamba* is found in both Mozambique and Zimbabwe. *Magamba* are generally the spirits of dead soldiers who are believed to return to the realm of the living to continue the fight for justice. In their varied meanings and manifestations, *magamba* both heal war-related wounds and play a piv-

otal role in the achievement of restorative justice among the survivors of war.

- 7 *Kuputisana fodya*, also known as *ukukhumisa umlotha*, literally means sharing the tobacco. This is a traditional justice system which originated among the Ndebele people of Zimbabwe. It involves the sharing of tobacco after a dispute has been amicably resolved.

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