

Transitional Justice and Settler States

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Abstract

Transitional justice has become the dominant international framework for redressing mass harm and historical injustices. However, transitional justice is commonly premised on the notion of a recent point of rupture or change from violence and oppression to a 'new dawn', and has therefore been less attuned to accommodating the long-term effects of colonialism. Accordingly, the historical experiences of Indigenous peoples in settler states such as Australia, New Zealand and North America have been considered outside the field.

This exploratory paper sketches out some of the perceived benefits of articulating a new conceptual approach, which at once historicises transitional justice and brings the experiences of Indigenous peoples within its purview. Taking an interdisciplinary (criminological, socio-legal and historical) perspective, we consider why notions of transitional justice have not been thought relevant to the circumstances of settler colonialism. We suggest that while the relatively presentist concerns of transitional justice effectively elide the impact of colonialism, its holistic ameliorative framework might nevertheless become relevant to considerations of how just outcomes might be pursued in settler societies. Similarly, in elaborating the significance of colonial pasts *per se* in shaping contemporary experiences, such interdisciplinary approaches might also help address some of the criticisms emerging in recent literature on transitional justice.

We draw here on a larger team-based and cross-sectoral interdisciplinary research project that has been submitted for funding under the Australian Research Council Linkage scheme. It will be the task of the larger project to develop and explore the many issues arising from this discussion, including the need to identify and examine certain conceptual and applied challenges involved in seeking the kind of comprehensive official recognition of past injustices we simply canvass here.

Transitional Justice and Settler States

As a field of scholarship and practice, transitional justice has become the dominant international framework for pursuing holistic, pluralist redress for mass harms in so-called Third World societies, yet it has not been able to account for the long-term effects of colonialism. Moreover, as Chris Cunneen (2008:159) has observed, transitional justice 'has tended to ignore the extent to which liberal democracies themselves might be considered in need of "post-conflict" reconciliation and restorative justice'. This paper discusses some benefits of bringing an interdisciplinary approach to bear on the broader question of state responsibility for mass harms. We set out to interrogate this phenomenon with particular reference to the theory and practice of settler colonialism: we therefore consider critical accounts of the historical experiences of Indigenous peoples in settler states such as Australia, New Zealand, Canada and the USA alongside accepted approaches to transitional justice in 'post-violence' societies such as South Africa, Rwanda and East Timor.

Transitional justice represents a particular approach to understanding and addressing systematic violations of human rights, including military rule and civil war, genocide and widespread oppression. It emerged as a discrete field in the late 1980s as a study of the role of law in times of political transition, prompted by the use of legal and quasi-judicial responses to the end of military rule in societies in South America and the collapse of Communism in East and Central Europe. The term was first captured by Ruti Teitel (2000), who observed the particular role that law can play in

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periods of 'transition', coining the term 'transitional justice'. Teitel argued that law functions differently in times of political upheaval: 'In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation' (2000:6). This function of law in enabling transformation has become the cornerstone of studies of transitional justice and the framework is now widely employed as an approach to the use of law and justice in the wake of mass harm.

Conceptually, the notion of transitional justice envisages a formal shift from authoritarian to democratic rule that is guided by law. Practically, it is concerned with designing justice approaches to facilitate both individual and broader societal redress for past violence and injustices through a range of mechanisms such as criminal trials, truth commissions, reparations measures and reconciliation initiatives. The overall approach therefore sets out to achieve accountability for past wrongs as well as to engender a broader societal transition from 'the past' through facilitating reconciliation and wider reconstruction. In the case of South Africa, for example, the process was dominated by a truth commission that was intended not only to establish an authoritative account (and in this manner establish accountability for the apartheid past) but also to reconcile a divided nation through drawing on the African concept of 'ubuntu' as well as Christian forgiveness.² In East Timor, we have seen both limited criminal trials and a truth commission process, which in using the local custom of '*nahe bitit*' attempted to encourage reconciliation and bring to account through truthful retelling.³

We can observe that the transitional justice model is flexible enough to accommodate both conventional prosecutions and local customary practices whose responsiveness to particular circumstances is seen as more conducive to achieving just outcomes across time and place. As Adam Czarnota (2001:127) has noted, these quasi-judicial processes developed for transitional purposes have the ability to 'respond at the same time both to the need for radical change and the need for substantial continuity'.

The effectiveness of transitional justice is greatly enhanced by this notional capacity to respond holistically and pluralistically to mass harm, while the United Nations' recent endorsement of its application in East Timor testifies to its growing entrenchment as a formal human rights intervention. This contrasts with the highly politicised, and often piecemeal, top-down efforts to redress enduring injustices experienced by Indigenous peoples in contemporary settler societies, where state-endorsed mass harms commonly characterised the historical transfer and transformation of their sovereignty.

While certain mechanisms common to transitional justice have certainly been applied to varying degrees in settler states, it has been more difficult to achieve substantial legal or political commitment to acknowledging the collective impacts of colonialism in terms of mass harm, or to moving forward collectively, systematically and pluralistically from that point to redress them.⁴ This is particularly apparent in the case of Australia, where no treaties were accorded to Indigenous peoples (Behrendt et al 2009; Reynolds 1982) and where public discussions about the past have been particularly damaging and divisive (Birch 2007; Macintyre and Clarke 2004). We direct attention later to some recent developments in postcolonial theory that shed further light on the reluctance of settler states to embrace the full impact of their histories, evident more forcefully, perhaps, in their prolonged opposition to endorsing the United Nations Declaration on the Rights of Indigenous

² For general reading on the South African case, see Graybill 1998; Wilson 2001; Philips 2005; Moon 2008.

³ For general reading on the East Timor case, see Stanley 2008; Kingston 2006; Katzenstein 2003.

⁴ Recent official interventions in Australia include: two significant national inquiries (Royal Commission into Aboriginal Deaths in Custody (RCIADIC) 1991 and Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families 1997); the High Court decision to overthrow the notion of terra nullius in *Mabo and Others v Queensland* [No. 2] (1992) and the highly circumscribed legislative recognition of native title in the subsequent *Native Title Act 1993* (Cth) (and *Native Title Amendment Act 1998* (Cth)); a now defunct National Council for Aboriginal Reconciliation, which was mandated to operate for ten years from 1991 and now operates minimally as Reconciliation Australia; and, in 2008, a formal apology to 'all Aborigines and Stolen Generations' (see <<http://www.news.com.au/apology-to-the-stolen-generations/story-e6frfkp9-1111115539655>>). A range of state-based reforms around justice issues followed the RCIADIC, although implementation of recommendations varies markedly across jurisdictions.

Peoples.⁵ Within this interdisciplinary framework, it becomes clear how the processes of dispossession, including the comprehensive regimes of management and control that succeeded the overt violence of the frontier, continue to circumscribe scope for reform in the present: without a commitment to thorough-going structural or constitutional change, the process of settler-colonisation has no formal point of conclusion (see Reilly 2011).⁶

Despite its evident appeal, however, transitional justice has also been subject to a number of criticisms from scholars and practitioners. These have included the limitations of a strictly legal approach to addressing crimes of the past (see McEvoy 2007), the importance of contextualising transitional justice processes locally (see Shaw 2007; McEvoy and McGregor 2008) and the premise of the transitional justice narrative on an idea of progression (see Moon 2008).

The most prominent of these is transitional justice's inadequate attention to structural injustices. While transitional justice has presented a holistic approach to addressing mass harm, it has still mostly stayed within an individual legal framework that has not worked to facilitate a deep engagement with systemic injustices. Rama Mani (2002), for example, has demonstrated the different types of justice necessary in the wake of conflict, arguing that distributive justice is one mostly neglected by the transitional justice framework. Lisa Laplante (2008:333) has argued that truth commissions must 'expand their mandates to analyze violations of not only civil and political rights but also economic, social and cultural rights' and in this way be more social-justice oriented. This inattention to the deeper socioeconomic causes and consequences of conflict has been a core recent challenge to the transitional justice approach (see also Muvingi 2009; Miller 2008). Lia Kent (2010) has considered this in light of the transitional justice approach implemented by the United Nations in East Timor, illustrating the way in which transitional justice mechanisms were inherently unable to address the legacy of structural violence in that country, including, for example, poverty, poor health, limited education and lack of economic opportunities for survivors. In the context of South Africa during apartheid, Mahmood Mamdani (2000:179) has argued that in its focus on individual physical harms, the Truth and Reconciliation Commission ignored the broader harm of the apartheid system, 'the colonial nature of the South African context'. This relative inattention to both the causes and ongoing consequences of violence suggests that, in its present forms, transitional justice may not always be able to live up to its promises of post-conflict justice and reconstruction.

Despite these concerns, we can nevertheless identify some transitional justice models that do acknowledge broader systemic causes of injustice. While these are exceptions, they demonstrate the enhanced potential of the transitional justice framework. The institutional hearings of the Truth and Reconciliation Commission of South Africa, for example, were a chance to demonstrate the broader organisational framework of apartheid. The commission held a series of hearings into the state and non-state institutions that collaborated with, or supported, the apartheid regime (including the media, the legal profession, the health sector and the police); out of these came a set of recommendations aimed at addressing the gross and systematic inequalities and discriminations apparent in these institutions and their operations. What was missing, however, was the adoption of a regulatory structure to follow this up—the recommendations were intended to be taken up by parliament and the institutions themselves. More recently, the Sierra Leone Truth and Reconciliation Commission generated a set of recommendations aimed at institutional change, yet these changes have been subject to criticism on grounds of failing to address the causes of the conflict. The Liberian Truth and Reconciliation Commission, in its recently released final report, acknowledges the early colonial context as one of the bases for the conflict.

⁵ After 20 years of negotiation, the UN General Assembly adopted the declaration in September 2007. Only four negative votes were cast (Canada, Australia, New Zealand, United States). Australia finally adopted the declaration in April 2009 and New Zealand in April 2010 (International Work Group for Indigenous Affairs 2010).

⁶ In terms of fostering conduits between the commonly discrete fields of scholarship we outline here, it is interesting to note recent transitional justice scholarly interventions in the case of Northern Ireland (see, for example, Eriksson 2009). The questions of Ireland's status as a settler colony, and/or of the influence of its colonial history more generally on contemporary events in Northern Ireland, have long been debated in historical and postcolonial literature (for a recent controversial intervention in the field see Howe 2005).

Further examples of acknowledging broader systemic causes include the Truth and Reconciliation Commission of Peru and the Commission on Historical Clarification of Guatemala. As Laplante outlines, the 1999 final report of the Commission on Historical Clarification of Guatemala examined 'the systemic causes of state violence, including economic exploitation, racism and political exclusion' (Laplante 2008:335). Further, the final report of the Truth and Reconciliation Commission of Peru, 'speaks of an "evident relation" between poverty and social exclusion and political violence that "ignited" and then became the "backdrop" of the war' (Laplante 2008:336). In its final report, the East Timor Commission for Reception, Truth and Reconciliation acknowledged the Indonesian state's responsibility for what unfolded in 1975 (and Australia and the United States as collaborating bystanders), but also noted Portuguese opposition to self-determination in the period immediately preceding Indonesian invasion. These cases have, however, been isolated examples, and seem better placed perhaps to recognise rather than confront the longer-term structural roots of contemporary injustices.

Overwhelmingly, though, it can be said that transitional justice has focused on short-term harm—on the particular harm that was experienced and perpetrated in the designated time period. Accordingly, transitional justice processes in East Timor focused on the harms perpetrated by the Indonesians following their invasion in 1975—their mandates did not stretch back to those of the Portuguese period. As Kent (2010) has shown, however, it was during the colonial period that land was taken, shaping later structural injustice. Similarly, the transitional justice process in South Africa focused on harms perpetrated after the rise to power of the National Party in 1948, yet did not examine the complex history of Dutch and British colonial exploitation that established the initial lines of separation. And in Rwanda, despite recognition that a Belgian colonial past had contributed to the genocide in 1994 (see Hintjens 1999; Prunier 1995), this did not feature in legal processes either nationally or internationally.

To some extent, then, the relative marginalisation of structural issues can be explained with reference to a number of conceptual constraints in the transitional justice paradigm.

First, transitional justice has not truly considered or embraced the fact that different types of harm need possibly different approaches for redress. That is, different genocides, or mass harms, may have different causes, histories and outcomes, and may require different kinds of legal approaches. We currently have no 'typology' of transitional justice (see Balint 2008).

Second, the idea of a 'point of rupture' has been central to transitional justice, assuming the need to identify a specific point of change from violence and oppression to a 'new dawn' (see Nagy 2008; Miller 2008). The model is premised on political change and upheaval, on an overt change of regime. Such a framework risks simplifying often complex and messy points of origin or completion.

Third, in nominating such specific timeframes for its operation, transitional justice has generally focused on the recent past. When viewed within the broader context of modern European expansion, which had such dramatic consequences for pre-colonial societies, the field seems relatively presentist in its concerns. With mandates for truth commissions and trials that cover quite short timeframes, the complex impacts of colonial pasts are effectively elided. This failure to appreciate the global and local historical causes of structural injustices constitutes an effective blindness to the role of colonialism in perpetrating or perpetuating mass harm.

For the purposes of this paper, these conceptual limits of transitional justice—particularly the requirement for a specific point of rupture and the failure to 'look backwards' to causes and histories as well as look forwards to possible resolutions—complicate its potential to address more comprehensively the kinds of mass harms suffered by recognised 'post-conflict' populations as well as by Indigenous peoples in settler societies. We suggest here, however, that engaging more deeply with the significance of colonialism through interdisciplinary critical analysis can help both to theorise and make manifest its long-term impacts across a range of historical experiences (Anaya 2004; Anghie 2005; Moses 2008).

In this final section, we therefore turn to explaining how bringing settler-colonial theory to bear on such internal critiques of transitional justice can help advance both scholarly and public appreciation of the need for governments to be more responsive to the ongoing effects of colonialism, as much in contemporary settler societies such as Australasia and North America as in officially recognised 'post-violence' states such as the ones discussed above.

For present purposes, we simply draw attention to three key insights from an expansive body of theory: the historical grounding of sovereignty in European expansion to the 'New World'; the specific structural features of settler colonialism as a distinctive colonial formation; and the constitutive significance for settler-states of the dispossession of Indigenous peoples and the ongoing transfer and transformation of their sovereignty.

In the first instance, historico-legal scholars have challenged the very concept of sovereignty, including its formidable capacity to transcend its social origins (Williams 1992; Anghie 1999, 2005; Fitzpatrick 2001). This interdisciplinary work has grounded in time and place the historical development of what we now know in quite positivist terms as international law, tracing its uncertain pathway through notions of divine law, natural law and the law of nations, as theologians and jurists sought to rationalise the violence and discrimination that characterised Europe's imperial endeavours against its self-representation as the harbinger of Christian and civilised values (Pagden 1995; Greenblatt 1991). Such scholarship has demonstrated, in particular, how the 'doctrine of discovery' – which was gradually consolidated from the 16th century and sought to settle through law growing European rivalries to the lands of others – remained consistent in its understanding of who would qualify as sovereign: whichever European coloniser claimed first discovery would be accorded dominion, but no matter which native peoples were colonised they would never be accorded more than the right of occupation (Anghie 1999, 2005; Wolfe 2007).

In demonstrating the responsiveness of sovereignty discourse to European expansion from 1492 (as well as to events internal to Europe post-Westphalia more than a century later), such work highlights the ideological (and, of course, legal) force of sovereignty's apparent neutrality in the present. The approach helps explain sovereignty's fortress status in law, whereby sovereignty is not only regarded as non-justiciable in municipal law but also as the very basis for membership of the international order. The question of the colonial history of sovereignty discourse therefore goes to the heart of considerations about structural injustice – the subordination of Indigenous peoples and cultures through the process of European expansion is embodied in the very concept that underpins both nation states and the international order they constitute (Anghie 1994, 2005; Anaya 2004).

In the second instance, the recent theorisation of the uniqueness of the historical experiences of Indigenous peoples in settler societies and, therefore, of the distinctiveness of the settler-colonial formation, has challenged accepted postcolonial understandings of enduring injustices (Wolfe 1994, 2007; see also Denoon 1983; Stasiulis and Yuval-Davis 1995). Arising within the international movement for decolonisation, and informed largely by the responses of diasporic intellectuals to the problem of why mass injustices persist despite the formal departure of colonial powers and declarations of national 'independence', postcolonial approaches commonly assume a similar point of rupture to the transitional justice paradigm. Settler colonial theorists argue, however, that no such change is evident in the circumstances of Indigenous peoples in settler societies, where declarations of national independence reflect the claims of the settler-colonisers vis-à-vis the 'mother country', rather than those of the colonised, whose subordination the fledgling nations continue to uphold.

Appreciating the significance of this particular experience of colonialism has fostered a more comprehensive engagement with its consequences in the present. In his influential and wide-ranging body of work theorising the practice of settler colonialism, Patrick Wolfe (1994), for example, has explained the overwhelming import of the fact that in the Australasian and North American colonies, settlers came to stay. In contrast to the slave or franchise formations of the West Indies or India, in settler colonies economic interest revolved around securing permanent access to the land of the colonised, rather than in seeking to control their labour to exploit its resources. Settler sovereignty is therefore premised on the ongoing denial of Indigenous claims, an assertion already authorised

discursively in international law, but which, in needing to be made good on the ground, formed the lived reality of the frontier period when Indigenous peoples' lands were appropriated and their numbers decimated by the impact of violence, disease and removal (Wolfe 1994, 2007; Evans 2009).

Wolfe's schema clarifies how settlement should be seen as 'a structure rather than an event', which unfolds in stages according to a persistent 'cultural logic of elimination' in support of settler hegemony (1994:96). This is a never-ending process that is evident not only in the initial periods of invasion and dispossession but also in subsequent periods of incarceration on reserves or missions and, finally, in the relentless attempts to assimilate Indigenous peoples into no longer counting as sovereigns. Consequently, in Australia, as a range of scholars have shown (Wolfe 1994; Simpson 1993; Motha 2005), the *Mabo* decision and resultant native title legislation do not so much mark a point of rupture as signal a continuation of the perpetual process of denying Indigenous sovereignty, an assertion that is apparent in the overwhelming difficulties claimants have had first, in bringing their cases before the courts (Atkinson 2001) and second, in securing legal determinations in their favour (Curthoys et al 2009).

Finally, historico-legal scholarship highlights the constitutive violence of the law during the so-called frontier period through to the achievement of nationhood and beyond. In the case of Australia, once again, the expansion of settlement was commonly accompanied by settler calls to make certain laws apply to Aboriginal people alone. Ranging from exemplary executions, to the banning of testimony, to summary justice provisions, to racialised legislation designed to break up families and communities, through to the overt extremes of martial law in times of apparent crisis, such suspensions of the rule of law not only contradicted British claims to peaceful settlement. In facilitating dispossession in the face of Indigenous peoples' resistance, the resort to exceptional procedures in domestic law also helped secure the material basis for sovereignty: Indigenous peoples' resistance had shown that the discursive claims of international law were far from self-evident on the ground (Evans 2009).

Such theoretical accounts of settler colonialism suggest certain parallels between the *Northern Territory National Emergency Response Act 2007* (the so-called 'Intervention'; see Altman and Hinkson 2007) and these foundational processes in Australia. In many ways, the discourse of emergency that surrounded yet another 'crisis' in Indigenous affairs simply represents a different dimension of ongoing colonial endeavour. As critical criminologists have long observed of Australia, the impact of colonialism continues to be apparent in the over-representation of Indigenous peoples in custody, in Indigenous peoples' historical distrust of the police, in their social disadvantage more generally, and in the lack of official, thoroughgoing commitment to redressing fully the unfinished business of the past (Cunneen 2001; Blagg 2008; Anthony and Cunneen 2008).

In conclusion, we hope that such interdisciplinary, longer-term understandings of the structural effects of colonialism might advance appreciation of what counts as mass harm and bring the question of justice more clearly to the fore of public knowledge and debate. We suggest that placing these understandings of Indigenous peoples' historical experiences alongside transitional justice scholarship and practice has the potential to inform analysis of how structural injustices might be more fully acknowledged and redressed in the present, as well as shed further light on why and how it is that official efforts at reform have long worked to acknowledge the extent of human suffering without necessarily transforming the material and ideological conditions that produce it.

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