Feminism, Postcolonial Legal Theory and Transitional Justice: A Critique of Current Trends

Khanyisela Moyo
Lecturer, Transitional Justice Institute, School of Law, University of Ulster, UK
k.moyo@ulster.ac.uk

Abstract
Inspired by feminist legal theory and postcolonial literary studies this article interrogates the ‘transitional justice discourse’ and coins critiques which re-examine the discipline’s key tenets; namely, democracy, liberalism, rule of law and human rights. It argues that while transitional justice can be seen as one of the masculine human rights strategies that are reminiscent of imperial intervention in the lives of postcolonial subjects, it is open to seizure by the same. This is possible in transitional contexts since these situations create opportunities for stakeholders to rethink the inadequacies of the accepted discourse, and to subscribe to new ways of seeking justice.

Keywords
transitional justice; postcolonial and feminist legal theory; democracy; liberalism; power; human rights; justice

1. Introduction

[Some of us, who adopted more radical approaches, albeit still within Western traditions, did not perhaps subscribe wholly to Thompson’s thesis that the rule of law was an ‘unqualified good’. Yet we, too, saw in bourgeois law and legality, space for struggle to advance the social project of human liberation and emancipation. Law, we argued, was a terrain of struggle.]

International law has distinguished liberal democracy as the ideal embodiment of national governance for societies making the transition from war or authoritarianism towards peace, rule of law and respect for human rights.

* All internet references cited in this article were last visited on 30 September 2012.
In such a passage, international law has also prescribed that societies ought to adopt a variety of measures for, *inter alia*, restoring the rule of law, in tandem with reforming tainted institutions, repairing the past, reconciling divided communities and preventing future human rights abuses. Further, international law has demanded that a gender perspective ought to be mainstreamed in all transitional justice approaches. Since most alleged dictatorships and the majority of wars that international legal scholars have focused on have been in former European colonies, it is those states that frequently resort to transitional justice, *albeit*, with limited success.

In the plentitude of treatises on transitional justice, oddly limited assiduity has been put to the issue of the imperial origins and bias of international law and how this might be a major contributor to postcolonial societies’ failure to meet the goals of their transitional justice endeavors. A recent comparative study conducted by the International Centre for Transitional Justice (ICTJ) on the experiences of a number of Sub-Saharan African countries’ transitional justice processes pins the limitations of these attempts on the shortcomings of those states’ institutions. These states’ colonial heritage is a mere footnote to this thesis, particularly noted as one of the factors that contribute to institutional weakness.

On this note, and in relation to the African postcolonial state, John Mukum Mbaku attributes institutional failure to an elite driven constitutional legal framework which lacks local legitimacy as it engraves the values of former

---

8 Bosire, supra n. 5.
colonial masters and not those of the local communities which those rulers sought to govern.9 The euphoria of independence is said to have prompted Africans to suspend representative constitutional making until their liberation and the acquirement of government machinery by the local elite. Democratic constitutionalism, that is, involving local stakeholders in the reconstruction of a new constitutional order is therefore seen as key to allaying citizens’ perceptions of their laws and institutions as foreign precepts intended for their exploitation and marginalization.10

The participatory constitutionalism argument is inconclusive and can even be said to be self-contradictory since the postcolonial state is itself a creature of colonialism, formally liberated but mostly dependent on former colonial masters for aid, external trade and foreign investment.11 Most of the postcolonial states did not exist before colonialism. Consequently, their boundaries are those which were carved by the former colonial masters during colonialism.12 These states are also likely to be governed by elites schooled in western philosophies and languages.13

External influence is inexorable in transitional context where attempts at democratic constitutionalism are likely to be subjected to greater international scrutiny.14 International experts often take leading roles in an array of postcolonial states’ post conflict reconstruction programs, including, the drafting of new constitutions, negotiation of peace processes, and institutional transformation.15 Also, attempts at democratic constitution making are likely to be led by those local elites who were trained in foreign institutions.

The use of foreign philosophies and actors is based on the conventional understanding that international human rights law is neutral. In the passage from war/authoritarianism to a democratic regime, international law which is presumed to be detached from the actors in the conflict plays a crucial role of re legitimating the domestic legal system which is likely to be suffering from a

15) Fox, supra n. 2.
This role is paradoxically since in its implementation, international law has been critiqued by feminist and postcolonial scholars for being based on self-interest, illegitimate, masculine and predisposed towards power.\textsuperscript{17}

Against this background, this article contests claims to universality by Eurocentric, masculine, elitist and peremptory accounts which dominate the legal scholarship that form the normative basis for transitional justice.\textsuperscript{18} In doing so, it derives inspiration from postcolonial legal theory taking into cognizance relevant feminist concerns.\textsuperscript{19} Postcolonial legal theory is a discourse of resistance which confront the colonial strategy of othering by countering it with the narratives, histories and personal anecdotes of the colonized.\textsuperscript{20}

Of course, postcolonial legal theory is neither fully developed nor monolithic and this work does not claim profound eruditeness on the subject.\textsuperscript{21} Rather, it draws insight from those postcolonial legal theorists whose ambitions are to revolutionize international law from being a discourse of oppression to one of liberation.\textsuperscript{22}

The article proceeds as follows. Section 2, presents the conventional notion that transitional justice's final ends are liberalization, democratization, strengthening the rule of law and the socialization of human rights norms. Section 3 introduces feminist interventions, successes and controversies.
Section 4 provides an overview of postcolonial legal theory and its relevance to the subject matter. And finally, Section 5 attempts to present a postcolonial legal feminist understanding of transitional justice.

2. Why Transitional Justice?

Transitional justice has come to presage an array of legal and political processes that are employed to undo a past and build a better future in the passage from war to peace or authoritarian rule to democracy. An understanding of the 'transition' and 'justice' parts of the term can help in shedding some light on the aims of transitional justice. The writer is aware that a similar analysis has been made to try and address disagreements which persist in academia on the timing of and the choice of mechanisms which constitute the field of transitional justice.

These questions have stirred the interests of lawyers, historians, anthropologists and political scientists alike. One could cynically state that there was historically a tacit arrangement between lawyers and non-legal social scientists that since the former belong to the field of justice they should confine their efforts to that area. This is evidenced by the paucity in legal writing on the 'transition' part of 'transitional justice' which Christine Bell cynically refers to as the colonisation of law by other disciplines.

Thus, the discussion below draws on writings by political scientists for clarity on the definition of 'transition.' This article will not address the question of which mechanisms make up the field of transitional justice nor will it address issues of timing. It restricts itself to an analysis of democratisation

---

23) These processes include, *inter-alia*, purges, truth commissions, criminal prosecutions for human rights violations, restitution, reparation, forgiveness, apologies etc. See webpages of the International Centre for Human rights <http://www.ictj.org/> and the Transitional Justice Institute, University of Ulster <http://www.transitionaljustice.ulster.ac.uk/>.


26) Elster, ibid.


28) See n 33-n 53 below.
which the dominant literature considers to be the final aim of transitional justice.\textsuperscript{29}

In this regard the article adapts Pablo De Greiff’s normative conception of transitional justice.\textsuperscript{30} De Greiff states that whereas providing recognition to victims and fostering civic trust are the two urgent goals of transitional justice, the long term goals are democratisation and reconciliation.\textsuperscript{31} This critique will focus on one of the final goals of transitional justice, namely, democratisation. Hopefully, future postcolonial feminist critiques will cover the other three goals.

2.1 Transition

The notion of transition implies that there is a shift from conflict to peace. But how is a state of conflict defined? What if there is a conflict as to the nature of the conflict? When and how does conflict become peace? Is peace defined by the rule of law and liberal democracy?\textsuperscript{32}

The classical political science definition of transition is that of O’Donnell et al’s which is to the effect that transition occurs within a circumscribed duration linking two regimes – an authoritarian regime and a liberal democratic dispensation.\textsuperscript{33} The idea of transition as being a bounded period that separates two regimes does however not sit well with those mechanisms which are adopted long after the shift from one political regime to another. This has led to a dissident contention that ‘transition’ is not just a bounded period that separates two regimes but a unique journey without a marked destination.\textsuperscript{34}

It is contended that although transitions can be perceived as sustained processes, the focus is mainly on constitutive historical periods, for example Chile after the rule of General Augusto Pinochet in 1990,\textsuperscript{35} South Africa's passage

\textsuperscript{29} Bell, supra n. 27.
\textsuperscript{31} Ibid.
from apartheid to majority rule in 1995,36 Rwanda after the 1994 genocide37 and Northern Ireland after the 1998 Good Friday Agreement.38 Political scientists have also noted that transitions are not peculiar to non-democratic regimes.39 They have drawn a distinction between a transition to democracy and a transition to a consolidated democracy.40 Further parallels have been made between a democratic government and a democratic regime.41 ‘Regime’ is said to be an expansive term that refers to both formal and informal rules that govern the way major actors interact in the political system.42 Related academic polemics on this issue cannot be exhausted in this limited study. Notable ones include debates on the distinction between liberalization and democracy and debates about the concept of democracy itself.43 This article does not seek to delve into all these political theories but works from the premise that there are two kinds of democracy, namely, procedural and substantive democracy.44

The working understanding of a procedural liberal democracy is that it has three characteristics.45 The first feature is that the principal route to an office whether legislative or presidential ought to be through free and fair elections. The second one is the idea that those elections ought to take place in an environment where there is a broad universal suffrage; exclusions should be


40) Ibid.


43) Ibid.


justifiable. An example of a condonable debarment could be that of the mentally unsound and criminals. Thirdly, there ought to be guarantees for human rights for all, including women and minorities.\footnote{46}

Substantive democracy is understood as a scheme whereby ‘the general public’ redefines the very makeup of the government.\footnote{47} This entails the basic rights of citizens, prescribes their ideas of justice, and encompasses understandings on property rights amongst other entitlements and duties.\footnote{48} This is the type of democracy that poses more challenges in most transitional societies.

Liberalization is understood as freedom from repression and the socialization of human rights norms within an authoritarian establishment.\footnote{49} Thus the working definition for liberal democracy is not confined to mere demands for elections but the requirement that human rights ought to be respected, protected and fulfilled.\footnote{50}

There has been a vast amount of literature produced by political scientists on this issue. Those relevant to this article are the contributions which sought to explain the relationship between the type of transition and the justice mechanisms employed. Perhaps the most authoritative discussion on the subject is Huntington’s distinctions between responses in transitions led by the elite of an old regime (transformations), those forced by the opposition force on the elite (replacements), transitions that are a result of negotiated settlements (transplacements) and those that have been imposed by foreign nations.\footnote{51} Huntington asserts that ‘the distribution of power during and after transition and not moral considerations have a greater bearing on the mechanisms that a country or region employs in the aftermath of a conflict.’\footnote{52} For example, the possibility of prosecution often presents itself in transitions where the authoritarian regime has totally collapsed and has been replaced by the opposition and not where the old regime’s elite plays a significant role in the transitional process.\footnote{53}
As this implies, the legal responses employed in the aftermath of a conflict are a product of the political transformation. This understanding can be contrasted with the idealist perspective that bases transitional legal responses on universal notions of justice. An elaborate discussion of this issue is beyond the scope of this section of which the main interest in the work of political scientists is in seeking clarification of concepts. A much more structured discussion on the role of law in transition will be reverted to below in the analysis of legal renditions on the subject.

2.2 Human Rights, Transitional Justice and Democratisation

In common with political scientists, celebrated legal commentators on the subject, view the term ‘transition’ as referring to periods of democratization or liberalization. Liberal democratization is perceived to be coterminous with the ‘socialization of human rights norms into the domestic practices’ of norm-violating states.

Indeed, human rights and democracy are interdependent. This is seen in that, not only is a democratic political establishment an unparalleled guarantor of human rights, democracy itself is a human right. However, this is not to say that by definition human rights and democracy are conjointly collegial. While a democratic government or at least an egalitarian democracy might be

---

55) For a compelling discussion on the subject, see Teitel, supra n. 16, at 4.
56) Ibid.
57) See n 58 – n 92 below.
58) Teitel, supra n. 16. See also RG Teitel, ‘How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses’ in NJ Kritz (eds), Transitional Justice: How Emerging Democracies Reckon with Former Regimes vol 1 (United States IP, 1995) at 146-154.
60) Para 8 of the Vienna Declaration and Programme of Action, A/CONF.157/23, adopted 12 July 1993 (hereinafter Vienna Declaration) states: ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.’
the best defender of human rights, the two concepts come from two different theoretical foundations.

Nonetheless, Professors Ni Aolain and Campbell have taken issue with this traditional approach that largely focuses on a movement from illiberal rule, referring to these transitions as ‘paradigmatic transitions’. To them a legacy of human rights abuses may exist in states that are broadly democratic. They draw from the case study of Northern Ireland, a ‘conflicted democracy’ that the United Kingdom, a democracy, had allowed to exist within its borders. Thus, they argue, with the aid of human rights provisions on derogations and applicable humanitarian standards, ‘that existing transitional justice discourses combine at least two kinds of transitions – that from authoritarianism to democracy and that from war to peace’. They state that the case of Northern Ireland, a ‘conflicted democracy’ involves a move from war to peace and is not a ‘paradigmatic’ case of a transition from authoritarianism to democracy. It involves an advancement of democracy rather than its launch.

An alternative perspective might be to draw a distinction between a regime and a government, that is, to treat the broadly democratic United Kingdom government and the Northern Ireland regime as two separate political establishments. To the extent that the informal and formal rules governing the main political actors in Northern Ireland were incompatible with contemporary procedural democratic standards, the Northern Ireland regime could be said to have been authoritarian. For example, the Ulster Unionist Party was accused of gerrymandering electoral borders and introducing voting rights based on economic status. Consequently the elections in the polity were not free and fair and there was no universal suffrage, as the exclusions, which were largely sectarian could not be said to be justifiable.

One can also draw from political scientists’ distinction between the move to democracy and the consolidation of democracy. If the Northern Ireland

---


64) Campbell and Ni Aolain, supra n. 48.

65) Ibid.

66) Ibid.

67) Ibid.

68) Ibid.

69) Campbell and Ni Aolain, supra n. 48.

70) Ibid.

71) Przeworski, supra n. 39.
example demonstrates a deepening of democracy rather than its introduction, as Professor Ni Aolain and Campbell assert, then it fits the paradigmatic model. It is a transition to a consolidated democracy.\textsuperscript{72}

The Northern Ireland experience does however have some distinguishing features. In Kritz's case studies no analysis was made of regimes that were moving out of colonial rule or rule by foreign powers (transitioning to independence), or those countries whose problems could be attributed to a failure of decolonization (an issue that is a concern of this work).\textsuperscript{73} Northern Ireland would not indeed fit the paradigmatic model since the conflict is not an internal conflict in the strict sense. It is a conflict that is peculiar to post-colonial societies, where there is even a conflict about the conflict itself (meta-conflict).\textsuperscript{74} Thus this work construes Northern Ireland as a good example of how the hazards of decolonization continue to have an influence on postcolonial societies.

These nuances however, do not wholly contest the notion that liberalization and democratization are transitional end goals.\textsuperscript{75} Since democracy is said to be contingent on the law, legal scholars focus on the legality of the outgoing regime's actions.\textsuperscript{76} Closely tied to this issue is the question of the role played by the law in the passage to a liberal-democratic state.\textsuperscript{77}

A post-transition regime's illegitimacy is evident in the general discontent within the population, with its laws and institutions.\textsuperscript{78} It is also usually characterized by wide-spread and largely state orchestrated human rights abuses.\textsuperscript{79}

\begin{itemize}
\item \textsuperscript{72} Ibid.
\item \textsuperscript{73} See Cobban, supra n. 59 and NJ Kritz (eds), \textit{Transitional justice: How Emerging Democracies Reckon with Former Regimes} vol 2 (United States IP, 1995) 1-832. Note however, that Elster, supra n. 25 at 49-76 does look at cases involving the restoration of monarchy and transition to independence.
\item \textsuperscript{74} See Campbell and Ni Aolain, supra n. 48 for the multilateral relationship between Northern Ireland, the United Kingdom and the Irish Republic. For the Northern Ireland history, see B O'Leary and J McGarry, \textit{The Politics of Antagonism: Understanding Northern Ireland}, (Athlone Press, 1993) 1-358.
\item \textsuperscript{75} See the discussion in Campbell and Ni Aolain, supra n. 48 at 183-184 and C Bell, C Campbell and F Ni Aolain, 'Justice Discourses in Transition' (2004) 13 \textit{Social and Legal Studies} 306 at 308.
\item \textsuperscript{76} See for example the debates by Professor H I A Hart and L Fuller on the legitimacy of the actions of the government of the Third Reich, Herbert I. A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 \textit{Harvard Law Review} 593 and Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart,' (1958) 71 \textit{Harvard Law Review} 630. See also Bell, Campbell and Ni Aolain, supra n. 75 and Teitel, supra n. 16 at 12-15.
\item \textsuperscript{77} See Teitel, supra n. 54 & Campbell and Ni Aolain, supra n. 48.
\item \textsuperscript{78} See the discussion in Campbell and Ni Aolain, supra n. 75, at 177-178.
\end{itemize}
Often, the state does not acknowledge the existence of these human rights abuses. Instead of respecting the rule of law, it 'rules by law' seeing the law as imposing obligations on the citizens and not on the regime itself.\textsuperscript{80}

In view of this outlined complicity of the law in periods of repression, legal undertakings in transitional times are complex.\textsuperscript{81} This issue has been traditionally explored from realist, idealist, critical and liberal theoretical perspectives which largely focus on the relationship between law and politics.\textsuperscript{82} Ruti Teitel however, has adopted a pragmatic approach, which points out that there is a dialectical relationship between law and politics in transitional times.\textsuperscript{83} Law in times of transition is not just a product of political change, it, actually provides a framework for the transition.\textsuperscript{84} As Teitel notes:

[L]aw is caught between the past and the future, between backward looking and forward-looking, between retrospective and prospective. Transitions imply paradigm shifts in the conception of justice; thus law's function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Ordinary predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a \textit{sui generis} paradigm of transformative law.\textsuperscript{85}

Thus, while heralding and sticking to the new liberal regime's undertaking to abide by democratic and rule of law principles, law in transitional contexts authenticate a demarcation between the outgoing regime and the new dispensation.\textsuperscript{86} Since domestic law is often politicized, international human rights law, by virtue of its supposedly neutrality and externality to the conflict, plays a significant role in otherwise issues of national sovereignty.\textsuperscript{87} It preserves the ordinary meaning of the rule of law, which entails notions of continuity and certainty that are often absent in the outgoing regime.\textsuperscript{88}

Indeed, human rights law structures transitions in three different ways. Firstly, it provides the normative basis for political transformation.\textsuperscript{89} Secondly,
human rights norms and institutions underscore the illegitimacy of the prior regime. Thirdly, human rights law is instrumental in advancing the political transition. Put simply, different mechanisms employed in the aftermath of repression are based on international human rights convictions. Consequently, in challenging states to stop, delve into, penalize, mend and forestall human rights abuses, scholars and practitioners rely on international humanitarian law and international human rights.

2.3 The 'Justice' part of 'Transitional Justice'

Issues of justice crop up in different contexts. In the case of transitional justice it is within the situation of a new regime coming into power by replacing a former repressive one. The outgoing administration often has a legacy of human rights violations. This explains why the vast literature on the subject has focused on different mechanisms for combating impunity. However a number of key studies spread across different disciplines are of the view that 'justice' in a transitional context incorporates a totality of reform strategies that deal with the previous regime's injustices.

According to the political scientist Nancy Fraser, one of the major dilemmas of justice projects is in striking a balance between commitments to redistribution and recognition. Thus within the context of transitional justice, 'justice' as recognition may involve prosecutions, the creation of truth commissions or commissions of inquiry whose role is to recognize and acknowledge the atrocities of the past regime. By contrast, justice as 'redistribution' seeks to re-order

---


Bell, Campbell and Ni Aolain, supra n. 75.

See Teitel (2000), supra n. 16 at 5. Bell, Campbell and Ni Aolain, supra n. 75 and Cobban, supra n. 59.


Ibid.


These studies include, inter alia, Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Polity, 2002) 5; Teitel (2000), supra n. 16, 7; Bell, Campbell and Ni Aolain (2004) (n 75). See also generally N Fraser, Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition’ (Routledge, 1997).

Fraser, ibid.

property or land rights and can symbolically redistribute shame, from the victim to the perpetrator.\(^{100}\)

Much more broadly and directly, Rama Mani has addressed the 'justice theory' in a post conflict dispensation.\(^{101}\) She identifies rectificatory, legal and distributive justice as the three dimensions of justice that must all be pursued at the transitional moment.\(^{102}\) Rectificatory justice concerns redress for the explicit human outcomes of conflict structured in gross human rights abuses, war crimes, crimes against humanity and other injustices inflicted upon human beings.\(^{103}\) Legal justice addresses the notion of the establishment of the rule of law that often loses its legitimacy, deteriorates or is destroyed both during and after a conflict.\(^{104}\) Distributive justice focuses on economic and political inequalities, which are seen as the root causes of most conflicts.\(^{105}\)

This is in line with Ruti Teitel's expansive approach to the discourse, which delineates criminal justice, historic justice, reparatory justice, transitional constitutionalism, and legislative and administrative responses as various legal approaches to injustices in the passage from repression to a liberal democracy.\(^{106}\) She stated that:

\[
\text{[A]djudications of the rule of law construct understandings of what is fair and just. Criminal, administrative, and historical investigations establish past wrongdoing. Reparatory projects vindicate rights generated by past wrongs to victims as well as to the broader society. Transitional constitutionalism and administrative justice reconstruct the parameters of the changing political order in a liberalization direction.}\(^{107}\)
\]

This begs the question of why particular 'justice' mechanisms are preferred over others. Perhaps the answer can be explained by Ruti Teitel's genealogy of transitional justice.\(^{108}\) This genealogy is structured in three phases; firstly, the post-World War II period in which international criminal justice was invoked to deal with war crimes; secondly, the end of the Cold War where transitional justice was tied to various nation-building projects and thirdly, the contemporary era where the instability associated with globalisation has normalised transitional justice.\(^{109}\) Justice mechanisms currently adopted are a conflation of the Nuremberg legacy of international accountability and the second

\(^{100}\) Ibid.
\(^{101}\) Mani, supra n. 97.
\(^{102}\) Ibid.
\(^{103}\) Ibid.
\(^{104}\) Ibid.
\(^{105}\) Ibid.
\(^{106}\) Ibid.\(^{106}\)
\(^{107}\) Ibid.
\(^{109}\) Ibid.
phase’s democratisation that focused on the rule of law applicable to political communities and local perspectives.\textsuperscript{110} Thus, the type of justice adopted is linked to the appropriate definitive political context.\textsuperscript{111}

On this note, cognisance ought to be made of Fletcher and Weistern’s arguments that justice needs to be both cemented on and focused on the communities, cultures and contexts of the regime in transition.\textsuperscript{112} Put simply, ‘justice’ in transitional justice is largely dependent on context of the past injustices of the transitioning regime.\textsuperscript{113}

3. Feminist Interventions, Successes and Limitations

3.1 Feminist expositions

Critical advances have been made by feminist scholars and activists in presenting women as objects and victims of a discourse which was originally conceptualised by men.\textsuperscript{114} With regards to women as objects of transitional justice, it has been pointed out that whereas in most societies women actively participate during the war or in the fight against dictatorship, this role is weakened in transitional times when returning to conventional practice entails the restoration of patriarchal values.\textsuperscript{115} Thus women’s concerns can be factored in by ensuring that women sit and participate in negotiating tables that deliberate on the transition to an acceptable regime.\textsuperscript{116}

Feminists have underscored how foundational transitional justice concepts presuppose male citizens thereby excluding women.\textsuperscript{117} Some critiques have

\begin{itemize}
\item \textsuperscript{110} Ibid.
\item \textsuperscript{112} Fletcher and Weinstein, supra n. 25. See also P Gready, ‘Reconceptualising transitional justice: Embedded and Distanced justice’ (2005) 5(1) Conflict, Security & Development 3.
\item \textsuperscript{113} Ibid.
\item \textsuperscript{115} Bell, Campbell and Ni Aolain, supra n. 75.
\item \textsuperscript{117} See generally H Charlesworth and C Chinkin, The Boundaries of International Law: A Feminist Analysis (Manchester UP, 2000).
\end{itemize}
gone further to highlight that liberal norms have been used to justify injustices in transitional contexts. An example in this regard could be the case of women's rights to property in South Africa in the transition from apartheid to democracy.\textsuperscript{118} Notwithstanding the inequalities and historical injustices, the liberal understandings of the rule of law were invoked to deny redistribution.

The rule of law has been presented as premised on male notions of law and governance hence the failure by the envisaged liberal democratic state to liberate women.\textsuperscript{119} Similarly, and in relation to women as victims, human rights law is said to be primarily concerned with offering protection from state encroachment in areas that relate to men instead of ensuring the inherent human dignity of all.\textsuperscript{120} For example, human rights violations that often dominate transitional justice mechanisms include forced disappearances, extrajudicial killings and torture.\textsuperscript{121} Notwithstanding the gravity of these atrocities, along with their possible female victims, focus on these violations fails to deal with the fundamental scope of human rights violations that women face.\textsuperscript{122} These may include uneven pain caused by internal displacement, loss of a family member and violations of economic, social and cultural rights.\textsuperscript{123}

Cultural or difference feminists, in particular, stress that the human rights system has to take into account women's difference from men in at least three areas.\textsuperscript{124} Firstly, women's biological difference to men makes them more vulnerable to sexual violence and other acts of violence.\textsuperscript{125} Their parturition and breastfeeding role concentrates their activities in the home.\textsuperscript{126} Consequently, women are less involved in public life.\textsuperscript{127} On this note, feminists decry the masculinility of international law which focuses on incidents of violence in the public sphere, yet as Fionnuala Ni Aolain cautions, women's experiences of violence are in both private and public realms.\textsuperscript{128}

\textsuperscript{118} See the discussion in Nesiah, supra n. 6, at 809-811.
\textsuperscript{119} Ibid.
\textsuperscript{120} E Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19(1) Human Rights Quarterly 136.
\textsuperscript{121} Fionnuala Ni Aolain, 'Political Violence and Gender During Times of Transition ' (2006) 15 Columbia Journal of Gender and Law 829.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{125} Brems, supra n. 120.
\textsuperscript{126} Ibid.
\textsuperscript{127} Ibid.
\textsuperscript{128} Ni Aolain (2006), supra n. 121.
Secondly, not only do feminists aim at breaching the public/private dichotomy, they also object to the hierarchy of rights. Identifying violations of economic, social and cultural rights as being central to women, they want them to be accorded the same status as civil and political rights. Thirdly, some feminists critique the liberal notion of human rights which focuses on individual rights. They argue that women are more inclined towards their families and other social groups. Thus attention to collective rights is necessary.

3.2 Feminist Victories and Critique

In the 1990s there were major developments that significantly altered the attitude of international law towards women in societies making the transition to a liberal democracy. While not adopted in relation to transitional justice at all, turning points were marked by several moments including; the adoption of the Declaration on the Elimination of Violence Against Women by the UN General Assembly in December 1993 and Vienna Declaration and Program of Action's emphasis that:

[T]he human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights," [and that] “Gender-based violence and all forms of sexual harassment and exploitation, are incompatible with the dignity and worth of the human person, and must be eliminated.

At the same conference feminist also triumphed in their quest for economic, social and cultural rights to be placed at par with civil and political rights when it was declared that:

[All] human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

---

129) Ibid.
130) Ibid.
131) See generally H Charlesworth, 'What are Women's International Human Rights' in RJ Cook(eds), Human Rights of Women: National and International Perspectives (University of Pennsylvania Press, 1994).
132) Ibid.
133) Ibid.
134) Brems, supra n. 120 and Franke, supra n. 99.
136) Para 5 Vienna Declaration, ibid.
Much more specific to transitional justice, at Beijing in 1995, the Fourth World Conference on Women averred in its Platform for Action that:

[II]n addressing armed or other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively.  

This resolution prompted campaigns for gender mainstreaming in transitional contexts through other platforms. The significant success of these lobby efforts was the adoption of the UN Security Council Resolution (UNSC) 1325. This Resolution requests particular efforts from the UN Secretary General, member states and those involved in the conflict. Apart from requiring that attention ought to be given to gender mainstreaming and gender balance, it also stipulates that certain actions ought to be taken. These include, among others, ensuring increased participation by women in the prevention, management and resolution of conflict, and that girl children and women should be protected from gender-related violence.

8 years later the UNSC passed resolution 1820 (2008) which focused on ending and preventing conflict related sexual violence and is considered to be the first recognition by the UNSC of the nexus between gender based violence and international peace and security. Its implementation was improved by Resolutions 1888 (2009) which allocated leadership and created actual support mechanisms.

In the same year, the UNSC passed Resolution 1889 which focuses on hindrances to women’s participation in peace processes. It suggests global monitoring mechanisms for the implementation of Resolution 1325, and strengthening both domestic and international reaction to women’s concerns in conflict and post-conflict contexts. This was followed by Resolution 1960 (2010) which called for a cessation to sexual violence against women and girls.

---


138) Chinkin, ibid.


in armed conflict and provides mechanisms for ending impunity for those who commit sexual violence, including sanctions and reporting mechanisms.\textsuperscript{146} This increase in UN resolutions confirms the importance of gender to the transitional justice discourse. Dianne Otto has however noted that the UNSC may be selectively engaging with feminist ideas and that international legal protection of women may in fact reinforce patriarchy.\textsuperscript{147} Nonetheless, she cautions that:

\[I\]t is always dangerous to challenge dominant forms of power, ideas and ways of doing things...There are the dangers of vilification and marginalization..., of institutional cooperation, of legitimating institutions that are deeply antagonistic to transformative change... and of making things worse for women.\textsuperscript{148}

Nonetheless, apart from the highlighted feminist victories in international conferences, at the UN General Assembly and Security Council, there have been significant developments in international criminal law, jurisprudence of war crimes tribunals and in the work of recent truth commissions.\textsuperscript{149} Ní Aolaín has recently opined that the occurrence of women in these contexts continue to be shifty and muddled by their constant positions as women.\textsuperscript{150} Nonetheless as the subsequent discussions will demonstrate while feminist ideas have been overtly accepted by international law and its institutions this is not the case with postcolonial thinking.

4. The Postcolonial Perspective

4.1 A vignette of Postcolonial Legal Theory

According to Darien-Smith, Eve and Fitzpatrick Peter, postcolonial legal theory is an examination by legal scholars of the sidetracked theme of 'law's consanguinity to the postcolonial'.\textsuperscript{151} In the context of globalisation, and the post-September 11 recrudescence neo-colonialism the appellation postcolonial

\textsuperscript{148} Otto, ibid at 120.
\textsuperscript{149} Franke, supra n. 99.
\textsuperscript{150} Ní Aolaín (2012), supra n. 17.
(postcolonial or post-colonial) has been subject to serious rancour. The major objection to the use of the moniker has been the claim that the alleged former colonies are still colonies. Such assertions can be very compelling as they confirm the evident resurgent neo-imperialism. However, this work's view is that former colonies are no longer really colonies since:

[T]hey have their own governments, which in most cases appear vastly different from the colonial regime. These new governments may represent improvements, new hope, or terrible disappointments, but they are not the same. The newly liberated nations may be ravaged by corruption, violence, and disease, and those horrors may be the direct or indirect result of having been colonized -- and that is the subject for investigation by postcolonial studies, not a denial of their value.

The history of colonialism and the current experiences of neo-colonialism have made postcolonial legal scholars overtly conscious of interstate power relations and the manner in which any intended international norm will, in reality impact on the administration of power. In evaluating power relations and their effect on the implementation of international law, postcolonial legal thinking has derived inspiration from non-legal major intimations of postcolonialism reflected in the works of, Michel Foucault, Robert Young, Edward Said, Homi Bhabha, Gayatri Spivak, Frantz Fanon, among others.

Indeed as a result of the thinking of these ground-breaking postcolonial theorists some concepts have become associated with and perceived in a certain way in postcolonialism. For example, whereas 'discourse' in linguistics simply refers to any segment of dialogue which is more than a sentence, in postcolonial studies the term is associated with Foucault's enunciations. Foucault saw discourse as a firmly circumscribed scope of knowledge, a philosophy with which the world can be recognised. Those with power control

---


154) Anghie and Chimni, supra n. 6.


158) Ibid.
this knowledge, how it's imparted, and exercise authority over those who have no say in what is known.\textsuperscript{159}

This nexus between power and knowledge is essential in interactions between former colonies and their colonial masters, and was seized by first-generation postcolonial legal theorists who explained how traditional understanding of international human rights law (in common with other facets of international law) imbricate with colonial needs.\textsuperscript{160} They specifically blamed international law for rendering legitimacy to the imperialists' objectives of subjugating the colonized and systematically pillaging their resources.\textsuperscript{161} From this theoretical angle, a deceitful positivist myth of sovereign equality which assumes that all states are the principal actors of international law who are bound by international human rights norms that they have freely and voluntarily consented to was rejected.\textsuperscript{162}

In his expostulation of Orientalism, Edward Said builds on Foucault's understanding of discourse to connect culture and imperialism.\textsuperscript{163} He points out that during the enlightenment period the western discourse assisted the Occident to construct, embody and prevail over the Orient.\textsuperscript{164} In postcolonial studies, Orientalism has come to be understood as a way in which western culture and stereotypes reinforce global depictions of non-western cultures.\textsuperscript{165} The effect is not only felt in political and economic structures and institutions but in the creation of a binary fashion of seeing the colonialists as the self and the colonised as the other who need civilisation.\textsuperscript{166}

Drawing on Edward Said's theory, Antony Anghie asserted that most of international law's core doctrines are a product of efforts by European jurists to legally account for the imperial distinctions between the civilised European world and the non-civilised non-European world.\textsuperscript{167} Similarly, Siba N’Zatioula Grovogui demonstrated that European viewpoints of the self and their philosophical depictions have been essential in the formation of international law.\textsuperscript{168} As James Thuo Gathii puts it:

\textsuperscript{159} Ibid.
\textsuperscript{160} See R P Anand, \textit{Confrontation or Cooperation? International Law and The Developing Countries}, (Martinus Nijhoff, 1987) 1-274.
\textsuperscript{161} Ibid.
\textsuperscript{164} Ibid. The Occident refers to France, Britain and the United States & the Orient was a term coined by Edward Said for the Far East and the Middle East.
\textsuperscript{165} See the analysis in S Khan, ‘Race, Gender and Orientalism: Muta and the Canadian Legal System’ (1995) 8(1) \textit{Canadian Journal of Women and the Law} 249.
\textsuperscript{166} Ibid.
\textsuperscript{168} See generally NG Siba, \textit{Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law}, (University of Minnesota Press, 1996).
These representations of the European self, and the contrasting non-European other, form the basis of simultaneous exclusion and inclusion and are grounded on differences or similarities of religion, culture or race.\footnote{169} In a global order that classifies nations as developing and developed, modern and pre-modern and as inhabiting different worlds, human rights norms are seen to be the new yardstick that have ousted civilisation as the postcolonial test for separating the Self from the Other.\footnote{170} Commenting on the realisation that the majority of cases that are being dealt with by human rights bodies are from postcolonial countries Makau Mutua had this to say:

[I]t is in this sense that the “other culture”, that which is non-European, is the savage in the human rights corpus and discourse..... Many are women and children twice victimised because of their gender and age, and sometimes the victim of the savage culture is the female gender itself.\footnote{171}

Indeed in relying on an overly generalized victim subject mostly representative of Western privileged women's concerns, the women’s human rights movement has been critiqued for its hegemonic bias.\footnote{172} According to this viewpoint, postcolonial women are largely depicted as victims of their societal bad cultural practices.\footnote{173} This approach bolsters stereotyped and racist images of that culture favouring Western culture.

Notwithstanding, its compelling articulation of discursive colonialism, Orientalism tends to represent an exceedingly general and fixed western cultural imperialist notion.\footnote{174} In particular, it tends to relegate the Other to a mere end result of the colonizer's discourse. This tendency is manifested, for example, in Said's assertions that ‘orient was not (and is not) a free subject of thought and action’.\footnote{175}
In view of this difficulty, Homi Bhabha seized upon Orientalism to point out the ambivalent relationship that exists between the Self and the Other.\textsuperscript{176} His philosophy basically unsettles the definitive power of colonial superiority since it disrupts the uncomplicated relationship between the colonizer and the colonized.\textsuperscript{177}

First coined in psychoanalysis, the term ‘ambivalence’ illustrates a constant alteration between desiring something and desiring its antithesis.\textsuperscript{178} Applied to postcolonial discourse theory by Homi Bhabha, the term depicts the love and hate relationship that exists between the colonizer and the colonized.\textsuperscript{179} For example while some colonial subjects struggled against colonialism, others collaborated with the colonizer and yet the actions of other colonized subjects alternate between complicity and resistance.\textsuperscript{180} On the same note, while the colonizer’s objective is to create deferential liegeman who ‘mimic’ the colonizer, it creates fluctuating subjects whose replication of the colonizer’s expectations, attitudes and ideals is far-removed from mockery.\textsuperscript{181}

According to Bhabha, the execution of colonial power is weakened by the process’s perpetual ambivalence.\textsuperscript{182} This is evident in that even though the colonizer’s sets out to impose his own values on the colonized, he does not really intend to produce precise mimics.\textsuperscript{183} Reproducing exact clones is scary since it would disrupt the notion of alterity—the distinction between the self and the other which is necessary for the colonizer to be identified as master.\textsuperscript{184} To explain this ambivalent process in the exercise of colonial power Bhabha formulated the term ‘hybrid.’\textsuperscript{185} He gives a classic example of Charles Hunt’s bid to covert Indians to Christianity in 1792.\textsuperscript{186} Charles Grant wanted Indians to adopt Christian beliefs but was afraid that this could stir a liberation rebellion thus he mixed the Christian tenets with factious caste practices.\textsuperscript{187} ‘Hybridity’ or the engagement by the colonizer with the culture of the colonized thus disrupts the exceedingly general and fixed western cultural imperialist notion.\textsuperscript{188}

\textsuperscript{176} H Bhabha, ‘Of Mimicry and Man: the Ambivalence of Colonial Discourse’ in H Bhabha, The Location of Culture (Routlegde, London, 1994) at 85-92.
\textsuperscript{177} Ashcroft, Griffiths, and Tiffin, supra n. 156 at 13.
\textsuperscript{178} R Young, Colonial Desire: Hybridity in Theory, Culture and Race, (Routlegde, London, 1995) at 161.
\textsuperscript{179} Bhabha, supra n. 176.
\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
\textsuperscript{183} Ibid.
\textsuperscript{184} Ibid.
\textsuperscript{185} For an explanation of alterity see Ashcroft, Griffiths & Tiffin, supra n. 156 at 11.
\textsuperscript{186} Ashcroft, Griffiths & Tiffin, supra n. 156 at 118-121 and Young, supra n. 178.
\textsuperscript{187} Bhabha, supra n. 176, at 85-92.
\textsuperscript{188} Ibid.
A significant part of Bhabha's theory is dedicated to explaining how hybridity can generate opportunities for agency.\(^{189}\) Agency, in postcolonial theory, denotes the ability of the colonized to engage with or resist colonialism.\(^{190}\) According to Bhabha, the ambivalence at the origination of established discourses on power facilitates a form of turbulence based on the fluctuation that modify paradoxical situations of authority into a justification for action.\(^{191}\) His famous illustration of this resistance is an incident whereby a group of villagers in India rebelled against an attempt to convert them to Christianity.\(^{192}\) The villagers are said to have declined the sacrament on the basis that the teachings of God emanated from a meat-eater and not a vegetarian.\(^{193}\)

It needs to be pointed out that Bhabha does not restrict the use of the powers of hybridity to resist colonial authority to colonial times.\(^{194}\) He also gives a postcolonial example of agency, that is, the way in which a British group; Women Against fundamentalism appropriated the news of the condemnation to death of Salman Rushdie in 1989. Women against Fundamentalism used the Rushdie affair, not to align themselves with either Christianity or conservative Islam but to attract a debate on issues that affect women.\(^{195}\)

Further, Bhabha stresses that agency only emanates from the contours of the master’s discourse.\(^{196}\) Therefore, a form of connivance and abetment between the colonizer and the colonized is inevitable.\(^{197}\) This explains Bhabha’s reference to agency as a form of ‘negotiation’.\(^{198}\) To him this ‘negotiation’ or playing out of ‘hybridity’ takes place at a ‘third space - a middle, disparate site where supplementary discourses move in to maintain their distinctiveness.\(^{200}\)

---


\(^{190}\) See Ashcroft, Griffiths & Tiffin, supra n. 156 at 8-9.

\(^{191}\) H Bhabha, The Location of Culture (Routlegde, 1994) at 112. See also M Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977), C Gordon eds, (Pantheon Books, 1980) at 142.

\(^{192}\) Bhabha, ibid at 121.

\(^{193}\) Ibid.

\(^{194}\) Ibid. at 229.


\(^{196}\) Bhabha, supra n. 191 at 229.

\(^{197}\) GC Spivak ‘Poststructuralism, Marginality, Postcoloniality and Value’ in Peter Collier and Helga Geyer-Ryan (eds.), Literary Theory Today, (Polity Press, 1990) at 228. See also the critique by R Young, White Mythologies: Writing History and the West (Routlegde, 1990) at 152.

\(^{198}\) Kapoor, supra n. 189 at 652.

\(^{199}\) Ibid.

\(^{200}\) Bhabha, supra n. 191 at 37.
It should be pointed out that Bhabha is emphatic that colonialism is said to have pronounced the distinction between the former colonial powers and their former colonies thus it is hopeless to attempt to recover the pre-colonial identity. For this reason he is wary of any attempts at directly confronting the dominant discourse as the product is likely to be reverse Orientalism and racism or a replacement of one authority with another. Concurring with this line of reasoning Bart Moore-Gilbert argues for a form of agency which disrupts the master’s discourse from within.

Parallels can be drawn between Bhabha’s understanding of the relationship between the colonizer and the colonized and some legal scholars’ attitudes to international law. First there is postcolonial scholarship which seeks to prove that the encounter between the European and the non-European world contributed to the creation of the core principles of international law; thereby unsettling the notion that international law is a sole product of European culture.

Second, it could be said that the Bhabain philosophy is best demonstrated by the ambivalent attitudes of these pundits to international law. From one viewpoint, these scholars criticized international law for adding legitimacy to colonialism. Yet, from another angle, these scholars accepted international law and even devoted research in proving that non-European states were not newcomers to the concept of international law. According to Makau Wa Mutua the suggestion that Africans did not have ideas of human rights is Eurocentric.

Thirdly, postcolonial scholars sought opportunities of agency within the international legal machinery. Believing that concerns of the newly-liberated states could be addressed through the United Nations (U.N) system, they contended that General Assembly resolutions imposed legal obligations on member states. This strategy was employed in attempts to address several issues,
including, the end of colonialism, racial discrimination, sovereign equality of states and non-intervention by powerful states in the affairs of the new states.\textsuperscript{211} Having succeeded in spearheading the decolonization process, they noted that political independence without economic liberation was insufficient.\textsuperscript{212} Therefore, they wishfully sought to re-order the uneven economic relations between the North and the South through the inauguration of a New International Economic Order (NIEO).\textsuperscript{213}

In spite of this ambitious attempt the gap between the rich and the poor widened and the NIEO vision collapsed with the end of the Cold war in 1989.\textsuperscript{214} It can be argued that the failure of the NIEO illustrates Bhabha's notion that agency and subjectivity are closely connected. Indeed, several underpinnings of the NIEO ideology qualify the ideas of agency and subjectivity.

Firstly, the NIEO demonstrates an attempt by the \textit{Other} to radically force transformation of international law on the \textit{Self} who play a significant role in the market economy. This can be assumed from the voting patterns at the adoption of the General Assembly resolutions which proclaimed the New International Economic Order.\textsuperscript{215} The NIEO declaration and the Program of Action were adopted without a vote.\textsuperscript{216} The Charter of Economic Rights and Duties of States were passed by a recorded vote of 120 affirmative votes, six opposing and 10 abstentions.\textsuperscript{217}

\begin{itemize}
\item \textsuperscript{211} See Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, UN Doc. A/4684 (14 December 1960); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131(XX), UN Doc. A/604.1 (21 December 1965) and Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), UN Doc. A/8028 (24 October 1970).
\item \textsuperscript{212} ME Ellis, 'The New International Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited,' (1985) \textit{15 California Western International Law Journal} 647.
\item \textsuperscript{213} Two resolutions adopted in pursuance of this goal are the Declaration on the Establishment of a New International Economic Order G. A Res 3201(S-VI), UN Doc. A/9559 (1 May 1974) and the Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), UN Doc A/9559 (Dec 12, 1974) (hereinafter cited as Programme of Action). The ideas represented in the two documents were refined and codified in the Charter of Economic Rights and Duties of States likewise adopted as a General Assembly Resolution. (Charter of Economic Rights and Duties of States, GA Res. 3281, UN Doc. A/9631(1974)).
\item \textsuperscript{215} See the discussion in E McWhinney, 'The International Law-Making Process and the New International Economic Order, (1976) \textit{14 Canadian Yearbook of International Law} 57.
\item \textsuperscript{216} Ibid.
\item \textsuperscript{217} Those who opposed were Belgium, Denmark, West Germany, Luxembourg, the United Kingdom and the United States. Austria, Canada, France, Ireland, Israel, Italy, Japan, The Netherlands, Norway and Spain abstained.
\end{itemize}
This differs from the quest for decolonization and national self-determination which was steeped in Western liberal thought and was achieved with the tacit support of the Self. Indeed, no colonial power voted against the Declaration on the Granting of Independence to Colonial Countries and Peoples which was passed with 89 affirmative votes and nine abstentions.\textsuperscript{218} Former colonial masters were not wary of political independence since they had already arranged the structures of the market economy in such a way that territorial and economic strength were divorced.\textsuperscript{219} As the then spokesman of the developing nations, President Boumedienne of Algeria aptly put it:

\begin{quote}
[I]n fact the colonialist and imperialist powers accepted the principle of the right of the peoples to self-determination only when they had already succeeded in setting up the institutions and machinery that would perpetuate that system of pillage established in the colonial era...\textsuperscript{220}
\end{quote}

Consequently the binary divisions of the self and the other produced by the colonial encounter were preserved since after political liberation, former colonial masters still controlled the international economic and trading systems.\textsuperscript{221} Developing nations which continued to be the source of cheap raw materials were still dependent on the industrialized West for capital, finished products and technology.\textsuperscript{222}

Secondly, this NIEO strategy was founded on the notion that socially generated resources and knowledge ought to be socially distributed.\textsuperscript{223} This highlights a suspicious attitude towards international law by developing countries and a refusal to accept capitalist ideas of trade by the same.\textsuperscript{224} Inherent is such a viewpoint was a recognition of the hypocritical nature of colonialism.\textsuperscript{225} This was tantamount to outright rejection of the Western discourse as a philosophical basis, a move that Bhabha warns against. Against this backdrop Eric, A. Engle, argues that any transformation of the current economic arrangements will be effected progressively within the Bretton Woods institutions.\textsuperscript{226}

\begin{footnotesize}
\textsuperscript{218} Declaration on the Granting of Independence to Colonial Countries and Peoples, supra n. 211. Australia, Belgium, the Dominican Republic, France, Portugal, South Africa, Spain, the United Kingdom, and the United States abstained.
\textsuperscript{219} Ellis, supra n. 212.
\textsuperscript{220} Opening speech at the 6th Special Session of the U.N General Assembly which passed the NIEO declaration and Programme of Action ( UN GAOR, 28th Sess, A/ PV. 2208 ( April 10, 1974) at 2). See also WG Haight, 'The New International Economic Order and the Charter of Economic Rights and Duties of States'; (1975) 9 International Lawyer 591.
\textsuperscript{221} Ellis, supra n. 212.
\textsuperscript{222} Ibid.
\textsuperscript{223} Engle, supra n. 214 at 191.
\textsuperscript{224} Ibid.
\textsuperscript{225} Ibid.
\textsuperscript{226} Ibid. at 196.
\end{footnotesize}
It is axiomatic from the discussion above that in the era of the NIEO; postcolonial legal scholars backed the postcolonial state in furtherance of its nation building responsibility.\textsuperscript{227} To them, sovereignty was negative, inhered in the newly liberated state and gave the state a right to be liberated from foreign interference.\textsuperscript{228} The state was seen as unitary, ideal body unaffected by class, race, tribal or gender related disagreements.\textsuperscript{229} As a result of this viewpoint, there was no focus on the postcolonial state's authoritarianism, neither was there any interrogation of its failure to provide governance.\textsuperscript{230} 

The post – NIEO era saw an end to postcolonial wars that had been previously exacerbated by the superpowers' Cold War.\textsuperscript{231} It also saw a rise in pro-democracy movements who were either engaged in constitutional re-engineering in the passage from war or to peace or were calling upon the postcolonial state to respect its citizenry's wider human rights.\textsuperscript{232} In the contemporary era of globalization such struggles has become an acceptable model for the rule of law.\textsuperscript{233} 

For postcolonial legal philosophers, these developments necessitated a shift from absolutist notions of state sovereignty to a revised idea of sovereignty which emanate from the will of the people and is related to people's rights, even though their elected representatives might exercise it.\textsuperscript{234} Understood in this way, sovereignty allows for intervention in a state's domestic affairs for grave human rights atrocities.\textsuperscript{235} It affirms the view that the state has rights as well as obligations and that these responsibilities may be enforced by both its citizens' struggles for civil liberties and by the international community's techniques for humanitarian intervention.\textsuperscript{236} International law can therefore be invoked in the event of a state's failure to provide good governance so as to ensure that the people's right to democratic entitlement is protected, respected and fulfilled.\textsuperscript{237} This tendency to resort to human rights and humanitarian law in the aftermath of war or authoritarianism homogenizes a broad study of

\begin{thebibliography}{99}
\bibitem{227} Anghie and Chimni, supra n. 6 at 82.
\bibitem{228} Ibid.
\bibitem{229} Engle, supra n. 214 at 196.
\bibitem{230} Ibid.
\bibitem{232} Ibid.
\bibitem{234} Anghie and Chimni (n 7) at 82. See also R Falk, 'Sovereignty and Human Dignity: The Search for Reconciliation' in Francis M Deng and Terrence Lyons (eds), African Reckoning a Quest for Good Governance (Brookings Institution Press, 1997) 1-185.
\bibitem{236} Falk, supra n. 234.
\bibitem{237} Ibid.
\end{thebibliography}
humanitarian justice establishing a legal corpus related to prevalent conflict – the transitional justice discourse.\textsuperscript{238}

4.2 Postcolonial theory and Transitional Justice

Efforts to construct a postcolonial understanding of the role of international law in a transitional context inevitably leads to an exploration of the extent to which the transitional justice discourse is bedeviled with the umbra of international law's complicit in facilitating imperialism. This is more-so in the current context of globalization and the war of terrorism where power and fundamental relationships which are entrenched and depicted in international law are undergoing much scrutiny.\textsuperscript{239} It is distinctly regrettable that these budding critiques of transitional justice unpretentiously mimeo the precepts of colonialism.\textsuperscript{240} Indeed axioms of imperialism are liable to be repeated in the use of international law in a transitional context.

First, in as much as international law is indicted for facilitating imperialism's civilizing mission the purpose of which was to emphasize control and power through knowledge formulation and the cultural creation of 'otherness,' the same can be said of the role of law in transitional justice.\textsuperscript{241} This can be inferred from the observation that:

[I] n the context of the ongoing violence in the international system, it is significant that since the beginnings of international law, it is frequently the 'other' the non-European tribes, infidels, barbarians who are identified as the source of all violence ... However, this violence when administered by the colonial power is legitimate because it is inflicted in self-defence or because it is humanitarian in character and indeed seeks to save the non-European peoples from themselves.\textsuperscript{242}

This 'subject-constituting project' is illustrated by the characterization of the wars in Iraq and Afghanistan.\textsuperscript{243} Bell, Campbell and Ni'Aolain have elucidated

\begin{itemize}
  \item \textsuperscript{238} Ibid. See also RG Teitel, 'The law and Politics of Contemporary Transitional Justice', (2005) 38 Cornell International Law Journal 837.
  \item \textsuperscript{240} This concern is noted by the editors of the International Journal of Transitional justice, see; Editorial Note 2007(1) International Journal of Transitional Justice 1 at 3. See also C Bell, C Campbell and F Ni Aolain, 'The Battle for Transitional Justice: Hegemony, Iraq and International Law' in J Morison, K McEvoy, and G Anthony (eds), Judges, Transition and Human Rights Cultures: Essays in Honour of Stephen Livingstone, (Oxford UP, 2007).
  \item \textsuperscript{241} See Anghie and Chimni, supra n. 6 at 85-86.
  \item \textsuperscript{242} Ibid.
  \item \textsuperscript{243} The term 'subject-constituting project' is borrowed from Gayatri C Spivak, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present (Harvard UP,1999) 1-464. See also
\end{itemize}
on how having failed to offer a credible explanation for their invasion of Iraq, the United States (US) and its coalition partners legitimatized the war by pointing to the human rights atrocities and the democratic deficit of Saddam Hussein's regime.244

Indeed the ghost of the civilizing mission was revived when terms like 'democratization' and 'human rights' were used to produce knowledge of a pre-invasion Iraq which was in turmoil and in need of the coalition's intervention for its liberation.245 This is noteworthy from George W Bush 2003 remarks that:

In Iraq, the Coalition Provisional Authority and the Iraqi Governing Council are also working together to build a democracy – and after three decades of tyranny, this work is not easy. The former dictator ruled by terror and treachery, and left deeply ingrained habits of fear and distrust. Remnants of his regime, joined by foreign terrorists, continue their battle against order and against civilization.246

In a similar vein, and with regard to postcolonial women, Anne Orford borrows Gatayri Spivak’s famous adage ‘white women ... saving brown women from brown men’ as she notes how certain feminist legal literature sees the role of international law and ‘white women’ as being the liberation of third world women from their cultures.247 According to this school of thought international law must set out to reform these savage cultures so that there can mimic those of powerful countries.248

Secondly, it could be said that almost all the key concepts associated with transitional justice – democratization, liberalization and rule of law – denote a progression from the Occident to the Orient.249 They imply the transformation of certain values that have professedly been developed by the untainted benevolent self and must now be embraced by the other if it is to make a successful transition to an internationally acceptable liberal democracy.250


244) Bell, Campbell, and Ni Aolain, supra n. 240.
245) Ibid.
247) Orford, supra n. 243 at 276.
248) Ibid. at 276-277.
249) The terminology used here is borrowed from Said, supra n. 163.
There are also based on the racist stereotypes of the postcolonial people as devoid of any philosophy for reconstructing their communities. These nuances can be deciphered from the then, Britain’s Prime Minister, Tony Blair’s address to the U.S. Congress in 2003. In his remark, he dismissed critiques that liberty, democracy and human rights are Western values and assertions that Serbian citizens, the Iraq people and the women of Afghanistan were content under the leadership of their outgoing regimes. In accordance to Tony Blair the US and its coalition’s values are:

[n]ot Western values, they are the universal values of the human spirit. And anywhere..., anytime ordinary people are given the chance to choose, the choice is the same: freedom, not tyranny; democracy, not dictatorship; the rule of law, not the rule of the secret police... And just as the terrorist seeks to divide humanity in hate, so we have to unify it around an idea. And that idea is liberty. We must find the strength to fight for this idea and the compassion to make it universal.

In the current context where those initiatives are entangled in intricate issues of power, efforts at making those values ‘universal’ are likely to be viewed with cynicism. As the cases of the ouster of Saddam Hussein and Muammar Gaddafi demonstrates, while those universal values stipulate that institutions and practices which are inimical to human rights must be transformed, use of force which justifies the reconstruction of a less powerful society by definition also necessitates imposition of the victor’s justice.

Furthermore, given transitional justice’s relation to the western view that the individual is the principal holder of rights in tandem with its marginalization of economic, social and cultural rights, the values it transmit cannot be said to be universal. Postcolonial Africa for example, accords economic social and cultural the same status as an individual’s civil and political rights. The Eurocentric notion cannot also adequately account for the

252) Ibid.
253) Ibid.
254) Blair (n 250).
multifariousness of group and individual rights in a postcolonial state. This attitude also testify to the masculinity of transitional justice since as a social class, women are the conventional care givers who are more directly affected by a state's failure to respect, protect and fulfil its citizens' economic, social and cultural rights.

Thirdly, international law's inattention to a historic fact that in most cases, postcolonial authoritarianism and violence was sustained and maintained by external historic and prevailing processes attracts criticism that transitional justice serves to deflect attention from and entrench impunity for human rights atrocities committed by former colonial powers' violence. According to Richardson, H.J. III,

[C]urrent Northern tier political and legal theory among dominating elites aims to suppress accountability for colonialism's destructive effects by burying it under mounds of responsibility placed on the present 'failed' governments for all the deficiencies among its peoples.

This explains the African Union's lack of support of the indictment of Sudanese President Umar al-Bashir for war crimes and crimes against humanity by the International Criminal Court.

The Cold war is often cited as an example of a historical process which upheld authoritarianism and wars in many countries while the current war on terrorism and the United States' hegemonic inclinations are contemporary illustrations. An illustrative example in ideological differences is approach to the Zimbabwean question ever since the country attracted international attention in 2000. External reaction has varied and in fact rekindled the ideological debates of the Cold War. The contemporary variance pits postcolonial

---


263) Bell, Campbell, and Ni Aolain, supra n. 240 and Mutua, supra n. 258.
Africa, with the support of Russia and China against Western governments led by the United Kingdom (UK) and The United States of America (US). 264

The former insists that narratives of the Zimbabwean crisis should take into account the indelible mark left by colonialism. 265 They have also proposed African solutions to African problems and respect for the principle of equal sovereignty. 266 On the other hand Western governments are focused on governance and call for tougher international action against what they perceive to be a rogue administration which does not respect property rights and the rule of law. 267

Fourth, in giving tacit approval to economic exploitative practices which often occur alongside the implementation of transitional justice mechanisms, and for both to be given legitimacy as the promotion of liberal democracy by the international community, international law can be charged with advancing neo-colonial projects of economic exploitation. 268 A recent example of this phenomenon is the Western expropriation of Iraq's resources and assets after the overthrow of Saddam Hussein. 269

As Anne Orford questioned with regard to the analogous case of Afghanistan:

[How] did it come to seem almost remarkable, in the aftermath of a 'war on terror', to be told in November 2001 that the government of Afghanistan was being 'freely determined' by its people in Bonn, while the World Bank, the United Nations Development Program and the Asian Development Bank co-hosted a meeting in Islamabad to decide how to transform Afghanistan into a market economy. 270

The occupying powers privatised Iraq in a manner which could be seen as a violation of the Iraq citizenry's international legal right to self-determination. 271 This process, which was undertaken without the consent of the Iraqi people, included giving Western investors the power to control almost all Iraq companies without any profit repatriation terms. 272 The Iraq oil industry was also placed under the control of an independent professional management
team chaired by the former chief executive of Shell Oil Company.\textsuperscript{273} These programs were based on the understanding that a regime administered under a free-market democracy paradigm would not be authoritarian or compelled to purchase weapons of mass destruction.\textsuperscript{274}

It may \textit{prima facie} appear unproblematic that transitional justice and free market capitalism have a complementary and mutually reinforcing relationship. This is because both practices purportedly set out to spread and improve human rights norms.\textsuperscript{275} According to liberals, as multinational enterprises operate globally within the system of free trade and investment they progressively impart human rights values in transitional societies.\textsuperscript{276} To illustrate, the rule of law which is essential for the development of both the free market and democracy is enforced to ensure certainty in legislation which relates to foreign investment and the general conduct of business.\textsuperscript{277} In particular, primacy is given to an individual's right to property and sanctity of contract.\textsuperscript{278} This legal certainty results in greater foreign investment leading to domestic economic growth which will be instrumental in, or lead to an unavoidable socialisation of human rights norms and usher a democratic regime.\textsuperscript{279}

A close postcolonial legal scrutiny of this relationship however, reveals that it is paradoxical that transitional justice discourses purport to move citizens from an unjust regime to a just establishment while embracing the notion of free markets.\textsuperscript{280} This is because the argument that free market capitalism's contributes towards the promotion of people's welfare has been largely disproved.\textsuperscript{281} In fact postcolonial legal theorists have pointed out that international financial institutions' structural adjustment and trade liberalization policies' insensitivity to budgetary actualities of postcolonial states weaken the economic, social and cultural rights of people in these societies.\textsuperscript{282} These neo-colonial agents, (multinational companies) have also been accused

\begin{itemize}
\item \textsuperscript{273} Ibid.
\item \textsuperscript{274} Ibid. at 143.
\item \textsuperscript{276} Ibid. See also Henry J Steiner, R Goodman and P Alston, \textit{International Human Rights in Context: Law, Politics, Morals} (Oxford UP, 2000) 1-1497 at 1310 -1311.
\item \textsuperscript{277} Steiner et. al. ibid at 1314.
\item \textsuperscript{278} Ibid.
\item \textsuperscript{279} Ibid.
\item \textsuperscript{280} Orford, supra n. 243, at 280- 282.
\item \textsuperscript{281} Heywood, supra n. 45 at 15-52 and T Li-ann, 'Rule of Law within a Non-liberal "Communitarian" Democracy: The Singapore Experience', in P Randall (eds), \textit{Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.} (Routledge, 2004) at 183-224.
\item \textsuperscript{282} Gathii, supra n. 251, at 67.
\end{itemize}
of failing to adhere to international legal requirements of minimum labour and environmental standards.\textsuperscript{283}

Despite recent international legal recognition that non-state actors can be perpetrators of human rights atrocities, transitional jurisprudence has only embraced this notion in as far as it relates to civil and political rights violated by armed rebels.\textsuperscript{284} This inattention to international economic institutions and multinational companies' well documented contribution to the humanitarian crisis and human rights atrocities of outgoing regimes further reinforce the argument that there is complicity between the practice of transitional justice and the neo-liberal practices of economic exploitation.\textsuperscript{285}

However, none of these compelling postcolonial critiques of transitional justice celebrate post-colonial African leadership's mismanagement and corruption which exacerbated the colonial legacy of inequalities they failed to address as a prerequisite to independence.\textsuperscript{286} They also do not totally dismiss transitional jurisprudence as an extension of the civilizing mission, cultural imperialism or a promotion of neo-colonial practices of economic exploitation.\textsuperscript{287}

To reiterate, Homi Bhabha has eloquently pronounced that civilizing projects are undermined by the ambivalent representation of colonial power.\textsuperscript{288} A postcolonial legal understanding could therefore also endeavor to unsettle the contradiction between the Occident and the Orient, by interrogating the crucial connivance between the conditions in which the other is produced in transitional jurisprudence, and the self that is circumstantially produced.\textsuperscript{289} In scrutinizing treatises on transitional justice, this work has already highlighted the analogy between the construction of the benevolent, valorous, masculine self of the international actors and the other against whom 'justice' mechanisms ought to be employed so as to diffuse 'universal values'.\textsuperscript{290}

Yet, authoritative texts on transitional justice are outlined in a similar manner.\textsuperscript{291} For example, Professor Ruti Teitel's analysis of the genealogy of transitional justice marks the discourse's key historical epochs as the period after

\begin{thebibliography}{99}
\bibitem{283} Orford, supra n. 243.
\bibitem{285} Orford, supra n. 243 at 287-293.
\bibitem{286} Anghie and Chimni, supra n. 6 at 85-86.
\bibitem{287} Ibid.
\bibitem{288} Bhabha, supra n. 176, at 85-92.
\bibitem{289} Ibid.
\bibitem{290} See notes 238–289 above.
\bibitem{291} Teitel, supra n. 16; Elster, supra n. 51 and Kritz, supra n. 58 and n. 73.
\end{thebibliography}
Second World War, the post-Cold War era and the contemporary period of globalization which is distinct for its persistent conflict.\textsuperscript{292} It is remarkable that in the period after the Second World War former colonial powers were involved in conflicts aimed at suppressing anti-colonial movements as well as preventing the expansion of Communism.\textsuperscript{293} After the Cold war, these operations gained prominence in postcolonial societies as armies of the super powers increasingly turned to global peacekeeping and policing activities.\textsuperscript{294} It is noteworthy that in these interventionist activities, western powers have been implicated in conduct which the field of transitional justice associates with the inhuman acts of ‘rogue’ authoritarian leaders of outgoing regimes.\textsuperscript{295} To use Anne Oxford’s words;

\begin{quote}
[T]hat with which we charge the other - that it founds a masculinity, racially exclusionary, violent and nationalist political order on the expulsion and wounding of women and children – is in fact the basis of the international community as constituted through intervention narratives. The attempts to disavow this leads to more violence.\textsuperscript{296}
\end{quote}

This demonstrates that the practice of transitional justice is not a one-way process in which ‘rogue’ leaders of ‘failed’ states are either sanctioned or reconstituted in the image of an untainted benevolent international community.\textsuperscript{297} Rather, and to borrow from Homi Bhabha’s exposition on the ambivalence of the colonial exchange, an inevitable consequence of this contradictory colonial exchange is the occurrence of hybridity which creates opportunities for the appropriation of the powerful imperial knowledge for anti-colonial resistance purposes.\textsuperscript{298} These counter-colonial projects draw upon various local and hybrid practices to challenge, undermine and occasionally supplant the authority of the colonial discourse.\textsuperscript{299}

A classic example of this hybridity and agency is the African Charter on Human and Peoples’ Rights (African Charter) which emerged as a simultaneous reaction to dictatorship in postcolonial Africa and a site for resisting all

\textsuperscript{292} Teitel, supra n. 108.
\textsuperscript{296} Orford, supra n. 243 at 287.
\textsuperscript{297} Blair, supra n. 250.
\textsuperscript{298} Bhabha, supra n. 177, at 85-92.
\textsuperscript{299} Ibid.
kinds of imperialism. At its birth, the African Charter was seen as unconventional since it went further than embracing an individualistic universal rights notion to also incorporate collective rights as well as economic, social and cultural rights. The instrument’s crucial aspiration was captured in the Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria decision (SERAC & CESR v Nigeria) where the Commission aptly stated thus:


It is submitted that by engaging with and considering that features of African traditions and the values of the continent’s civilization can be its foundation, the Charter undermines the original civilizing mission of human rights. These developments however, do not obliterate the critique that because of its liberal bias, the transitional justice discourse may not be an appropriate tool for dealing with the postcolonial world’s injustices. Underlying tenets of liberalism do not amply consider these societies’ political, economic and cultural conditions.

A postcolonial legal reading could however, attempt to strike a balance between the need to decolonize humanitarian legal and human rights standards which form the normative basis of transitional justice, on the one hand, and a recognition that these international legal standards can be both viperous and redeeming. Further, and against the backdrop that globalization has reconfigured, disrupted and destabilized the notion of the sovereign state, postcolonial legal scholarship can also engage with non-state actors and other locations of power so as to holistically address rights and sites that concern injustices perpetrated on postcolonial subjects and women.

---

301) Oloka-Onyango, supra n. 257 and Swanson, supra n. 300.
303) Para. 4 preamble African Charter, supra n. 257.
305) Ibid.
306) For an analogous view see Krisch, supra n. 239 and Kapur supra n. 19.
307) Kapur, ibid at 29-36.
5. Conclusion: Feminism, Postcolonial Legal Theory and Transitional Justice

Feminists and postcolonial scholars share a fundamental suspicion of the preoccupation with transitions to a peaceful liberal democratic order as this tends to reverse gender equality gains and confirm a traditional public/private divide. They both direct their criticisms at the discourse's foundational concepts, namely, rule of law, liberalism, democracy and human rights. According to them, the liberal notions of democracy, rule of law and human rights were invented by an authoritarian system. For radical feminists, this dominant group is the patriarchal society and for postcolonial legal theorists, it is their former colonial masters. Both focus on the rights of a group and not necessarily on individual rights. Both theorists are critical of the traditional practice of privileging civil and political rights at the expense of economic, social and cultural rights. They differ though, in that feminists do not share the absolute positive attitude that post colonialists seem to have towards the collective, noting that groups can also be sites of abuse.

Thus this article has endeavored to directly weld the transitional justice discourse to the imperial origins and bias of international law. It has also problematized transitional justice's liberal basis. The observation it makes is that in their conventional form, transitional justice mechanisms may not adequately deal with the postcolonial world's injustices since postcolonial legal theorists and feminists have shown that liberal core values do not neatly fit into the societies' peculiar, socio-economic and political contexts. Previous authors have either ignored this connection or merely footnoted the colonial legacy. It is this author's assumption that this is because most of these scholars are largely steeped in liberal thought and are therefore eager to dismiss arguments of a cultural relativist nature as detraction and an exploitation of culture by dictators and their supporters. Yet most of these pundits concur that legitimacy is central to linking transitional justice processes to sustainable peace.

Inspired by feminists and postcolonial legal theorists, who largely draw on literary studies this thesis submits that Eurocentric views cannot however, be limited to the colonial context and thus rejected. Nor should they be removed from this historic context and thus written off. Therefore, while transitional justice can be seen as one of the human rights strategies that are reminiscent of imperial intervention in the lives of postcolonial subjects, it is open to seizure by the same. This is possible in a transitional context since these

308) Ibid.
situations create opportunities for stakeholders to rethink the inadequacies of the accepted discourse, and to subscribe to new ways of seeking justice. Therefore, in applying postcolonial legal thinking to transitional justice this paper exposed the field’s dominating ream in its usance so as to simultaneously inaugurate its liberating potential.