

Transitional Justice and Decolonisation: Beyond Postcolonialism

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TRANSITIONAL JUSTICE; DECOLONIALITY; DECOLONISATION; POSTCOLONIALISM



“May stitching bring us back the voice that the war took away from us”

Credits: The artwork was provided by [\(Un\)Stiching gazes](#). The group is an interdisciplinary collective of reflection, research and praxis, which tells and collects stories of peace and encounters in Colombia, especially after the signing of the 2016 Peace Agreement. They do so through textile narrative, that is to say through threads, needles and fabrics.

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This entry outlines the key debates with respect to transitional justice (TJ), a range of processes that a society may undertake to reckon with the legacies of gross and large-scale violations of human rights and humanitarian law in the past. Although the literature on transitional justice and postcolonialism is emerging, this entry explains why transitional justice might not sufficiently address the complex issue of decolonisation. To do so the entry engages with ontology (what TJ is about), teleology (what TJ aims to do) and epistemology (questions relating to knowledge production in TJ), framing the discussion around the ‘four waves’ of development of TJ practice and scholarship. The entry argues that true decolonisation requires a more radical approach to the future of the field. Transitional justice should not only engage more with genealogies of decolonial thinking; it also needs to be decolonised in itself.

Abstract¹

Transitional justice (TJ) is ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’ (UN Secretary-General Report, 2004). The instruments or dimensions of transitional justice involve, but are not limited to, justice, truth, reparations, guarantees of non-repetition, and memorialisation. TJ has seen a rapid proliferation as a field over the past four decades, and is a multi-disciplinary area that is driven by and deeply rooted in practice. While there have been attempts over many centuries to overcome oppressive past events, the term ‘transitional justice’ gained currency in the 1990s and has been particularly associated with transitions from military dictatorships in Latin America and on the African continent (Arthur, 2009; Teitel, 2014).

TJ can involve a variety of scenarios and has expanded in scope both horizontally and vertically. Initially there was a presumption that states were the sole actors responsible for carrying out TJ measures, but today states represent only one set of actors (Hansen, 2016). The broader set of TJ actors now includes international organisations, NGOs and victim groups, as well as the population at large. The idea that TJ is constrained to a particular ‘window of opportunity’, usually the period of regime change, has also been questioned (Hansen, 2016). Today, some forms of TJ relating to mass violations sometimes happen before the actual ‘transition’ takes place, and continue long after the new regime has consolidated (Hansen, 2016). The processes of TJ can take place in diverse contexts – in established democracies, in countries where a repressive regime is still in power, or during an ongoing armed conflict (Hansen, 2016; Winter, 2014). The instruments of TJ have advanced significantly to reflect these developments in theory and practice, but substantial limitations remain in its potential for facilitating long-lasting radical change (Sesay, 2022).

The entry outlines the four phases of TJ, and aims to demonstrate how TJ has addressed critiques of previous stages and ongoing practice. The outline of the four phases of TJ demonstrates that the decolonial agenda has not penetrated the field at the ontological (what the field represents), teleological (what it aims to do) or epistemological (knowledge production)

¹ This entry is based on: Selbi Durdiyeva, ‘Towards Decolonial Agenda for Transitional Justice: “The Old is Dying and the New Cannot Be Born”’, published in *The Wretched of the Global South – Critical Approaches to International Human Rights* edited by Thamil Ventham Ananthavinayagan and Amritha Vishwanath Shenoy (Springer, 2024).

levels. It is worth noting, however, that the four phases of TJ as depicted below do not engage comprehensively with debates in the field, since the scope of this entry does not allow a full exploration of the richness of the discussion to date. However, the four phases do illustrate that addressing of the crimes of colonialism has received only marginal attention within the field. We also see that issues related to structural problems and the roots of conflicts and oppression often reoccur, resulting in disenchantment with TJ (Samset, 2020).

While there is no easy solution for this impasse, I argue that in order to be transformed, TJ itself needs to be decolonised; it should be deeply intertwined with decolonial thinking and should adopt a decolonial option, something that has not been attempted as yet.

The 'Four Waves' of TJ and the State of the Field

The exact historical starting point of transitional justice as we know it is unclear, and even the four so-called 'waves' of transition have been accounted for differently. Ruti Teitel (2014) argues that transitional justice had somewhat 'murky beginnings' in the Nuremberg and Tokyo tribunals, which were criticised for representing 'victor's justice' and for issues relating to due process guarantees. Nevertheless, they were important because they laid the foundations of international criminal justice.

For Lauren Balasco (2013), the first wave of 'normative exploration' in TJ was marked historically by transitions from military dictatorships in Latin America in the 1980s and 1990s, and by the fall of the Soviet Union. This phase was also characterised by nation-building, and by examinations of the role that transitional justice plays in this (Teitel, 2014). Ariella Aïsha Azoulay (2019) offers a perceptive critique of this period in the formation of international human rights law, a parallel area to TJ, arguing that international human rights law was used, among other things, to conceal and distract attention from colonial crimes that had not been accounted for.

The normative exploration in this first wave of transitional justice may be characterised by what Christine Bell (2009) described as a 'metaconflict over the nature, direction, goals and ownership of transition itself' (p.6). Bell (2009) suggests that the contested nature of these concepts enables both scholars and practitioners to apply sets of characteristics that fit particular contexts and understandings of justice, a claim that remains relevant in the present day. Normative exploration also involved thinking about the relationship between transitional justice and international human rights law; according to Paige Arthur (2009), human rights law and TJ both rely on norm affirmation or distinguishing what is right or wrong. The principal difference

between the two is in their goals: while the goal for human rights is to establish a violation, transitional justice deals with finding appropriate means to address a violation that is already known, although perhaps not yet acknowledged (Viaene & Brems, 2010). The norms of TJ were also articulated 'from below', often both despite and because of the reluctance of states to address mass scale violation. This differs from the top-down nature of institutionalised international human rights law, on which TJ is based. These characteristics of TJ allow space to incorporate a decolonial agenda in its practice and scholarship; this will be examined below.

Balasco (2013, pg. 201) characterises the second wave of transitional justice as 'growth and introspection,' representing an attempt at conceptualisation to 'catch up' with practice alongside an investigation of transitional justice's relationship to democracy. The turn towards democratisation as a teleological orientation for transitional justice was questioned because established democracies are not immune from atrocities (Winter, 2014). This turn is important in thinking about the ongoing legacies of colonial harms perpetrated by 'established democracies' (Destrooper, 2023), as discussed below.

Balasco's (2013) third wave was a 'methodological turn' in transitional justice, when impact and evaluation came to the top of the agenda. Teitel (2014) labels this phase 'globalisation', when '[t]ransitional justice moves from the exception to the norm, to become a paradigm of the rule of law' (p. 52). However, this fails to account for the asymmetric and hierarchical nature of norm-creation and articulation in TJ, particularly with respect to knowledge production which happened overwhelmingly in the Global North. This is also manifested in unequal geographies of TJ and how they mimic colonial logic, discussed in greater depth below.

Finally, the fourth wave of TJ deals with reflection and retrospection within the field. There has been a growing demand for conversations on topics such as the environment, indigenous peoples' rights, youth involvement, postcolonialism, and notably, race, representing a shift in discussions of what the goals and focus of transitional justice should be. Historically transitional justice has been driven by social movements, and the emphasis on transition and justice 'from below' remains the ongoing focus in literature and practice. Nevertheless, transitional justice is at a crossroads (see Nesiah, 2016; Sharp, 2019; Sesay, 2022) – or, rather more pessimistically, an impasse. This is particularly so in 'countries with a colonial history', where there is a sense of 'disillusionment with transitional justice' (Samset, 2020, pg. 598).

One of the responses to the current deadlock in the field is the call for transformative (rather than transitional) justice, as argued and pioneered by Paul Gready and Simon Robins (2014). Transformative justice aims to tackle the challenges faced by transitional justice by focusing on the root causes of conflict, socio-economic rights, women's and LGBTQ+ rights, the rights of indigenous people, environmental issues, dealing with structural violence, putting gender at the forefront, and drawing on the potential of new civil society and social movements (Asheikh & Direkli, 2023; Kerremans & Destrooper, 2023; Elcheroth & de Mel, 2022). Due to 'the difficult trade-offs, policy choices and contextual realities that would inevitably be associated with efforts to implement an alternative vision of transitional justice', Sharp (2019) argues in favour of an 'integrated' approach to transitional justice (p. 570). However, the imagination of this 'alternative vision of justice' is still based on an in-between space between liberal and social demands (Sharp, 2019), which is limiting because social justice, if applied to enduring colonial structures, can only bring limited change to those who are most oppressed (Madlingozi, 2017).

Despite this critical evaluation of TJ and the proliferation of scholarship and practice, certain issues remained unresolved, which (among others) are integral to TJ's insufficient engagement with the legacies of colonialism. The pursuit of justice remains in the hands of the powerful, since 'liberal democracies that have the resources and political interest to mount a case' are more likely to engage in the investigation and prosecution of perpetrators for international crimes (Nagy, 2008, pg. 282). An examination of 1,518 peace agreements that were concluded in 80 countries from 1990 until 2015 found that 'transitional justice dissemination displays a geographic discrepancy towards the Global South' (Jamar, 2019, pg. 56). The Global South is thus seen as a place where violations of human rights and humanitarian law take place, while the Global North is portrayed as the guardian of justice. In other words, the global project of transitional justice is seen as asymmetric, with 'geographic "zones of impunity"' located in the Global South (Nagy, 2008, pg. 282).

The unequal geographies of transitional justice and the heavy focus on former European colonies also promulgate a post-Cold War rhetoric and discount cases of non-Western imperialism from the agenda. This issue was made even more starkly obvious with the launch of Russia's full-scale invasion and war in Ukraine in 2022. Russia never made it to the canon of transitional justice literature or practice, despite the experiences of over 20 million people (by some estimates) who were the victims of the Soviet regime (Durdieva, 2024). Palestine also remains at the margins of the literature despite the efforts of several scholars to discuss what

it means to engage with transitional injustice in this region (Afana, 2023; Browne, 2023). India's occupation of Kashmir (Schuurmans, 2023), and Morocco's occupation of Western Sahara also remain at the periphery of transitional justice literature and practice.

The unequal geographies of TJ, the persistence of structural inequality, and the field's inability to move forward all point to the importance of taking a critical approach to the unequal foundations on which TJ built itself, despite recent increase of self-reflection within the field (Scott, 2022; Jamar, 2022). I suggest adopting a decolonial lens to rethink transitional justice and to decolonise TJ as a discipline.

Beyond Postcolonialism: Towards a Decolonial Turn in Transitional Justice

Scholarship offering a postcolonial critique of transitional justice is growing. This postcolonial critique engages in discussion of a country's situation after a colonial administration has ceased to exist, but without necessarily calling for a change in the described or accounted-for situation. Postcolonialism 'decouple[s] modernity and colonialism', and is more concerned with 'dismantling meta-narratives' as opposed to engaging with questions of 'power, epistemology, and ontology as foundational questions in the quest to understand the unfolding and operations of the modern Euro-North American-centric modernity' (Ndlovu-Gatsheni, 2015, pg. 491). However, the use of a postcolonial lens alone risks potentially affirming the static status quo (Ndlovu-Gatsheni, 2015), imposing an idea of a 'miracle of transitions' (Madlingozi, 2017) – an assumption that a new world will be created by the fall of a colonial administration. This was pertinent for South Africa, where the 'miracle of transitions', together with a new constitution and TJ processes, were assumed to be enough to bring about change, despite the fact that structural inequality remained even after the official change of regime (Madlingozi, 2017).

TJ measures have been utilised to address the legacies of colonial harm, with a plethora of scholarship on postcolonialism and TJ reflecting on these practices. One of the most discussed examples is the Belgian Parliament's establishment in 2020 of a Special Parliamentary Commission to examine the country's colonial past in its overseas colonies, particularly Congo, Burundi and Rwanda (Gijs, 2022). The Commission was given a broad and rather ambitious mandate over a short period of time to examine colonial crimes from 1885 to 1962, and it was therefore seen to be at risk of contributing to epistemic injustice due to the omission of voices, even though its potential impact could have far-reaching consequences (Destrooper, 2022). In

June 2022 the Belgian King Philippe ‘expressed regret’ for colonial harm, and the country’s Prime Minister apologised for Belgium’s responsibility for the assassination of the DRC Prime Minister Patrice Lumumba (Gijs, 2022). Other examples of apologies for colonial crimes involve Germany’s official apology in May 2021 for the massacre of Herero and Nama tribespeople in Namibia that had taken place over a century earlier, using the term ‘genocide’ for the first time and offering to provide developmental aid as a form of reparation (Mazeingo, 2021; Zoodma & Schaafsma, 2022).

TJ measures have also been used to address the harm inflicted on indigenous populations, for example in relation to Indian Residential Schools in Canada and care institutions in Australia, where indigenous children were forced to study in a different language, adopt foreign cultural practices, and be separated from their families and communities (Park, 2020). Such measures as enquiring about events (the truth dimension of transitional justice), reparations and public apologies were used with respect to settlers’ policies towards indigenous populations in Australia and New Zealand, with a Waitangi Tribunal being called to settle disputes concerning the land claims of Māori people (Park, 2020). Further attempts to address the legacies of colonialism have also been described by official institutions such as the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, in its report on ‘Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts’ (A/76/180, 2021). Even if these kind of initiatives are laudable, however, they often represent compromises rather than comprehensive approaches and policies, they usually have limited mandates in terms of timing and expertise, and they commonly fail to account for the needs of victims.

Calls to deal with the legacies of colonialism using TJ tools have also been proliferating in scholarship. In her book entitled *Postcolonial Transitional Justice: Zimbabwe and Beyond*, Khanyisella Moyo (2020, pg. 43) applies postcolonial legal theory to critique ‘liberal bias’ within TJ, manifested in the ‘linear notion of progress’ which is believed to be achieved through TJ measures. The author argues that TJ, as well as its counterpart international law, needs to be decolonised, with particular emphasis on the right to self-determination that is less often addressed within the field (Moyo, 2020). In turn, international law is critiqued for being used to “civilize” postcolonial societies’ (Moyo, 2020, pg. 188). By focusing on the static and teleological issue of ‘closure’, TJ fails to engage with continuities of violations, focusing rather on ruptures between the linear past and present (Moyo, 2020, pg. 185).

The problematic nature of the assumption that there is a rupture between the old and the new is also noted by Tshepo Madlingozi (2017) in his concept of the 'miracle of transition'. This implies that social justice comes with the invocation of a new constitutionalism and other TJ mechanisms, but the idea is problematic because transitions do not bring about structural changes per se. The new constitutionalism in South Africa did not provide for transformation; society remained divided, inequality was exacerbated and control of land and resources remained in the hands of the white minority, despite the change of constitution (Madlingozi, 2017). TJ thereby becomes complicit in the 'colonisation of time', creating an artificial historical delineation, enforcing a Western-centric linear understanding of time and engaging with a discourse of emancipation, while the reality for the 'forgotten' who suffered due to the oppression remains the same (Madlingozi, 2017, pg. 126).

Other scholars who engage with colonialism and TJ echo Moyo's and Madlingozi's concerns. Stephanie Vielle (2012) argues in her article 'Transitional Justice: A Colonizing Field?' that TJ has been informed by Western legalistic approaches to law that leave little or no room for customary and indigenous approaches, while the whole field has been part of neoliberal democratic transitions. The framework of liberal democracy influences TJ's 'epistemic knowledge base and ontological view of the world' (Richmond, cited in Vielle, 2012, pg. 61). Vielle argues that the rule of law as promoted and emphasised within TJ becomes detached from the social context, especially when applied neutrally and apolitically, making it 'an exclusively Western and ethnocentric notion' (pg. 62). Hakeem Yusuf (2018) also points at depoliticisation, which results in 'the considerable lack of engagement by transitional justice with the structural injustices instituted for colonial governance in postcolonial polities' (pg. 2).

The notion of a decolonial turn, as opposed to postcolonialism, characterises a set of processes that challenge the foundations of modernity (understood as a Western enlightenment model), considering coloniality as the major problem facing humanity (Maldonado-Torres, 2011). This is an ongoing and unfinished process that does not end after an official colonial administration ceases to exist (Maldonado-Torres, 2011). Decoloniality and decolonisation, as opposed to postcolonialism, not only proclaim or reflect on the supposed end of 'the colonial era', but also scrutinise the contemporary forms of coloniality that exist in more visible settler colonial structures as well as the hidden and less visible forms of coloniality.

Aníbal Quijano (2000) developed the idea of a colonial matrix of power, pointing to Western domination in four areas: '(a) the disputes over the control of labor and its resources and products; (b) sex and its resources and products; (c) authority and its specific violence; (d) intersubjectivity and knowledge' (pg. 557). Engaging with these four domains within TJ would allow for a more comprehensive engagement with coloniality, but engaging with the intricate and complex web of the colonial matrix of power would also involve, at both the ontological and teleological levels, challenging the fact that newly-emerging regimes are compared to 'the European threshold' in the narrative of transitional justice – 'progress, progression, procession' (Rothberg, 2012, pg. 4). It would also contribute to challenging how TJ narratives are largely silent about the Global North's complicity in creating, contributing to and sustaining colonial violence, and in protecting the image of Western normativity (see Madlingozi, 2017; Jamar, 2022).

Decoloniality and decolonisation question the established canon of knowledge production, as well as developing a notion of colonisation beyond settler colonialism that involves, but is not limited to, coloniality of imagination, power, sexuality, mind and being (Maldonado-Torres, 2007). Anibal Quijano (2007) offers a further explanation of what coloniality means: 'The repression fell, above all, over the modes of knowing, of producing knowledge, of producing perspectives, images and systems of images, symbols, modes of signification, over the resources, patterns, and instruments of formalized and objectivised expression, intellectual or visual. It was followed by the imposition of the use of the rulers' own patterns of expression' (pg. 169). TJ requires an engagement with decolonial thinking in multiple pluriversal forms (as opposed to universal engagement, positioning the Global North as the epistemic centre), where decolonisation is seen as a project that does not cease to exist with the fall of an official colonial administration.

Mohamed Sesay (2022) goes further and argues that the goals of TJ and decolonisation are incompatible, since it is impossible to integrate the latter into the former because decolonisation aims to dismantle the very foundations that allowed destructive structures to emerge and exist. Although I do not disagree with Sesay's thesis, which argues that the foundations of decolonisation are more radical than TJ and TJ risks depoliticising the decolonisation project, I do believe that there is room for imagining different futures within TJ itself. Despite the bleak prospects to date, TJ as a field enjoys a more vernacular origin than its counterpart international law. TJ was born out of social movements in the Global South (Viaene & Brems, 2010), and this vernacular origin, focus on contextualisation, and victim-led and victim-centric approaches to

justice in TJ allow for more leverage when it comes to norm formation, which often happens on the ground (Viaene & Brems, 2010).

Conclusion

When colonialism escapes the focus of TJ it becomes a 'move to innocence', as outlined famously by Tuck and Yang (2012). A 'move to innocence' represents an attempt to distract attention and disregard the root causes of conflicts and oppressions, which are often (although not always) founded on colonialism and racism. This contribution argues in favour of 'marrying' the concepts of decolonisation and TJ by applying decolonial thinking to transitional justice. It is important to understand the genealogies of decolonial thought in order not to risk hijacking the term because it is fashionable and applying it thoughtlessly (Tuck and Yang, 2012); we see this in efforts to decolonise educational curricula in a technocratic manner by meeting quotas of historically marginalised scholars. We need to free transitional justice from its colonial vestiges and structures, and we need to look at experiences of violence 'within the structures that created the violence', examining them using both the vocabulary, the values and the cultural lenses of that very context (Ndlovu-Gatsheni, 2015).

Even though there is a consensus around the development of TJ theory and practice that departs from the liberal democratic foundational paradigm, it is still the case that newly-emerging regimes are compared to 'the European threshold' of 'development'. This is still orthodox thinking in binary terms with measurement based on ideals born of Western modernity, where everything outside of this idea is viewed by the Global North as if not barbarian, then certainly in need of education, capacity building, monitoring, and close evaluation of the 'effectiveness' of measures. We need to problematise the meaning-making and epistemologies of transitional justice by a process of self-reflexivity and by approaching hierarchies more thoughtfully. Although a significant move has been made to expand the boundaries of the field of TJ by including feminist and queer critiques, there remains much to be done if we are to decolonise TJ norms and practices as well as our consciousness.

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