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# COLONIALISM, REDRESS AND TRANSITIONAL JUSTICE: IRELAND AND BEYOND

*Bill Rolston and Fionnuala Ní Aoláin*

**Abstract:** The article begins by addressing the contribution and limits of postcolonial studies to the understanding of colonialism; in particular, it critiques the field's fixation on the discursive to the detriment of the material reality of colonialism. We then examine the intellectual history of transitional justice (TJ) as a field and a practice and itemize some of the criticisms made of its shortcomings, not least in relation to colonial harms. These harms are considered in detail through the specific example of colonialism in Ireland. We focus on the noticeable absence of the concept of colonialism from contemporary deliberations and practices of transition in relation to the Northern Ireland conflict. Finally, we interrogate the ability of TJ in the postcolonial period to adequately make amends for colonialism, again focusing on the Irish case, concluding that while there are major obstacles in such a task, especially in relation to "hard" measures, there are also some promising possibilities, particularly as regards "soft" measures. The lessons learnt are applicable to a range of other transitional sites grappling with postcolonial legacies.

**Keywords:** colonialism; transitional justice; Ireland; redress; reparation

## Introduction

An obvious starting point in examining the question of colonialism and its legacy is the field of postcolonial studies. However, although this field acknowledges the harms of colonialism, it has been massively influenced by literature studies and cultural studies, with the result that it has tended to focus overwhelmingly on discursive practices, to the exclusion of consideration of remedies and responses. The purpose of this article is to consider another field with potential to give concrete insights on colonialism, namely the field of transitional justice (TJ). Despite some valid claims of success in terms of dealing with the legacy of past violent conflict, TJ has to date not managed to adequately incorporate redress for colonialism in its repertoire and overwhelmingly fails to account for the long reach of colonialism in its articulation of what constitutes the "to and from" of transition. The article seeks

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to examine the extent, if at all, to which that failing can be corrected, allowing TJ to deal substantially with colonial harms and in the process go beyond the discursive concerns of postcolonial studies. The potential of TJ will be examined in the context of one particular colonial example, Ireland.

To this end, Part 1 of the article addresses the form, contribution and limits of postcolonial studies. Part 2 examines the intellectual history of TJ and explains its relationship to processes of acknowledgement and accountability, specifically as regards colonial harms. Part 3 turns to consider the specificity of the colonial in the Irish context and explores the importance of colonial legacies to the experience of conflict and its noticeable absence from contemporary deliberations and practices of transition in the jurisdiction. Part 4 narrows its discussion to address the contemporary reckoning for the long-term harms of colonialism under the rubric of TJ measures.

## Postcolonial Studies

Postcolonial studies can be broadly described as growing out of literature studies; leading scholars have included such writers as Said (1978). The discipline represented a powerful critique of the dominant momentum of preceding literary analysis, as in the re-interpretation of texts such as Shakespeare's *The Tempest*, to focus on the indigenous servant Caliban speaking back against his master, Prospero. The approach shone a light on a central element in the development and legitimization of colonialism, namely, that of representation. From "the noble savage" to the "cannibal", images of the colonized served to justify conquest; these images were created and dispersed through popular forms, including literature. Equally innovative was the fact that postcolonial studies acknowledged the history and culture of the colonized. The practice and logic of colonialism meant that indigenous culture was overrun, marginalized and often actively suppressed. In the face of such domination, a key question for postcolonial theorists was whether or not the subaltern could speak (Spivak 1988). To presume that they could not was to suggest that they could only be represented as victims, lacking agency. Yet, to conclude that they had a voice begged the question of the nature of that voice. When to be heard one had to master the language of the colonizer, the implication was that there was no indigenous form of agency untainted by colonialism. The radical contribution of postcolonial theory was to uncover and emphasize the ways in which the subaltern writer found forms of mimicry and irony, in speech and in literature, which were an imaginative and effective form of resistance against colonial discourse.

There is undoubted value in this approach. Colonialism and imperialism were practices which depended on justification, on ideology, ultimately on discourse. Powerful hegemonic beliefs about the colonized were central to colonial takeover

and dominance. Conversely, organized resistance and rebellion against colonialism had its ideological and discursive core. From Ireland to Africa, the revolt against colonialism often began with a cultural revival among the colonized, and especially their more radical educated cadres, reclaiming history, language and culture (Childs and Williams 1997).

The major shortcoming of postcolonial studies has been the overdetermination of the discursive. Although some scholars attempt to broaden the field to consider the material reality and experience of colonialism, there is a distinct sense in which the field has been unable to break from its origins in literature studies, with the result that “The meaning of ‘discourse’ shrinks to ‘text’, and from there to ‘literary text’ and from there to texts written in English because that is the corpus most familiar to the critics” (Loomba 1998: 96).

From the first European incursions into the Americas in the fifteenth century to the height of European imperialism in the late nineteenth century, a global system of domination was fashioned which wrought havoc on the non-Europeans of the planet. Ideology played a key role in this development. Ideologies driving colonialism included the doctrine of “manifest destiny” which proclaimed that the colonialists in America had a “god-given” right to take the land from the natives to develop it (Pearce 1998) and “terra nullius” in Australia, the assertion that there were no pre-colonial inhabitants (Lindqvist 2007). In the United States, Australia and earlier in Ireland, settler-colonialism tended to equate to a more brutal experience for the indigenous population than for those in countries where the imperial power sought trade and raw material extraction (Wolfe 2006; see also articles by Grewcock and Anthony, this volume). The rationalization of colonialism was frequently encapsulated in the notion of the “civilizing mission” of the West, but there was no contradiction between the ideal of a civilizing mission on one hand and the call to extermination on the other; barbarism was frequently carried out in the name of civilization (Van Krieken 1999: 299).

It is worth reminding ourselves that colonialism played out materially, with respect to the domination of territories, people and bodies. It involved real suffering of real people in actual historical time. Colonialism involved land expropriation, settlement, ongoing violence, the use of law as a weapon of submission, skewed wealth distribution, sexual violence, policies of cultural marginalization or annihilation and ultimately genocide (McVeigh 2008). Extermination was frequently the inevitable acolyte of colonialism. For example, in the Canary Islands, the number of the indigenous population, the Guanches, was estimated at 80,000 when the Spaniards arrived in 1478; by 1541, “there was one single Guanche left, eighty-one years old and permanently drunk” (Lindqvist 2002: 111).

Once there is empirical affirmation of systematic harm through colonial practices, the subsequent questions are twofold. First, whether recognition and

acknowledgement of the infliction of the harm and its consequences will be articulated by the perpetrators. Second, what remedies exist for those who have experienced such harm (or their descendants) and how can they be implemented in practice, particularly when the harms have occurred in the distant past? There is no way, for example, to resurrect the dead peoples such as the Arawaks who committed mass suicide in the face of Spanish conquistadors (Zinn 1980: 4). Even if all the ill-gained wealth achieved by imperial nations through booty and forced labour could be calculated, how can it be realistically returned without completely upending the economic and political structures of the contemporary political and economic order? The problem is a fundamental one: there is no going back to the status quo ante. Any attempts at redress have to begin in the here and now, in the material reality of a world which has inherited the consequences of colonialism.

### **Transitional Justice and Colonialism**

Transitional Justice is “a set of techniques and mechanisms for ‘dealing with the past’ when traditional legal mechanisms prove difficult or undesirable politically (for whatever reason)” (Bell 2009: 24). After a phase of consolidation and relative consensus, during the 1990s and early 2000s, in which the field grew from a preliminary focus on political transition from repressive or authoritarian regimes to more liberal forms of governance (Kritz 1995) and from there to play an important role in transitions from conflict to peace, TJ is now in a new phase of critique and reassessment. The boundaries of the field have continued to expand into new concerns. One such area is that of “non-paradigmatic transitions”, that is focusing not on the traditional move of TJ, liberal political transitions from authoritarianism to democracy, but on post-conflict peacebuilding more generally. Moreover, there are other expansions, including in societies not undergoing a paradigmatic liberal transition or the application of TJ to situations of “ongoing hostilities” as well as the use of TJ by consolidated democracies to do accountability work (Sharp 2015: 150; Ní Aoláin and Campbell 2005). TJ is now said to have value even in the absence of a fully fledged transition (Moreno-Ocampo 2007). In practice, this has led to truth commissions for a specific localized issue, as in Greensboro, North Carolina (Magarell and Wesle 2008), or TJ in advance of ceasefires and peace agreements, as in Colombia (García and Lid 2010), or in sites of ongoing hostilities and occupation, such as Israel-Palestine (Dudai 2007). Finally, there have been applications of TJ’s insights to issues far removed from its original concerns, such as historic child sexual abuse (Gallen 2016). In these various sites, TJ engages the practice of criminal accountability, including the trials of perpetrators whether by local or international courts, truth commissions, vetting and lustration of state institutions, reparations, acknowledgement, apologies, memorials, exhumations

of mass graves, quotas and affirmative action practices, security sector reform and modalities of political accommodation, particularly associated with transitional compacts.

Even before this expansion, TJ had come in for criticisms. These include TJ's focus on a specific and usually recent time frame and the limits that holds for meaningful accountability, its concern with restricted criminal harms inflicted on individuals and collectives, its blindness concerning structural inequalities and harms, a relative silence about socio-economic issues and its state-centric focus. As will become clear, each of these criticisms has particular relevance in relation to the possibility of TJ addressing the harms of colonialism.

Nagy (2008) has noted that “. . . transitional justice has typically appeared salient only after massive direct violence has been brought to a halt” (279). Violence is often seen as singular rather than a connected set of phenomena. There is a lack of historicity in the understanding of cycles and causes of violence that infects TJ, and a core blind-spot in its methodological presumptions. Not only does this underestimate the beginning point of violence, but it also presumes (inaccurately) that transition marks the end of violence. The focus on “single sequential transitions” means that not only are relationships between cycles and patterns of violence unseen, but intergenerational justice issues frequently go underexplored (Moyo 2015: 85). More generally, as Maddison and Shepherd (2013) conclude, “. . . a narrow temporal understanding of the process of transition can only ever result in short term interventions that, while not unimportant, will never be transformational” (268).

Silence about the deep past has implications for including colonialism and its aftermath in considerations about transition. Thus, TJ processes in East Timor focused on the human rights abuses during the period of Indonesian occupation from 1975 and not on those of the prior period of Portuguese occupation. The much-lauded South African Truth and Reconciliation Commission dealt only with the period following the rise of the National Party in 1948 and not on Dutch and British colonial exploitation prior to that. In Rwanda, the focus was on the 1994 genocide, even though it was clear that the deep roots of that genocide were in the practice of Belgian colonialism (Balint, Evans and McMillan 2014: 201). The numerous processes of TJ in Latin America, from Chile to Guatemala, have had little to say about the colonial history of the region and the patterns of violence which have colonial echoes in recent authoritarian cycles (but see Bueno-Hansen 2015) and more recently the involvement of the United States, directly and indirectly, in human rights abuses throughout the region.

Similarly problematic in the context of armed conflict transitions is TJ's “inadequate attention to the deeper socio-economic and structural causes and consequences of conflict” (Balint, Evans and McMillan 2014: 198). Major inequalities can fuel



conflict and do not cease to do so merely with the cessation of direct violence. The challenge of TJ in practice is how to ameliorate, if not actually eradicate, the effects of socio-economic inequalities. Such inequalities usually have deep roots, stretching back beyond the immediate period of violence to class, ethnic and gender divisions which have developed historically. A blindness about such structures means that TJ measures “may have only ‘negligible’ effects on social structures that have developed over a long period of time” (Arthur 2011: 11). In particular, in many contemporary conflict and transitional sites (Uganda, Democratic Republic of Congo, Rwanda, Afghanistan, Iraq, Guatemala and beyond), the antecedent structures of land ownership, ethnic distribution and power monopolies, the clientelism of crony economic distribution, the exclusions from government, property, assets and legal equality all have deep roots in the DNA of colonial ordering. Hence, in a very fundamental way the evidence of socio-economic inequality is merely a decorative fringe on the tablecloth of the colonial pre-state. Moreover, it should be remembered that the colonial decouplings that took place in the era of decolonialization were often deftly negotiated by the European states which replaced the yoke of overt colonial mastery with the subtler (but no less effective) neo-colonial empire of economic dependency, trade relationships, military subvention and ongoing legitimacy through political recognition in regional and global clubs.

Many current socio-economic divisions and inequalities in postcolonial societies result directly from colonialism. Land seizure and the extraction of natural resources produced a class of wealthy owners, often geographically far removed from the colonies they exploited (Bulhan 2015). At the same time, it created a massively impoverished working class in colonial societies, whether enslaved or working for low wages (Martinez 2014). The wealth produced in the colonies was for the most part repatriated to metropolitan centres and not used to the benefit of local populations. At the same time, there was the emergence of a local “comprador bourgeoisie” (Frank 1972) which benefited from colonialism and so reproduced the division of wealth between the metropolitan centre and the colony within the colony itself. Colonial rule also frequently exacerbated or created ethnic divisions within colonial societies (Sellström and Wohlgemuth 1996); relative privilege proved a powerful tool to divide various groups of subaltern people, thereby encouraging a hierarchy of inequality among the dispossessed. Finally, settler-colonialism added its own particular form to ethnic, class and other divisions (Veracini 2010). As Loomba (1998: 110) argues, where trade is the basis of the colonial takeover, the political and administrative class may be able to view sections of the indigenous population as quaint, even noble, provided they do not engage in active resistance. But settlers lived in fear that the indigenous majority would rise up and slaughter them, and therefore almost inevitably viewed the indigenous population through a racist lens and from behind the shield of force.

The inequalities “that are put into place during colonialism survive long after many of the economic structures underlying them have changed . . .” (Loomba 1998: 129). Many new postcolonial political orders are dependent on the continuation of colonial social and economic structures to survive, and the continuities of colonial practice are far more ingrained than often acknowledged (Massoud 2014). Ignoring these legacies in later transitional periods is short sighted, as demonstrated in South Africa and Zimbabwe (Muvingi 2009: 163).

A further conceptual constraint in TJ is “its focus on strengthening, rather than challenging, the state” (Balint, Evans and McMillan 2014: 201). The purpose of much TJ intervention is on the restoration of the status quo ante, with little consideration of the deep roots of the state and the question of its ultimate social and political legitimacy, whatever its current legal status. The origins of the state may have resulted from military takeover, internal political conflict, colonial intervention or imperialist conquest, but for all that, TJ’s tools are applied within the confines of the specific contemporary context as the post-Cold War consolidation of TJ practice has amply demonstrated.

This is particularly problematic in the case of colonialism. The European imperialist scramble for Africa in the late nineteenth century led to the creation of states where none had existed before. In the Middle East, boundaries were drawn on maps, their clear straight lines bearing no resemblance to the complex interfaces between different ethnic groups. All were thrown together into the one colonial creation which may have served the administrative, military and economic needs of the colonial power but did little to forge an “imagined community” (Anderson 1991) among the disparate groups so confined. The roots of sectarian division and genocide in places as diverse as Ireland, Rwanda and Iraq emerge from these colonial decisions. Decolonization had further effects on these political structures. Substantial structural problems were imported into the very being of the new states, one consequence of which was that for many insiders the “new” state was not seen as legitimate. A TJ intervention based on restoring the state to political health is at best dealing with the symptoms, not grappling with the complexity of the status quo ante.<sup>1</sup>

Overall, there is clearly a blindness about colonialism within TJ. This is particularly relevant in relation to settler-colonialism. For example, in all the deliberations on TJ in South Africa, South Africa’s first inhabitants, the Khoe-San, barely came in for a mention (Young and Korir 2014: 109). Balint, Evans and McMillan (2014) conclude that “the extensive and enduring harms caused by settler-colonial practices and policies in countries such as Australia, New Zealand, Canada and the US have not constituted the traditional focus of transitional justice discourse and practice” (195). In similar vein, Maddison and Shepherd (2013) note that “where transitional justice measures are deployed in settler-colonial contexts, the transitional justice



label is either not applied – as in the Australian case . . . – or applied only to more recent atrocity, which is distinguished from a colonial ‘past’” (254).

In summary, a number of critiques of the TJ paradigm point to deficiencies in its ability to date to deal with the issue of colonialism. Maddison and Shepherd (2013) stress that for subaltern peoples in postcolonial situations, there exists “a structure of oppression that is for them a current reality rather than a historical artefact” (265). The original harms may be far in the past, but their consequences are currently real and immediate. That said, the intellectual challenge is to hold that the limits of TJ as regards colonial legacies are not inevitable or unavoidable. Rather, there is significant theoretical and practical work to do which could, if deftly managed, produce a more thoughtful and engaged relationship between TJ and colonial legacies.

### **Ireland, Colonialism and Decolonization**

Considering the vast amount of academic work produced on the Northern Ireland conflict over the last four decades, it is possible to see a number of approaches to viewing the conflict as colonial in origin (Miller 1998). The first is denial – there was no colonialism, simply the expansion and consolidation of what became the British state. Second is acceptance, even to the point of acknowledging that, as Britain’s first colony, Ireland proved in many ways a training ground (Rolston 1993; as regards law see Campbell 1994) for empire and also that conquest had long-term repercussions.

But for most, while colonialism may have been of central significance for Ireland in the seventeenth to nineteenth centuries in particular, its significance is viewed as solely historical. There is no specification of when colonialism ended, thereby ceasing to have an influence in contemporary Irish affairs, but most observers affirm an endpoint. This has two consequences. First, the aetiology of contemporary problems on the island of Ireland, north or south, is not seen in any way to be explained by colonialism. Even the violence in the North is frequently explained as atavistic and substantially irrational; at best, it is characterized as an ethnic conflict, but not colonial. The second consequence is that there is no sense that there needs to be any repair for the harms of colonialism, except perhaps for the recognition that apologies for particular acts that occurred during colonial times (e.g. the Irish Famine) have symbolic importance in remedying British–Irish bi-lateral relationships. For example, convincing arguments are made at present in relation to overturning impunity for state crimes in relation to the Northern conflict and indeed to consider reparations (McEvoy 2008). But these insights are couched in terms of broad human rights concerns and duties rather than as part of a process of making amends for the specific harms of colonialism. Little wonder,

then, that Clayton (1996) concludes that “Ireland, Britain’s oldest and longest-held colony, is ignored by the majority of imperial theorists . . . a reading of the literature would suggest that Ireland has no place in the debate on imperialism or settler colonialism” (24). Even when it finds a place, the focus is on postcolonial studies-inspired definitional debates (Howe 2002), with remarkably little insight into the material reality of colonialism and its effects. Consequently, the purpose of this section is to briefly examine the history of Ireland through the lens of colonialism; the insights thus gained may assist in the analysis of other colonial instances, thus establishing Ireland as neither outlier nor aberration.

The Norman conquest of England in the eleventh century had relatively little impact on Ireland. Norman-English incursion into Ireland began in 1171, when King Henry II claimed sovereignty. Thereafter, Norman authority in Ireland was effectively confined to an area known as the Pale, centred on Dublin. “Beyond the Pale”, it was said to be lawless. In reality, the territory occupied by the native Irish clans had a complex Gaelic social order with its laws and customs, most of which were starkly different from those of feudal Europe (Ginnell 1894).

For the British state as it developed and expanded, Ireland presented two problems. First, was the military power of the Irish clans which acted as a bulwark against colonial incursion. Second, and related to this, was that the Norman settlers, effectively the frontline garrison of the British colonial enterprise in Ireland outside the Pale, became “more Irish than the Irish themselves”, adopting Irish customs, including clothing, habits and language and frequently involved in rebellion, with or without native allies, against the metropole. Consequently, laws were introduced to control the Norman settlers. In 1366, the Statutes of Kilkenny forbade intermarriage between Normans and Irish, and decreed that Normans could not speak Irish, use Irish names or live alongside the Irish (Beckett 1979: 27). In 1494, Poyning’s Law ruled that legislation passed by the Irish parliament, already a relatively powerless settler-dominated institution, could not be enacted without prior approval from the English Lord Deputy in Ireland and by the English monarch (Kelly 2001). For those creating imperial strategies without a previous blueprint, this was an important lesson, the need to separate the colonizer from the colonized. The insertion of new elites and the dominance over old elites was a tactic used frequently in colonial practice thereafter.

The colonized represented a problem of a different order. The Irish chieftains continued to resist and periodically obtained military support from continental rivals of England. The northern chieftains, by far the most powerful, and their Spanish allies lost a decisive battle to the English at the Battle of Kinsale in 1601, and the chieftains left for Europe seeking military help. The Elizabethan state seized the clan territories. Many of the natives were removed from their ancestral

lands and replaced by impoverished settlers from England and Scotland. Half a million acres of mainly fertile land was handed over to the settlers (Connolly 1915/1968: 9). Herein lies lesson number two in colonial expansion: the control of land was worth the social and economic upheaval of massive population displacement.

The ancient Gaelic order was in terminal decline, and the fatal blow was administered a few decades later. The natives staged a major rebellion in 1641, and in 1649, Oliver Cromwell provided the English response. The Cromwellian settlement, as it is known, was, in the words of Connolly (1915/1968: 1), “the final consummation of the conquest of Ireland” and constitutes the third major lesson learned in British colonial expansion. The native Irish landowners of the eastern and southern provinces were ordered to remove themselves to the most barren western province under pain of death, and their lands were seized. Any natives on planter estates had to be registered and if not, were classed as “idle persons”. The Irish could not move from one place to another without a magistrate’s certificate. As Burns (1931/1974: 2) points out, these policies pre-date South African pass laws by centuries. In 1641, Irish Catholics, the vast majority of the population, owned 59 per cent of the land; by 1703, that was reduced to 14 per cent (Miller 1978: 26). These practices of territorial control, population displacement and harsh emergency laws to oversee the enforcement of colonial regimes were exported across the globe.

After the accession of King William III to the English throne, in 1691, penal laws were introduced that effectively blocked the native Irish from land, wealth and political power as well as restricting the rights of Presbyterians. The penal laws represent lesson number four for this, the first experiment in colonial acquisition by Britain and later followed in other colonial expansions from Palestine to South Africa. Law is a powerful instrument in the colonial repertoire, a tool to manage the political. The penal laws can be described as an early form of national security law or emergency power.

Ireland was now a fully fledged colony with differential effects on settlers and colonized. For the bulk of the colonized, the peasantry, the experience was one of prolonged impoverishment that often surpassed that of the peasantry anywhere else in Europe. The mainly Presbyterian bourgeoisie was curtailed by English protectionist laws which blocked their participation in international trade, not least the slave trade. In response, the Presbyterian bourgeoisie embraced the republican ideals of France and America and rebelled in 1798. The “punishment” for insurgency was the passing of the Act of Union, incorporating Ireland into the United Kingdom. Suddenly freed to participate economically in the British Empire, the bourgeoisie in Ireland quickly switched from republicanism to pro-Unionism. From that point, Irish anti-colonialist struggle was increasingly confined to the

colonized. Often that struggle was focused solely on the issue of national independence, but struggle on social issues also occurred. In the late nineteenth century, the main such issue was land. The bulk of the population, the peasantry, lived on small plots rented from landlords, many of whom were absentees. A highly successful land war, incorporating tactics such as mass mobilization and boycotts, led to the government provision of loans to enable tenants to purchase land.

The national struggle reached a crescendo with the Easter Rising of 1916 and the subsequent war of independence. The compromise outcome was the partitioning of Ireland, with 26 of the 32 counties achieving a form of sovereignty and the remaining six counties remaining tied to the United Kingdom. The Free State in the south had a level of independence, but strong vestiges of colonialism remained: politicians had to swear an oath of allegiance to the British crown; Britain retained access to a number of Irish ports for military purposes; small landowners had to pay back loans to the British exchequer provided for purchasing their land; and many colonial laws, such as that on abortion, remain in force at the time of writing. The United Kingdom, squeezed in part by the affirmation of the right to self-determination in the League of Nations, cannily understood that controlled exit and long-term structured relationship might be equally beneficial and less costly than the management of the formal colonial relationship. Hence, the Irish model provides an early prototype of neo-colonial control. The history of the twentieth century in Ireland was a long path of incorporation into and decreasing resistance to neo-colonial dependence.

The other sub-state on the island, Northern Ireland, provided evidence of Veracini's (2010: 95) conclusion that *settler-colonialism has been remarkably resistant to decolonization*. The borders of the state were drawn in a way to ensure that there would be a majority of Protestant citizens in perpetuity. This new ethnic state had a single unionist party in power for over half a century, with policies geared towards keeping nationalist numbers and influence low (Farrell 1976). A civil rights campaign in the 1960s morphed into a three-way war between British forces, republicans and loyalists which concluded with a peace agreement in 1998. This has been followed by attempts to apply TJ mechanisms to a series of "legacy issues" arising from the conflict.

## **Making Amends for Colonialism**

Colonialism represents a complex conundrum in the TJ context. Specifically, there is a deep conceptual gap in defining where colonial legacies "fit" in the TJ toolkit. At its very simplest, TJ defines a move "from and to". Does the fact of a colonial past inevitably fix and historicize the "from"? Should we only address colonialism if there is a demonstrated link between the events of the near past

under scrutiny and the institutions, legacies and practices of the prior colonial context? Does time matter – specifically is there a time limit on whether a prior colonial past is no longer relevant to the exigencies of the contemporary moment? Is there a specified length of colonial time that creates particular incentives to address colonial histories, that is, does it make a difference if it was a short or a long colonization? What is the standard for such a demonstrated link and how might it be proven?

Some scholars are decidedly optimistic on the capacity of TJ mechanisms and theorizing to take account of the colonial, albeit indirectly in much of the published work now available. In this school of thought, one can include those writing from a transformative justice perspective, whose commitment to uncovering the deep institutional imprints of poverty, exclusion, elite power configurations and more affirm that colonialism simply cannot be ignored (Gready and Robins 2014). Scholars concerned with the advancement of socio-economic rights in transition such as Balint, Evans and McMillan (2014) thus conclude that TJ might enable “the transformation of the social, political, economic and legal frameworks such as those that underlie settler colonialism” (214). The question is whether TJ can offer a means of recompense to the victims of colonialism. Certainly, TJ has a number of “hard” mechanisms to offer, such as prosecutions, land reform, reparations and structural transformation, as well as “soft” mechanisms, including apologies and acknowledgement. By and large, there has been no comprehensive testing of these tools/mechanisms against the colonial backdrop of TJ and fulsome analysis of the totality of these measures awaits. Our preliminary contribution to this debate is to consider the value of each mechanism with specific reference to the Irish case. We offer these reflections understanding that each transition is *sui generis* but believe there is some transferability from our observations of the Irish case to transitions in other settings.

In transitional periods, the desire to prosecute gross human rights offenders faces a number of obstacles, including the passage of time and the rigid requirements of evidence in relation to findings of guilt (see, for example, Gegout 2013). The passage of time is a significant factor in the likely success of any criminal prosecution but is particularly limiting when it comes to colonial harms. With the heyday of colonialism so far in the past, beyond memory, measure, observation and recording, it is virtually impossible to determine who could be prosecuted. As a formal legal matter, we prosecute individuals for crimes under international law and the obvious limits of ascertaining individual liability for colonial crimes do not need lengthy elucidation (Stover and Weinstein 2004). The colonial heyday was not marked by a surfeit of norms prohibiting plunder, slavery, torture, extrajudicial execution and even genocide. This means that again there is a fundamental legal challenge of *nullem crimen sine lege* in using the lens of criminal prosecution



to view the actions of states and individuals in the past. This conclusion certainly fits in the Irish case, and it remains distinctly improbable as well as impractical to conceive of a criminal prosecution that would be triggered by the now long-past colonial occupation of the island of Ireland.

In the category of restitution falls the question of land and property. Restitution is a key TJ mechanism, which offers the concrete return of land, property or other material items taken during a prior regime to those who have legal rights to these objects or their descendants (De Greiff 2006). Restitution is however a complex concept to which various meanings apply. From *restitutio in integrum* (a return of the person back to the precise position they were in before the harm occurred) to partial restitution, there is a restitution continuum in play for the mediation of loss in most legal systems. Restitution can be difficult to apply for any loss; for example, the murder of an individual makes the concept of restitution impossible as the ending of life is irreversible. But other forms of restitution are no less fraught. For example, there are grave difficulties in returning land taken during colonial incursion. A variety of issues arise. First is the challenge of establishing undisputed title to land where the “first” owners may simply not be ascertainable in any historical sense. Second, in many pre-modern societies, Ireland being one, private property was a limited if non-existent concept, and so a contemporary notion of fixed individual ownership sits uneasily (or not at all) with communal dispossession in an earlier era (Wylie 2013). Finally, intervening claims of reliance, use, ownership and takings will doubtlessly and correctly shape any discussion around title and restitution, in ways that make any process of restitution overwhelming from a practical perspective.

While restitution is a live issue in societies such as Zimbabwe, where there is pressure for a justice system which, rather than privileging “the sanctity of property and the binding nature of contract” adopts “policies which take into account other principles, such as ‘unjust enrichment’ . . .” (Moyo 2015: 72), there are limitations in relation to Ireland where the “land question” was effectively solved by the time Ireland was partitioned and political independence was granted to the Irish state. A successful popular movement, the Land League, wrested from the government a relatively generous policy of loans to allow tenant farmers to buy land (Curtis 1994: 184). However, this solution was based on the distribution of land as existed at the time of the Land League, the late nineteenth century, and did not question the redistribution of land as a result of previous colonial occupation and consolidation, the original “unjust enrichment”. The problem of a more fundamental redress is underlined by the fact that in Ulster, “a redistribution of land to its original inhabitants, were such a thing to be practical, would almost eradicate Protestant farmers . . .” (Clayton 1996: 33). Hence, while land issues remain peripheral to the mainstay of the political negotiation land ownership, displacement, access and imagery remain



a vital part of the historical memory in Ireland and underpin many of the historical grievances that remain the subject of TJ adjudication.

Reparations offer another possibility for redress for colonial harms. Reparations come in multiple forms including material, psychological, collective and symbolic (de Feyter et al. 2005; see also Atilés-Osoria and Paulose and Rogo, this volume). The use of reparations has been sporadic and generally limited in the TJ toolkit, despite a general recognition that reparation is a vital element to reconciliation, individual repair and legal satisfaction following harm. Broad challenges of implementing reparation include a question of liability, specifically whether successor regimes who did not instigate the human rights violation pay for their consequences. Additionally, there are tough questions of incommensurability in reparations, whether certain losses can in fact be remedied in any meaningful way, financially or otherwise. Finally, in resource constrained environments, it may be difficult to identify the target group for reparations when violations have been widespread and systematic. If everyone in a society has been affected by the harm, the obvious question is whether all are equally deserving of reparations.

Some examples of colonial reparations have emerged in recent years; for example, in July 2016, the British government paid £19.9 million to 5,228 claimants who had been tortured in Kenya in the late 1950s (Moffett 2016: 146). But these instances are patchwork in nature, and it remains unclear if they offer a broader precedent for reparations for colonial harms than has hitherto been accepted. In addition, individual financial compensation can be an emotive subject in transitional societies. For example, in Argentina acceptance of compensation was rejected by one victims' group, Madres de Plaza de Mayo, as "blood money" (Moffett 2016: 8). In this context, arguably, reparation for historic harms may be better served through collective rather than individual measures. Lu (2011: 279) suggests that a minimum in terms of collective reparation would be the concession of "not only formal, but also effective, equal sovereignty for previously colonized states". The applicability of this insight to Ireland is severely limited. For a start, the Republic of Ireland has achieved sovereignty. It is a member of the United Nations, has regional membership of the Council of Europe and the European Union, and exerts full diplomatic and legal competency in the international sphere. Moreover, those citizens of Northern Ireland whose political aspirations are towards a united Ireland rather than the United Kingdom are citizens of a legitimate sovereign entity, no matter how disaffected they may be with this arrangement. Seeing redress in Ireland through collective reparation is fraught with logistical problems. The question of redress encounters the definitional problems identified above: redress for what and to whom precisely? First, would a dubious essentialist position have to be taken whereby, in the face of intermarriage over many generations, contemporary Irish Catholics are taken to

represent the descendants of the indigenous Irish First Nation which was dispossessed? Moreover, most of the egregious legacies of colonialism in Northern Ireland – including gerrymandering, discriminatory employment practices and political marginalization – have been overcome as a result of mass pressure and legal reform in recent decades, addressing the need for structural mechanisms to prevent repetition of similar violations again.

If the “hard” mechanisms of transitional justice offer little in relation to dealing with Ireland’s colonial past, the question remaining is whether “soft” mechanisms could prove more fruitful. Take official apologies as one example. They have proliferated in recent decades as a means to redress historic harms (Barkan 2000). Colonial harms have fared less well in this regard. Although some former settler-colonial societies have seen postcolonial governments apologize in relation to the removal of indigenous children from their families (Moses 2011; Nagy 2008), politicians from other colonial nations often seem reluctant to apologize.<sup>2</sup>

Although British Prime Minister Tony Blair in 1997 and Queen Elizabeth in 2011 voiced regret over historical conflict between Britain and Ireland, neither actually used the word “sorry”. Even if they had, a sceptic might well conclude that the willingness to concede an apology is precisely to avoid deeper, more structural transformation. At the same time, an apology can provide something which is usually missing in the experience of colonized people, namely acknowledgement. The value of this cannot be underestimated. Central to the experience of colonialism is the denial of harms, the rejection of the victims’ narrative and above all the demonization of any subaltern resistance. To name colonial conquest, genocide and dispossession for what they were is to go some way towards reinstating the colonized to dignity. This insight provides us with some clues particularly for long-departed colonial regimes as to what TJ mechanisms may be of greatest contemporary use.

In this sense, there is great value to naming the Irish experience for what it was: colonialism. That would have been impossible during the recent conflict in Northern Ireland when distancing oneself from an anti-imperialist analysis which might resonate with the political philosophy of such non-state actor groups as the IRA was *de rigueur* for most academics, politicians and public intellectuals (Miller 1998). Indeed, a strong “revisionist” strand in Irish historiography sought to produce a version of history designed to remove any emotive support for insurgency (Perry 2010). Nor is it necessarily easier in the post-conflict situation where a “meta-conflict” (Bell 2009) rages over the definition of “innocent victims” and disputes over symbols such as flags, marches and commemorations. At the same time, the relative absence of outright political violence might allow the space for a calmer exploration of the consequences of naming Ireland’s historic situation as a colonial one.

The partitioning of Ireland in 1921 was a solution for the colonizer but not for the colonized. It led to a seemingly endless cycle of state violence and resistance in Northern Ireland. The most recent phase ended with a peace agreement in 1998. Prior to that, the British Secretary of State, Peter Brooke, stated in November 1990 that Britain had no “selfish strategic or economic interest” in Northern Ireland. He added, “It is not the aspiration to a sovereign, united Ireland against which we set our face, but its violent expression.”<sup>3</sup> Subsequently, the British government, along with other signatories, accepted the clause in the 1998 Agreement that specifies that Northern Ireland would remain part of the United Kingdom as long as a majority of its citizens agree and that a border poll could be held at some unspecified future date to enable reunification of Ireland.<sup>4</sup> This was a significant concession by a successor regime. At the same time, it did not commit the British state to working towards the overturn of a major colonial legacy, partition. More recently, the Irish government has moved considerably in this regard. Following on from the British decision in 2016 to leave the European Union (EU), Irish Prime Minister Enda Kenny stated that the possibility of Irish unity must be included in negotiations between Britain and the EU.<sup>5</sup>

In the meantime, other actions of symbolic reparation can occur. Childs and Williams (1997) conclude thus, “In the post-colonial period it has become a matter of some importance not only to recover the histories of native insurgency, but also to analyse them at a theoretical level” (26). Applying this to Ireland would not be easy; the attempt to understand violence as subaltern resistance would be a profound challenge for historians, educationalists and indeed wider society. However, the prize on offer could be the emergence of a sophisticated understanding of how colonialism has consequences which continue to affect society and that the differences between citizens, descendants of settlers and colonized alike are not due to atavism and, consequently, are surmountable.

Reconciliation could be dismissed as a soft option which can deliver nothing in terms of redressing colonial harms. Certainly, an approach to reconciliation based on the least common denominator, and ultimately on denial, is likely to confirm that conclusion. However, naming colonialism and beginning to unpack its consequences could be simultaneously a reconciliatory act and one that contributes to further multi-level reconciliation. Such a robust process would make major demands of the range of contemporary actors. For the descendants of the colonized, it would require that every effort be made not to represent this as a victory over the descendants of settlers and to accept unreservedly their right to continue to identify as British. For the descendants of settlers, there is the task of recognizing that colonialism once conceded privileges to them but that the hope for conflict transformation lies in embracing equality rather than pursuing privilege. For its part, the metropolitan state would have to go beyond relatively passive gestures to

work actively towards decolonization through support for TJ practices of truth recovery, reparation and so on. For all three actors, discursive transformation could be one element in unpacking the legacy of settler-colonialism on institutions, politics and culture in Ireland.

## Conclusion

Every colonial situation is unique and Ireland is no exception. As Kiberd (1996) points out, as a result of “the close proximity of Ireland to England . . . the enforced intimacies of Anglo-Irish relations created both bitterness and tolerances of unusual refinement” (251). As such, Ireland represents a more difficult case for the analysis of the applicability of TJ than other societies where, for example, colonialism lasted much less time. Conquest and dispossession date back eight centuries in the Irish case, a century and a quarter in many African cases and occurred in living memory in the case of Palestine. These differences make for great divergence when considering the task of making amends for colonialism. That said, our study here can offer some insights on TJ and colonialism which may be generalizable to other colonial experiences.

On the basis of the discussion here, the conclusion is that certain aspects of TJ have limited value in terms of redressing the harms of colonialism. Prosecutions are unlikely to be viable given the passage of time. Reparation in the form of restitution might fit in relation to land expropriation but requires complex calibration given the passage of time, disputes over pedigree of ownership and the challenges of handing over material compensation; the application of this in relation to settler-colonial situations such as Australia and, for different reasons, Ireland would appear to be unworkable. Compensation may seem to be a more viable form of reparation, but, the question of who is due how much is only the least of the obstacles facing practical realization. All of which seems to relegate TJ’s insight to the softer options of acknowledgement, apology and equality of symbolic representation. Limited though these mechanisms may be, they can contribute to an acknowledgement of colonial harms long denied or downplayed. In addition, as it is argued here in relation to Ireland, naming colonialism for what it was has the potential, however remote, of allowing the descendants of colonialists, dispossessed and settlers to understand their interrelationships, thus possibly contributing to a genuine reconciliation based on firm foundations of truth and recognition.

## Notes

1. Feminist scholars have made a similar point about the use of transitional justice measure to return women to the status quo ante in societies where their situation prior to repression or conflict was marked by egregious inequality and exclusion.

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2. British Chancellor Gordon Brown stated in 2005: “. . . we should move forward . . . the days of Britain having to apologise for its colonial history are over”, and in 2007, French President Sarkozy rejected “black armband views of history” (De Cesari 2012: 319).
3. [http://news.bbc.co.uk/1/hi/northern\\_ireland/4072261.stm](http://news.bbc.co.uk/1/hi/northern_ireland/4072261.stm).
4. <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm#constitution>, Constitutional Issues: Annex A.
5. *Irish Times*, 26 September 2016.

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