

Research Brief

Transitional Justice, Federalism and the Accommodation of Minority Nationalism

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In societies scarred by ethnic animosity or religious intolerance, one goal of transitional justice is to help reshape identities. In particular the aim is to weaken aspects of identities that were the source of violence and conflict and replace those with a strengthened sense of shared identity related to common membership in the national political community. This is often described as the “nation-building” dimension of transitional justice. It is essential not only for peace, but also for democratic consolidation.

This nation-building function of transitional justice is a delicate task in any context, but it is particularly fraught with danger when a country undergoing a democratic transition contains a strongly mobilized minority nationalist movement seeking some form of self-government on a territorial basis, either through federalization or independence. The cases of the Catalans in 1970s Spain, the Kurds in Iraq today, and the Acehese in Indonesia raise some acute dilemmas about the relationship between transitional justice, nation-building and democratic consolidation.

Democratic Multination Federalism

While all countries contain identity cleavages, the phenomenon of territorially concentrated minority nationalism is a distinctive challenge. In such cases, the state is, sociologically speaking, a “multi-nation” state. In a world where “nation-states” legitimate themselves by reference to norms of the self-determination of peoples, a group that claims to form a distinct “people,” with its own rights to self-determination, is often perceived as a serious threat. Indeed, many argue that democratic stability is impossible in such cases.

But this is unduly pessimistic. There are ways of accommodating minority nationalism that are consistent with democratic stability. One model of accommodation is “multination and multilingual federalism,” which has two key features: (a) it involves creating a federal or quasi-federal sub-unit in which the minority group forms a local majority and can exercise meaningful forms of self-government; and, (b) the group’s language is typically recognized as an official state language, at least within the sub-

Research Project

Identities in Transition

In post conflict societies, histories of exclusion, racism and nationalist violence often create divisions so deep that finding a way to agree on the atrocities of the past seems near-impossible. This project seeks, first, to ensure that transitional justice measures are sensitive to the ways in which targeting people on the basis of their ethnic or religious identity may cause distinctive harms and, second, to clarify the difficult political challenges that arise in societies where communities are not ready to cooperate, or even agree on a definition of who the victims are. If transitional justice can find ways to act as a means of political learning across communities, foster trust and recognition, and if it can serve to breakdown harmful myths and stereotypes, then this will be at least a small step toward meeting the challenges for transitional justice in divided societies. The project is managed by Paige Arthur, Deputy Director for Institutional Development at ICTJ.

unit. Versions of this model are found in several Western democracies.

Minority nationalist movements are characterized precisely by their claims to peoplehood or nationhood, and the adoption of multination federalism reflects an acknowledgement of the need to accommodate this nationalist identity. Territorial autonomy both acknowledges this sense of minority nationhood and provides the institutional means to reproduce it (for example, by enhancing regional control over education, public symbols, public media).

This approach has helped defuse conflict, even though it opens up, rather than forecloses, the question of the larger state's legitimacy. It leaves the nature of sovereign peoplehood in multination states indeterminate. This puzzles political theorists who think agreement on peoplehood is a precondition of democracy. However, most citizens in multination Western states have learned to live with this ambiguity. Conflicting nationalist projects are not inherently unstable or violent. Citizens of multination federations in the West are capable of managing whatever conceptual ambiguities and political controversies arise from the fact of overlapping claims to sovereignty and self-determination, and of building peaceful, democratic and free (multi-level) political orders.

Given the positive experiences with multination federalism in the West, this model has often been recommended for democratizing countries that confront minority nationalisms. Indeed, transitional justice is increasingly likely to arise in countries in which federalization is a component of peace agreements or democratic transitions. Federalization or regional autonomy has been part of several recent peace agreements (Iraq, Sudan, Indonesia, Bosnia, Nepal), and many expect it to be part of potential agreements in other countries in the future (Cyprus, Burma, Sri Lanka).

Lessons and Implications for Transitional Justice

It is important to ask, therefore, whether or how transitional justice can contribute to the consolidation of these distinctive relations of multination citizenship. We know what kinds of transitional justice processes have been adopted to promote “nation-building,” but what kinds would help promote “multi-nation building”? Can transitional justice be used, not to foreclose disputes over legitimacy, but rather to help citizens learn to live with their unresolved character, and to build peaceful, democratic forums for continuing that conversation?

Unfortunately, this question has rarely been studied, and few real-world examples exist. It is striking that transitional justice has rarely, if ever, been used in this context. Under these circumstances, the only responsible conclusion is a call for caution and modest expectations. The best we can do is to try to identify the central challenges facing practitioners of transitional justice in contexts of a transition to multination democracy and to think creatively about possible strategies for addressing them.

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One key challenge is to prevent transitional justice from being captured by, and subordinated to, the dynamics of ethnonational contestation. Virtually all decisions about the design and implementation of transitional justice are likely to implicate contested assumptions about sovereignty and territory. Even the most basic logistical issues, such as the physical location of transitional justice processes, the language in which they operate, or the level of government that authorizes them, will be inflected with ethnonational connotations.

Consider Iraq. If processes of transitional justice are located in Baghdad and held in Arabic, they will inevitably be seen as efforts at relegitimizing the authority of the central state. If they are located in Erbil and held in Kurdish, they will inevitably be seen as efforts at legitimizing Kurdish nationalism.

Practitioners of transitional justice may have no intention or desire to be seen as taking a stand on such contested claims, but this is the frame within which their actions will inevitably be perceived. After all, these contestations over sovereignty and territory often engendered the violence in the first place. Local actors will be sensitive to any hint or implication that transitional justice is being implemented in a way that either advances or subverts their claims. When transitional justice is perceived as endorsing one side's claims to territory and sovereignty, the entire process will quickly be delegitimized in the eyes of other key actors. Consequently, transitional justice will not only fail to promote multinational citizenship, but also will fail to achieve its more basic goal of gaining public acknowledgement of wrongdoing. For example, transitional justice measures in Aceh have been paralyzed by the way both Acehnese nationalists and the Indonesian central state seek to gain control over them in order to bolster their own claims to sovereignty and territory.

How then can transitional justice avoid being instrumentalized in these ethnonational struggles, and thereby delegitimized? Given the absence of real-world precedents, we can only speculate about possibilities. At this point, three broad options for thinking about the relationship between transitional justice and multinational citizenship exist:

- (1) Given the danger that it will be captured and distorted by ethnonational contestation, we might seek to defer transitional justice to a post-transitional phase. For example, claims for transitional justice have recently emerged in Spain, but only after democratic consolidation is essentially complete and a practice of multinational citizenship has been established. The obvious downside is that it is unfair, and perhaps unrealistic, to ask victims to defer their rightful claims to recognition and restitution.
- (2) Given the danger that it will be captured by ethnonational contestation, we might seek to take transitional justice out of the hands of domestic governments, and relocate it either to the international level or to civil society. For example, in

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the former Yugoslavia state-sponsored forms of transitional justice have run into powerful ethnonationalist opposition, but there are both vibrant civil society organizations devoted to truth-telling and reconciliation and international prosecutions. The obvious downside of international transitional justice is that while distance creates the appearance of neutrality, it also undermines pedagogical aims. If transitional justice is to have transformative effects, wrongdoing must be publicly acknowledged by the communities involved and not just by a remote international body. Similarly, civil society efforts cannot achieve goals such as restitution, prosecution or vetting, which require engaging with formal state structures.

(3) Practitioners might try to tackle the problem of ethnonational contestation head on, by developing consensual models of transitional justice that finesse issues of contested sovereignty. In principle, it should be possible to design innovative forms of transitional justice that are endorsable by all parties, despite their differing views of sovereignty. One could have a model of transitional justice that moves between different cities and regions, operates in different languages, and is authorized (and staffed) by multiple levels of government, in such a way that all sides can see it as consistent with their own views of state legitimacy. Where all parties agree to the process, contested questions can be finessed. But while this may be possible in principle, no examples exist in practice. Moreover, such a solution potentially presupposes that we already have an effective ethos of multination citizenship, which is precisely what is missing in most transitions in multination states. In post-conflict situations, states and substate groups are too jealous of their powers, and too distrustful of others', to accept vague or ambiguous formulas that allow all sides to finesse their disagreements. As a result, calls for transitional justice remain blocked, stymied by the need for consent.

In short, all three of these options are neither tested nor backed by clear models or firm evidence. Much research and experimentation is needed to help clarify the different options, risks and opportunities. At this point, all the options require us to radically and creatively rethink current assumptions about how transitional justice relates to state legitimacy and nationhood.

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