

Research Brief

Transitional Justice and the Rights of Minorities and Indigenous Peoples

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Chris Chapman

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.

Many of the situations that transitional justice has been called upon to address involve wholesale attacks on minority communities—not only through physical attacks but also by seizure of land and property, economic marginalization, prohibition of community organization, dismantling of political structures and forms of assimilation by stealth. The rights of minorities and indigenous peoples (MIPs) were designed, in part, to provide comprehensive protection against these kinds of abuses.

MIP rights may be—and in some cases have been—articulated to strengthen claims for transitional justice, and produce outcomes in transitional justice processes that contribute to more effective and sustainable justice and reconciliation. Employing an MIP rights framework in transitional justice efforts may promote objectives of transitional justice, such as creating a more just and inclusive society and preventing repetition of abuses.

What are MIP Rights?

Existing international law regarding MIP rights can be understood through the following set of pillars:

The right to exist: obliging states to protect the existence of minority communities as a whole, which means the prohibition of genocide, assimilation and population displacement.

The right to non-discrimination: protecting minorities from direct or indirect discrimination on the basis of ethnic, religious, linguistic or cultural identity.

The right to protection of identity: preserving the freedom of minorities to practice their culture, religion and language in the public and private spheres, and taking measures to enable minorities to develop these aspects of their identity.

The right to participation in public affairs: ensuring that minorities can participate in decision-making processes at the local and national level, particularly in regard to how their communities are governed.

Applications of MIP Rights to Transitional Justice

Situations of transition offer enormous potential for change and innovation in the political system. Debates on new forms of governance show that people are grasping the opportunity to radically question the way their countries are administered and bring previously excluded communities into the political arena. Countries emerging from political transitions are keen to establish their legitimacy internationally, and in this respect, MIP rights are an important benchmark. For example, the European Union includes protection of minority rights as one of the criteria aspiring members must meet.

MIP rights have been a tool in some cases for highlighting MIPs' justice claims, both with respect to acts of atrocity and the discriminatory contexts that enabled them. Minority rights arguments have been leveraged in particular through reparation claims, which have been linked to demands for legal, political and social reforms to ensure that massive and systematic abuses do not recur. For example, in *Plan de Sánchez Massacre v. Guatemala*, the Inter-American Court of Human Rights found in favor of 317 victims and survivors—mostly of the indigenous Maya-Achí community—of a massacre perpetrated by the Guatemalan army and civilian collaborators in 1982 that killed 268 people. In addition to monetary compensation of \$6.34 million, the court ordered symbolic measures and affirmative action programs aimed at promoting reconciliation and reversing the marginalization of indigenous communities. The case highlighted the difficulty for indigenous Guatemalans to gain access to justice at the national level due to systemic racism, geographical isolation and lack of mastery of Spanish.

Other transitional justice efforts may draw similar links between abusive acts and the broader context of marginalization and lack of protections for minority groups—thus enabling mechanisms to remedy to these conditions.

Resistance to MIP Rights

After ethnic conflicts, hatred and suspicion between groups can be very strong. The state itself has not had enough time to establish its legitimacy in a new political environment, and is often afraid of challenges; this fear breeds aggressiveness and impulsive reactions to demands from MIPs.

Transitions are, by definition, about making significant changes to the way the state is governed and how it defines itself. MIP rights claims—including transitional justice claims—in this context may cause some fear among majorities that are used to a unitary state defined in terms of the dominant ethnic group. When challenging myths of nationhood, majority communities will need to be reassured that their rights will continue to be recognized and that their identity will not be lost, assimilated by another community or engulfed in a “melting pot” of cultures.

Even in established democracies, there are risks. In Australia, for example, *Eddie Mabo*

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and Others vs. the State of Queensland spurred considerable debate, in particular whether the case contributed to or detracted from reconciliation between indigenous and non-indigenous communities. *Mabo*, which dealt with a land claim by Torres Strait Islanders, rejected the concept of *terra nullius*—the idea that the land was, from a legal perspective, empty when European settlers arrived in Australia—and recognized the principle of legal ownership based on customary use by Aborigines (albeit only in the case of land currently under leasehold). *Mabo* and other developments in Aboriginal claims may have contributed to a backlash against indigenous communities. As Australia's recent elections have shown strong swings between the two extremes on issues of Aboriginal rights and immigration, the debate has not been fully settled.

Collective and Individual Rights

An important dynamic in societies emerging from violent identity-based conflicts involves the tension between claims for collective rights and the rights of individuals. This dynamic is informed by relationships of power. Elites within MIP communities, driven by an understandable fear of assimilation and a return to economic and political oppression, may emphasize the need for guarantees of collective rights. These guarantees may not equally benefit all members of MIP communities. Customary laws may have established rigid hierarchies within the community benefiting those same elites and favoring men over women in matters of personal law. Some arrangements, including transitional justice measures, may privilege some minority communities at the expense of others.

The push to recognize collective group rights may be counter-balanced by guarantees of individual human rights, and indeed, the correct application of an MIP rights approach requires this. A number of elements of MIP rights emphasize individual rights, such as the right of members of minorities to identify with or “opt out” of membership with the group, protections that forbid discrimination by any actor including members of one's own community, and the requirement that a community's cultural practices must not violate individual human rights.

Integrating MIP Rights into Transitional Justice

When ethnic groups have suffered massive and systematic abuses, respecting MIP rights within the transitional justice process is an important symbolic gesture, demonstrating that a break has been made with the past and encouraging all communities to have faith in the process. Seeing that a state body is inviting them to participate, taking steps to accommodate their cultural specificities, such as language, and listening to their testimony can, for members of marginalized communities, be a powerful force for the re-establishment of bonds of trust between the state and its citizens.

Since minority groups are not homogenous, transitional justice actors must consider who represents a given community. Ideally, a variety of figures representing different demographics, such as gender and age groups, will be represented, and these may

About the Author

Chris Chapman is Head of Conflict Prevention at Minority Rights Group International. He has previously worked in Haiti on capacity-building for conflict resolution, human rights monitoring, and as a journalist; and in Guatemala as an observer/accompanier with an internally displaced community under the provisions of the peace accords.

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provide a wider variation of perspectives on issues such as customary law. It is therefore important for governments to avoid demands that MIPs form a united front in presenting transitional justice claims and to seek innovative methods of accommodating the diversity of positions.

The issue of representation also plays out in inequalities between minority communities. The ability to present and lobby for transitional justice claims will be affected by power relationships resulting from negotiations that bring conflicts to an end, and most often, the actors present at these fora represent communities that have political or military power. As a result, smaller minority groups may be neglected and poorly positioned to make transitional justice claims. Additionally, MIP rights require that cultural practices of MIPs be respected and promoted. As a result, the use of traditional mechanisms developed by MIP communities to promote reconciliation and justice is justified.

Conclusion

During transitional efforts—including transitional justice—there may be a tension between the two aims of MIP rights—that is, promoting trust and understanding between communities, and strengthening the claims of the marginalized. This tension will be most evident if there is a strong perception among members of majority communities, who have historically benefited from an exclusive and mono-cultural conception of the state, that the transition will threaten their economic and social well-being. As a result, the process should offer opportunities for open-ended discussion of issues such as the status of minority languages, collective land ownership, affirmative action in the economic domain and appropriate models of political participation for all sectors of society. Rather than set formulas, the process may require messy, unsatisfactory compromises. The process itself, however, would signal the start of a long-term reflection on addressing the injustices of the past and forging new models of citizenship and inclusion for the future.

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The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit www.ictj.org.

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