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The end of the global transitional justice project: What future for justice in Africa?

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This policy brief makes the case for the provision of more appropriate support to the mechanisms and forms of justice practiced in communities by people at the grassroots during periods of transition, instead of looking at how to integrate informal justice systems into the existing normative transitional justice framework.

The failure of transitional justice

The global transitional justice project is coming to an end. Before ever really establishing itself, as an academic field or as a viable intervention after mass violence, transitional justice is already being declared 'failed'. Scholars across the globe have identified the many ways in which the norms and values that characterise transitional justice are simply not translatable into the diverse and unique contexts of Timor Leste, Sierra Leone, the Balkans, Tunisia, northern Uganda and South Africa, to name a few.

Speaking from the perspective of the Balkans, Jelena Subotic (2015) for example states:

The way in which transitional justice is experienced on the ground ... has often been quite different, even unrecognisable, from much scholarly as well as international policy expectations. In fact, in many post-conflict states transitional justice processes on the ground produced outcomes so different substantially from international expectations ... that it has become necessary to take a step back and explain how these divergent outcomes came about and what their political effect is.

What future, then, for justice on a continent such as Africa, where mass violence, at times perpetrated by our own governments, cries out to be addressed?

This policy brief makes the case for the provision of more appropriate support to the (mechanisms and forms of) justice practiced in communities by people at the grassroots during periods of transition, instead of looking at how to integrate informal justice systems into the existing normative transitional justice framework.

The brief is based on the findings of a three-year cross-national research project that surveyed a total of 742 respondents, in an effort to examine the way in which justice is practiced in rural communities in Burundi, Namibia, Mozambique, South Africa and Zimbabwe. The cross-national comparative design employed in the project allowed for a deeper understanding of informal systems of justice and the way in which they function in African societies and what the implications of this are for justice during periods of transition.

Transitional justice refers to a set of judicial and non-judicial measures, including criminal prosecutions, truth commissions, reparations programs, and various institutional reforms implemented by different countries in order to address the legacies of mass violence. Tshepo Madlingozi (2015) uses the term 'the global transitional justice project' in his radical critique of the ways in which transitional justice interventions are used by intergovernmental organisations, funders, think tanks, consultants, researchers and so on to 'save' countries in transition and reinforce their dependency on the global North



Background

As is commonly known, the formal justice systems in most African countries were inherited from continental Europe and Great Britain during colonialism. However, parallel to these, informal systems of justice have continued to function from pre-colonial times until today. Informal justice systems are the dominant regulatory system in up to 90 per cent of most African countries.

Many African governments have made some attempt to integrate the formal and informal justice systems. This has largely been done by incorporating traditional leaders through 'Traditional Authority Acts' and tradition-based practices through customary laws. However, the relationship between the formal and informal justice systems remains complex and difficult. The formal justice system largely operates in

urban centres, whereas the informal justice system, which in most contexts receives little state support, operates almost exclusively in contexts in which the state is at best absent, in the large rural areas, meeting the justice needs of the majority of Africans.

When high level conflict occurs, both these systems of justice are often disrupted, the formal perhaps even more than the informal. It is in this context – of the disruption of the parallel systems of justice which already have a difficult relationship with one another – that a transitional justice intervention is planned. This transitional justice intervention is normally imagined within the context of the formal justice system, and more broadly, formal systems of leadership and governance.

Key findings

A difference of norms

Transitional justice interventions have been critiqued for not had enough local ownership and legitimacy, and have had little relevance for those outside urban centres. Considering that between 60-90% of people in most African societies live in rural areas, a significant amount of people are left out.

The discovery being made is that in the absence of transitional justice mechanisms, and formal state-based court systems, justice is being practiced, and has been practiced, all the time. Indigenous or 'informal' justice systems across Africa have continued to function and meet people's justice needs.

Much of the criticism directed at informal justice systems focuses on norms (related to how we understand justice, gender, and human rights, for example), rather than fully understanding how these systems function in their own right.

Beyond being the result of a 'weak state' or absence of state institutions, though, informal justice systems hold legitimacy in their own right. They also meet the practical needs of rural populations because they are easier to access than formal justice systems. In this regard,

typically, the procedure takes place on site, it is more or less free of cost and less prone to corruption, it is exercised by trusted people in the language everybody speaks, and decisions are taken according to rules known to all community members and allow for better access to justice in that they aim at restoring social peace instead of enforcing abstract legislation' (Röder 2013).

Informal justice systems find their legitimacy in the norms and values which underpin them. These are not simply behavioural norms, but *constitutive* norms, which speak to issues of identity and personhood. They are far deeper and more pervasive than is often described in the literature, and are threatened at this *constitutive* level when confronted with the norms that underpin the formal justice system or transitional justice processes.

It is this kind of threat to the *constitutive* norms of a given society that become apparent in, for example, the rejection by African leaders of the International Criminal Court (ICC), or the failure of certain justice interventions by external actors to 'take hold' in rural communities.



Ruth Murambadoro collecting data about informal systems of justice in a community in Zimbabwe.

Co-opting the informal into the formal justice systems doesn't work

When informal justice systems are co-opted into formal or transitional justice systems, they lose something of the very norms and values that give them their legitimacy in the communities in which they function. This point has already been made in a Penal Reform International report in 2000, but is not well reflected in transitional justice policy or practice.

There are certain conceptions of personhood that are central to African ways of being which have implications for justice during transitions. These conceptions of personhood are characterised by the fact that they are relational, and that communities are composed of complex networks of relationships. In postcolonial African states people accommodate multiple identities and speak of a 'relational aesthetic of recognition'. Rather than recognising distinct communities of differences, they suggest we recognise the relationships that unite groups of people, and to acknowledge these relations not only as something inserted into communities after they emerge, but as intrinsic to the very emergence of the communities.

These networks or webs of relationships are not only between people, but point to the cosmological, or metaphysical. They include the relationships between the living, the not yet living and the living dead, as well as the ecological. The intrinsic importance of the intersection of the physical and metaphysical are most visible in the cleansing rituals that characterise most African systems of justice. Even were a conflict to be resolved between individuals through the formal state system, on returning to their community, these individuals would need to engage in a cleansing ritual that involves the whole community in the cosmological sense.

This practice is not unique to rural communities. Mobility between urban and rural spaces is a characteristic of most African societies, to the extent that we need to interrogate notions of 'urban' and 'rural' altogether. Many people living in urban centres have a rural 'home' they return to, where they engage in these cleansing rituals in order to restore the balance or social harmony between themselves and their community of origin.

The social contract is between people with one another, not between people and the state

The norms that underlie these practices are not simply behavioural, they constitute the very way in which identities, and as a consequence, justice, are understood. Justice is thus not about individual accountability, nor about any kind of social contract between an individual and the state. It is not about the rights and duties of a citizen (as in the case of the continental European civilian law system), or to protect an individual from the state (as in the case of the British common law system). It is about restoring social harmony and the balance in the web of relationships that are integral to the survival of the community.

When engaging with these informal justice systems from the perspective of *lived experience* rather than a state centric perspective, it is possible to get to the deeper values that underlie justice practices. The results were that apology and compensation were resoundingly valued far above punishment. Even where forms of punishment did form part of the justice practice, the qualitative data pointed to the fact that this was for the purpose of restoring the balance, or harmony, of the community.

Recommendations: From transitional justice to justice during transitions

The apparent failures and limitations of transitional justice interventions to date call for an alternative, more effective 'justice during transitions' approach.

Shifting to justice during transition firstly requires rethinking the way in which justice is understood and engaged with, both in terms of what justice *means* in rural African contexts, and in terms of how it is *practiced*. Secondly, it requires rethinking what authority and legitimacy mean in rural African societies where the formal systems of governance and justice do not necessarily hold greater legitimacy or authority, and what the implications of this are for the relationship between informal and formal systems of governance (i.e. traditional and government authorities) and systems of justices.

Its starting point is the ways in which communities are already resolving conflicts, and practicing justice, on a day-to-day basis.

This includes:

- Understanding and valuing the norms and values that inform the informal justice system on their own terms.
- Permeating the formal and state centric justice system with the norms and values of the informal systems to create greater coherence between these systems, and increase the legitimacy and efficacy of formal justice systems, make them more participatory, and decrease the inequalities in access to formal justice.
- Giving traditional authorities relevant and appropriate levels of status and responsibility both within their communities and within formal government structures.
- Providing material, financial and human resource support for the functioning of informal justice systems.
- Recognising rituals as valid means by which justice is practiced.

Based on Wielenga, C. and Nshimbi, C. C. (2017) *Justice during transitions: Developing policies that reflect African realities: Regionalism, transitional justice, and tradition-based practices*. Dakar: CODESRIA, forthcoming.

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