



CSV

Centre for the Study of
Violence and Reconciliation

**POLICY BRIEF:
TRANSITIONAL
JUSTICE AND
COLONIALISM**



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Acknowledgements:

Authored by Richard Chelin and Dr. Hugo van der Merwe

Edited by Jasmina Brankovic

Layout/design by Digipaper

Published October 2018

INTRODUCTION

Transitional justice is a set of processes or mechanisms designed to promote reconciliation, justice, healing, or democracy in transitions from war to peace or from authoritarian rule to democracy. It has found much traction in Africa, particularly in relation to recent peace processes or newly emergent democracies seeking to deal with legacies of systematic human rights abuses. However, transitional justice processes that do not engage with the history of colonialism may impose simplistic templates that leave the underlying causes of conflict and intergenerational legacies of oppression unaddressed.

The use of transitional justice language and mechanisms in recent African transitions has raised serious questions about the meaning of transitional justice in contexts where the spectre of colonial rule still hangs heavily over the political landscape. Do transitional justice processes have the capacity to investigate these histories, diagnose their structural legacies, and envision a social change agenda that reaches beyond immediate political reforms?¹

This policy brief unpacks the challenges faced by transitional justice proponents in countries where colonial legacies still mark institutions, political culture, and international relations.²

WHAT ARE THE KEY LEGACIES OF COLONIALISM THAT STILL IMPACT CONFLICTS IN AFRICAN SOCIETIES?

Which colonial legacies still fuel conflict and undermine constructive resolution of conflicts? While the drivers of conflict are multiple and complex, there are some common features that seem to especially bedevil the pursuit of sustainable peace in post-colonial contexts. Rather than simply assign blame for these legacies, transitional justice strategies need to diagnose and propose solutions to these problems:

a. Structural economic injustices

Post-colonial African states have inherited the structural economic injustices that remained largely untransformed following independence. Colonial rule fundamentally transformed economic relations and power, both between the colonised and the colonisers and among local populations. This took the form of expropriation and privatisation of land, taxation, externalisation of wealth, control over trade and production, and the exploitation of natural resources. Women's access to land and work were particularly impacted.

Traditional economic systems were destroyed and replaced by extractive economies based on market demand – driven mainly by consumption and wealth creation in colonial empires. In Tunisia, for instance, the colonial reconfiguration of the economy was aimed at centralised and export-oriented production. It resulted in the prioritisation of coastal regions at the expense of the rural hinterland.³ Imposed pre-independence inequalities such as these provide the foundation for many present-day conflicts. Transitional justice interventions have to address them as unresolved root causes of conflict.

1 Many mainstream transitional justice policies or frameworks remain mute regarding these colonial legacies. See for example the EU's Policy Framework on support to transitional justice, which carries no mention colonial era abuses: http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf.

2 A key debate about transitional justice and colonialism is that of reparations for slavery. While we recognise the importance of tackling this, it is beyond the scope of this policy brief.

3 Laryssa Chomiak, "Tunisia: The Colonial Legacy and Transitional Justice," CSVR Report, 2017, <https://www.csvr.org.za/pdf/Tunisia-Report-Electronic.pdf>.

b. *Authoritarian political systems*

State authority during colonial rule was fundamentally coercive in nature. It was based on autocratic control that treated local populations as subjects with limited or no rights. Systems of accountability, transparency, and consultation were generally absent for local populations. Impunity for large-scale abuses was institutionalised. Where space for participation or local authority was provided, it was done in manner that marginalised women. Independence brought about a shift in the political control of state institutions but accomplished little to transform their authoritarian norms or procedures. The violent suppression of political movements in the lead-up to independence in most cases also meant that there was no space for nurturing democratic political cultures. Violence became valorised as a tool for political emancipation.

The post-independence banning of political parties, systematic abuses by state institutions, and authoritarian institutional cultures thus represent, in many respects, a continuation of colonial-era state building, rather than post-independence deterioration. The colonial era bequeathed to incoming political elites an authoritarian system of exploitation, which was often simply repurposed. The exclusion of women from positions of power during the colonial era was carried over into post-colonial dispensations, as evidenced by the low number of women in parliament and executive positions. Colonial-era repressive tactics were easily called into service for managing post-independence political tensions, with predictable consequences. Transitional justice processes thus have to look not only at the abuse of state institutions by authoritarian regimes, but also more fundamentally at the governance model inherited from colonialism.

c. *Identity politics*

Replace with: In the colonial period, race and ethnicity formed the basis of indirect rule. Differences among local populations, and between them and colonists, were reified. Differences that were previously malleable or only marginally significant became concretised and increasingly shaped access to power or resources. Colonial rulers often favoured one group – usually judged as more ‘civilised’ – who were elevated into the hierarchy of colonial rule, including privileged access to education and recruitment into civil service and the military.

The development of identity politics in colonial-era Rwanda provides a particularly stark example of the consequences of this process.⁴ In Nigeria, the British favoured the recruitment of the Hausa and Yoruba into the military, making them complicit in certain colonial abuses.⁵ The colonial system thus bureaucratised ethnic, religious, or other markers of difference, which shaped the composition of the state and the allocation of economic privileges. This process laid the foundation for lasting inequalities and a political culture of identity politics that framed politics in most independence contexts. Transitional justice mechanisms need to challenge the foundations of identity politics in these contexts. Exposing the historical manipulation of identity and challenging the narratives that feed identity-based political mobilisation is a priority for reframing political processes through transitional justice interventions.

d. *Weak or manipulated state institutions*

State institutions under colonial rule served the interests of the rulers. Employees were servants of the state rather than public servants. The institutions were thus fundamentally different from those in the colonising states on which they were modelled, where public pressure had promoted increasingly accountable governance systems. Colonial institutions were based on domination

⁴ Helen M. Hintjens, “When Identity Becomes a Knife: Reflecting on the Genocide in Rwanda,” *Ethnicities*, Vol 1, Issue 1, 2001.

⁵ Toyin Falola, *Colonialism and Violence in Nigeria* (Bloomington, IN: Indiana University Press, 2009), 21.

and coercion. In addition, these relations were built on notions of racial and cultural superiority that imposed Western values and norms that were incongruent with local cultures. The institutions were also geared towards playing extractive roles in society, particularly relating to the economic links between the colony and the international market. The failure of these institutions to offer effective public goods – namely, education, healthcare, infrastructure beyond the main economic hubs – further contributed to their lack of legitimacy and reach. Transforming these institutions into effective vehicles for the public good and development, while simultaneously changing their culture of operation, was a huge challenge that few countries managed effectively in the post-colonial era. Some institutions became rigid embodiments of their colonial forms, unable to adjust to new demands. Nigeria’s judiciary has, for example, been critiqued as a moribund colonial relic that is unable to deal with present-day political pressures.⁶ These institutions may present obstacles rather than avenues for pursuing transitional justice goals. Transitional justice have often had to rely on innovative or traditionally inspired mechanisms to circumvent this dead weight of colonialism. Such processes can also play a key role in recommending reforms to such public institutions.

e. *Unaddressed civil-political and economic, social, and cultural rights violations*

Colonial powers were responsible for systematic civil, political, cultural, social, and economic rights violations, sometimes amounting to genocide. They created extreme suffering and lasting devastation for whole communities. Impunity for such abuses was the norm, while the full force of the law was brought to bear on local populations who sought to challenge colonial authority.

This impunity was further entrenched after independence when colonial powers sought to wash their hands of responsibility for these abuses. They insisted that the new independent states had inherited the legal responsibility to compensate those who were victimised during the colonial period. Independent states were thus left with a legacy of impunity, where the long-term inequalities emerging from conquest and exploitation were not reversed after independence. Concerns about land ownership and control of natural resources, which lie at the heart of many conflicts, need to be included in discussions about the meaning of justice for past abuses.

f. *Gender and Colonialism*

Not enough is known about women’s experiences during colonial rule, or the way that colonialism impacted on gender relations in affected societies. Colonists imposed their particular patriarchal social structures and norms, which in some instances correlated with local social arrangements but in others came into tension with local practices. Colonialism was practiced in gendered ways that also served to divide local populations and co-opt segments into positions of authority. Men were seen as the ‘natural’ gender for leadership positions and education, while women were positioned in reproductive labour roles.

It is important to acknowledge that women were active in challenging the colonial and traditional roles assigned to them, and that they participated in struggles against colonial rule and in reshaping post-colonial social structures. At the same time, the objectification of African women’s bodies and the exploitation of their social and economic vulnerabilities contributed to a broader distortion of gender relations that continues to frame present-day norms and struggles around gender equality. Recognition of colonial-era abuses of women and the colonial distortion of cultural norms relating to gender is key to the ability of transitional justice to make sense of the nature and scope of

⁶ Hakeem Yusuf, “Nigeria: The Colonial Legacy and Transitional Justice,” CSV Report, 2017, <http://www.csvr.org.za/pdf/Nigerian-Report-Electronic.pdf>.

the post-independence gender dynamics of conflict. A broadened narrative of the past that acknowledges the various gendered harms alongside the active role of women in these struggles is thus essential.

HOW HAS TRANSITIONAL JUSTICE EVOLVED TO INCLUDE THESE ISSUES IN ITS MANDATE?

Transitional justice is a field that has evolved as it has been used by a range of local and global actors to deal with new contexts. The transitional justice field only directly confronted the colonial underpinnings of conflicts once national policy makers employed it to address African transitions. The individual challenges presented by colonial legacies for transitional justice processes are not unique to these countries. Colonial contexts, however, present them as a combination of fundamental challenges that pushes transitional justice beyond its conventional limits. Transitional justice has thus been pushed to respond to these dimensions as they each question its underlying assumptions and claims of relevance in diverse settings.

a. *Engagement with economic, social, and cultural violations*

The modern framing of transitional justice was mainly construed in response to the struggle for justice during transitions from authoritarian rule in Latin America and post-communist Eastern Europe. The early influential cases, such as Chile and Argentina, were concerned with addressing a narrow set of civil and political rights abuses relating to physical violence against political opponents. This liberal bias of transitional justice has been widely criticised.⁷ Transitional justice processes in Africa (and elsewhere) have sought to engage more expansively with the broad scope of abuses that have characterised situations of civil war. Such conflicts have involved deprivation of access to land, mineral resources and other means of livelihood that are not addressed by more narrowly framed transitional justice approaches.

Recent truth commissions have been given extended mandates to engage more directly with socio-economic rights abuses. Examples include the Kenyan truth commission's engagement with land expropriation, and the Tunisian truth commission's engagement with corruption as a key part of their respective mandates.

b. *Engagement with violence prevention by dealing with structural violence*

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⁷ See for example, Khanyisela Moyo, "Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies," *International Journal of Transitional Justice*, Volume 9, Issue 1, 2015.

c. Engagement with colonial-era abuses

Transitional justice engagement with colonial legacies has become a regular phenomenon in settler colonial societies. The first such process was in 1975 when New Zealand established the Waitangi Tribunal to investigate land claims on the part of the Maori.⁸ Since then, there have been a number of national and sub-national initiatives in Canada, the USA, Australia, and New Zealand that seek to deal with unresolved disputes and legacies of colonial era abuses and systematic violations against indigenous populations.

Some of these processes have sought to deal with both the socio-economic violations during the period of colonialism, such as land expropriation as well as the systematic physical, and cultural abuses committed against groups who were labelled as culturally inferior. These processes have pushed the boundaries of transitional justice particularly in terms of their ability to provide effective redress for abuses that are now embedded in inherited economic inequalities and dominant cultures.

While most transitional justice mechanisms are given timeframes that start at the outbreak of war or a military coup, some African countries have extended their reach further back to cover events that more directly implicate colonial actors. The first attempt by the DRC to establish a truth commission set a time frame that covered the murder of Prime Minister Patrice Lumumba in 1961 (but this was dropped from the subsequent commission's mandate).⁹ The Tunisian truth commission also stretched its mandate to include conflicts among rival political groups leading up to independence.¹⁰ Other legal channels for claiming reparations for colonial-era abuses, such as the claims in British courts for the survivors of the Mau-Mau repression in Kenya, have also started opening up.

The most ambitious timeframe for a truth commission was that of Mauritius, which examined over 370 years of its history. In 2009, Mauritius established a truth commission to investigate the legacies of slavery and indentured labour that had left a lasting legacy of ethnic tensions and inequality.¹¹

d. Attempts to address regional and international conflict systems

Transitional justice is conventionally viewed as a state-led and state-focused process. Its key concern is the responsibility of the state (for committing past abuses and for preventing future abuses). This state-centric orientation of transitional justice has, however, created blind spots in relation to the actual dynamics of conflict. The political economy of many conflicts in Africa entails armed groups and conflict sponsors that are active across borders, state actors that actively intervene in neighbouring countries, and peace processes that elicit regional peacekeeping interventions. While regional initiatives and collaboration has broadened the reach of narrow criminal accountability for some perpetrators (e.g. Rwandan *génocidaires*, Charles Taylor, Hissène Habré), transitional justice mechanisms have struggled to develop effective strategies to hold more powerful international actors (both state and corporate) responsible for their roles in abuses. Countries that have pursued national transitional justice processes where international actors are directly implicated, such as the DRC and South Africa, have struggled to find appropriate legal avenues for criminal or civil accountability.

8 Stephen Winter, "Towards a Unified Theory of Transitional Justice," *International Journal of Transitional Justice*, Volume 7, Issue 2, 2013.

9 Philippe Tunamsifu, DRC Transitional Justice Case Study, CSVR unpublished report, 2017.

10 Laryssa Chomiak, "Tunisia: The Colonial Legacy and Transitional Justice," CSVR Report, 2017, <https://www.csvr.org.za/pdf/Tunisia-Report-Electronic.pdf>.

11 Mauritius Truth and Justice Commission Report. https://www.usip.org/sites/default/files/ROL/TJC_Vol1.pdf.

e. *Attempts to address gender in conflict*

Transitional justice has typically framed gender-sensitive responses to conflict simply as addressing sexual and gender-based violence (SGBV). This is a narrow, and insufficient, interpretation that embodies a limited understanding of the various gender roles and experiences that mark the colonial past and the present. When women's experiences have been addressed through transitional justice measures, they have generally been 'added' to the agenda as an afterthought instead of being a central focus.

There have been increasing efforts to ensure broader interpretations of gender mandates in transitional justice, and to mainstream gender equity. This has seen transitional justice mechanisms, such as that of Tunisia, ensuring that women are represented in decision-making processes and as beneficiaries. These recent transitional justice processes have paid more serious attention to the gender norms and power relations that pre-date political conflicts and create the conditions for gender violence both during and after such conflicts.

RECOMMENDATIONS FOR ADDRESSING COLONIAL LEGACIES AS PART OF TRANSITIONAL JUSTICE

Transitional justice has come a long way from its initial focus on criminal accountability for physical abuses during a narrowly circumscribed period of violence. While it has evolved into a very ambitious and complex set of interventions, it has struggled to develop practical strategies to effectively deal with the full scope of violations, the deeply entrenched structural causes of conflict and the physical, cultural, and psychological damage caused by decades or centuries of colonial rule.

Physical violations during colonial periods – such as the Herero genocide in Namibia and the exploitative violence in the Belgian Congo – have received significant attention in recent years. Appropriate measures for accountability and redress for such historical incidents are still hotly contested even when the truth is fully exposed. What do reparations for descendants of these groups look like? What are the obligations between ex-colonial powers and victimised countries? Measures to repair historical socio-economic abuses are even more challenging. Many transitional justice processes still take the inherited structural inequalities at the time of independence as their natural starting point, a given set of circumstances that provide an unquestioned foundation. Attempts to address historical injustices involving land expropriation and ethnic marginalisation are viewed as destabilising fragile economies and cause serious backlash from international trade partners as well as newly entrenched elites.

The greatest danger is that transitional justice is presented as a quick solution to these complex problems. Quick fixes that do not deal with the underlying problems presented by colonial legacies are likely to be short-lived. They may even serve to legitimise unjust social orders and further marginalise the voices of those who remain excluded in a new dispensation.

Transitional justice needs either to carve out a more modest goal that can complement broader social transformation initiatives, or to spell out a clear expanded mandate that takes the dimensions spelled out above more seriously, and offers practical solutions.

Expanding the mandate of transitional justice

Transitional justice mechanisms require mandates that are equal to the goals set for them.

Preventing future conflict, reconciling deeply divided societies, building a culture of respect, and promoting gender equity are hugely ambitious goals that can only be addressed through long-term holistic approaches that engage all relevant stakeholders.

Expanding the mandate of transitional justice does not mean that one mechanism should cover all the functions and possess all the requisite authority. It means that an integrated and long-term strategy is required to prioritise and sequence interventions in a way that deals with social change as a complex transformational agenda.

Transformative approaches to transitional justice have been proposed for situations where past injustices are embedded in economic, social, or cultural systems that create inequalities and vulnerabilities.¹² In such situations, individual accountability, individual repair, or narrow legal and institutional shifts only play a small part in the broader agenda of social change. Practitioners and policy makers who seek to promote transformative transitional justice processes in post-colonial contexts must pay particular attention to key policy principles:

- Transitional justice interventions should analyse the historical and structural causes of conflict, and highlight the urgency of measures to address issues of inequality, poverty, and marginalisation. The roots of present structural violence that drive conflict need to be acknowledged.
- A comprehensive approach is needed that addresses the full scope of human rights abuses (not just civil, political, or physical abuses) that characterise colonial rule and exploitation. Heinous colonial practices such as slavery, genocide, and land theft need to be highlighted.
- Processes should address the responsibility of external actors such as corporations and states involved in committing colonial-era abuses (which often remain untouchable because of their ongoing economic power).
- Gender transformative and inclusive designs, processes, and recommendations need to be included that provide a historical understanding of gender norms and power relations and seek to address gender justice, not just recent manifestations of SGBV. This approach needs to address the ongoing insecurity endured by women in the post-conflict period.¹³
- The time frames of transitional justice mechanisms should be extended so as to engage with the historical roots of a conflict and develop interventions that are able to address the intergenerational legacies of abuses committed against previous generations.
- Marginalised systems of knowledge, particularly relating to healing, reconciliation, and justice, need to be incorporated into the design of transitional justice processes in a way that affirms local values and priorities that were marginalised under colonial rule.
- Transitional justice must acknowledge the legacies of exploitation that persist in existing international power relations, and which are embedded in international institutions such as the United Nations and the International Criminal Court. They undermine equality and dignity in the relations between former colonial and colonised societies.

¹² Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice*, Volume 8, Issue 3, 2014.

¹³ For a more comprehensive review of what gender just transitional justice would cover, see CSVJ's Gender and Transitional Justice Policy Brief, 2018.

ACKNOWLEDGEMENTS

Gratitude is extended to the country case experts who contributed country reports that informed this policy brief: Philippe Tunamsifu, Hakeem Yusuf, and Laryssa Chomiak.

Special thanks to CSVR's Masana Ndinga-Kanga, Nonhlanhla Sibanda, Maxine Rubin, Nomathamsanqa Masiko, and Annah Moyo for their contributions and inputs on drafts of the policy brief.

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION

CSVr is an independent non-governmental organisation established in South Africa in 1989. We are a multi-disciplinary institute that seeks to understand and prevent violence, heal its effects and build sustainable peace at community, national, and regional levels. We do this through collaborating with, and learning from, the lived and diverse experiences of communities affected by violence and conflict. Through our research, interventions, and advocacy we seek to enhance state accountability, promote gender equality, and build social cohesion, integration, and active citizenship. While primarily based in South Africa, we work across the African continent through collaborations with community, civil society, state, and international partners.

COMPARATIVE TRANSITIONAL JUSTICE STUDY IN AFRICA

This publication is one of the outputs of the Comparative Transitional Justice Study in Africa.¹⁴The study presents a comparative analysis of 12 country case studies in Africa where transitional justice mechanisms have been implemented. Mapping the range of processes in this field, the study pays particular attention to transitional justice mechanisms employed between 1990 and 2010 to deepen understanding of how these processes were developed, and the role of their respective contributions to the prevention or recurrence of war and repression. Specifically, the study examines the factors that shaped state policy decisions in framing the diverse set of responses to dealing with legacies of dictatorship, civil war, and mass human rights abuses, and assesses the consequences of these decisions for achieving sustainable peace and preventing future human rights abuses.

¹⁴ <http://www.csvr.org.za/programmes/156-research/2641-african-transitional-justice-comparative-study>.



CSV
Centre for the Study of
Violence and Reconciliation

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION

Johannesburg Office

Physical address: 33 Hoofd Street, Braampark, Forum 5, 3rd Floor, Braamfontein 2001, South Africa
Postal address: PO Box 30778, Braamfontein 2017, South Africa
Phone: +27-11-403-5650 Fax: +27-11-339-6785 Email: info@csvr.org.za

Cape Town Office

Physical address: 451 Main Road, Premier Centre 5th Floor, Observatory 7925, South Africa
Phone: +27-21-447-2470 Email: ctadmin@csvr.org.za

www.csvr.org.za

