Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach

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Abstract

Transitional justice has become the dominant international framework for redressing mass harm. To date, however, transitional justice has not adequately accounted for past colonial harms and their ongoing effects. How to confront and redress structural harm has been beyond the purview of its framework. Taking ongoing historical and structural harms against indigenous peoples in Australia as a reference point, we draw on the insights of settler colonial theory to propose a new justice model for transitional justice. We argue that a commitment to structural justice will enhance the ability of transitional justice to recognize and address structural injustice in settler colonial and other contexts. By elaborating the concept of structural justice with reference to postcolonial and settler colonial theory, this article sets out to support the development of a more robust theory of transitional justice.

Keywords: settler colonialism, postcolonialism, structural injustice, structural justice, Australia

Introduction

The colonial injustices experienced in settler colonial states have generally remained beyond the purview of transitional justice. Reflecting a broader trend of conceptualizing the West as the locus and agent of justice and human rights...
that needs to respond to the conflict and abuses occurring in non-western states.\(^2\) Transitional justice has not – until recently – been used as a framework to consider the injustices that have occurred in western, liberal democratic countries. Liberal democratic societies have been positioned as the desired end points of transitional justice, and transitional justice ‘has tended to ignore the extent to which liberal democracies themselves might be considered in need of “postconflict” reconciliation and restorative justice.’\(^3\) Indigenous individuals and collectivities have of course been active, throughout time, in drawing attention to the injustices arising from colonialism.\(^4\) While their activism has produced groundbreaking commitments in international human rights law through the UN Declaration on the Rights of Indigenous Peoples and the UN Permanent Forum on Indigenous Issues, 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.\(^5\) Instead, western countries continue to appear as the actors that can best support transitional justice processes in postconflict countries such as East Timor, Rwanda and Libya, rather than the subjects of transitional justice that might need to reckon with their own problematic pasts.

In recent times, however, a greater interest has emerged in connecting transitional justice and the historical experiences of indigenous peoples in settler colonial states. Arguably, this is attributable, in part, to the recent use in such states of political-legal processes that could be deemed transitional justice mechanisms, including truth commissions, reparations, apologies and prosecutions.\(^6\) Centred around goals such as acknowledgement and reconciliation, in the case of the former, and accountability, in the case of prosecutions, these initiatives have been positioned by governments – implicitly, rather than explicitly – in line with transitional justice rhetoric, as ways of addressing the injustices of the past in order to provide the conditions for a more just future. They include initiatives such as the Truth and Reconciliation Commission of Canada (inquiring into the system of residential schools for Aboriginal people that existed in Canada until 1996) and the Australian National Inquiry into the Separation of Aboriginal and

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Torres Strait Islander Children from Their Families, the governmental apologies delivered in Canada and Australia regarding certain policies in these nations’ colonial histories,\(^7\) the reparations funds established in select Australian jurisdictions, such as Tasmania, for distinct colonial injustices\(^8\) and broader state reconciliation initiatives such as the Australian Council for Aboriginal Reconciliation, which was a key recommendation of the 1991 Royal Commission into Aboriginal Deaths in Custody.\(^9\)

These initiatives are mirrored by growing academic and practitioner interest in the significance of transitional justice for addressing settler colonial harms.\(^10\) This article draws and builds upon the resulting scholarship to open out onto a broader consideration of what insights might stem from bringing the fields of transitional justice and settler colonial theory into relation and, in particular, how this may strengthen transitional justice in addressing structural injustice.

As a programme of political-legal initiatives in times of transition from state-sanctioned harm with the capacity to design institutional reform processes that hold legitimacy and maintain continuity while initiating change, transitional justice has strengths that can be built upon. While it has conventionally been located in moments of political change to enable and shape political transition through legal measures,\(^11\) the flexibility and potentiality of transitional justice as a broader justice model makes it an attractive approach for addressing the historical injustices of settler colonialism that to date have not been addressed as harms. We focus here on the structural nature of such harm that transitional justice, in its limited temporal response, has not addressed.

In this article, we seek to revise conventional transitional justice approaches by considering the injustices experienced by indigenous peoples in the settler colonial state of Australia as a structural harm. We hope that this reconceptualization

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\(^8\) Maria Rae, ‘Why Tasmania Adopted the International Norm of Reparations in Compensating the Stolen Generations’ (MA thesis, University of Melbourne, 2011).


offers new possibilities for understanding structural injury and responding to the historical injustices that exist in settler colonial states, including through opening up to indigenous worldviews and jurisprudences rather than simply continuing to privilege western frameworks (including ameliorative transitional justice approaches). In so doing, we build on the work of other scholars who have sought to extend transitional justice frameworks beyond their originary contexts of application and to revise the concept of ‘justice’ (as transformative and distributive) in the context of transitional justice. We consider the strengths and limitations of the conceptualization of transitional justice as a temporal response brought about by political transition and the observation of transitional justice as a use of law in enabling political change. By elaborating the concept of structural justice with reference to settler colonial theory, this article sets out to support the development of a more robust theory of transitional justice in relation to post-conflict and postcolonial contexts more generally.

The article begins with a consideration of conceptual constraints within the transitional justice framework that affect its ability to address structural injustices, particularly those resulting from colonialism. We then discuss how settler colonial theory may address some of these limitations. We consider the empirical situation in Australia in order to explicate the complexity of structural injustice, and draw on historical and theoretical analysis to identify the nature, scope and purpose of the injustices visited upon indigenous peoples whose initial dispossession and continuing marginalization have helped constitute and maintain the Australian state. We ultimately trace the conceptual contours of a revised transitional justice model that raises new possibilities for thinking about what a commitment to justice, a new structural justice, may require.


Transitional Justice and Structural Harm

Described by Rosemary Nagy as a ‘global project,’ transitional justice now constitutes a dominant international framework for conceptualizing and pursuing redress for 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 through the study of the role of law in times of political transition, prompted by the use of legal and quasijudicial responses to the end of military rule in societies in South and Central America and the collapse of Communism in Eastern and Central Europe. Ruti Teitel argues 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.’ 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 immediate aftermath of mass harm.

As transitional justice has consolidated into an academic field and mode of practical intervention, it has increasingly been subject to critical attention. Commentators have illustrated the contradictory imperatives that characterize transitional justice approaches and sought to broaden the field’s mandate and scope beyond the provision of once-off justice measures focused largely on individual accountability and the protection of civil and political rights. A prominent critique, which is of particular significance to our consideration of the potential relevance of transitional justice to settler colonial injustices, has focused on the field’s inadequate attention to the deeper socioeconomic and structural causes and consequences of conflict. Transitional justice has continued mostly to operate in accordance with an individualistic legal framework without facilitating a deep engagement with structural injustices and the types of interventions needed to address them. As a temporal response to political transition, the field has engaged little with broader long-term structural inequities and harms.
particularly those that lie outside the conventional transitional justice model of
transition from an authoritarian to a democratic regime. Based on a liberal, in-
dividualistic model of accountability, traditionally pursued through criminal
prosecutions, transitional justice theories and initiatives have not foregrounded – or
often addressed – the structural and societal arrangements that enable or
facilitate human rights violations and other harms – what Ratna Kapur refers to as ‘the
institutional arrangements and structures [that] may be deeply implicated in
the production of the violation or the harm in the first place.’ 21 Transitional
justice has emphasized seemingly ‘exceptional’ violations, rather than the more
routine and hence ‘invisible’ damage stemming from unjust societal arrange-
ments (that do exist in liberal democratic collectivities). 22 While there have
been some transitional justice models that seek to address the broader systemic
causes of injustice, such as the Truth and Reconciliation Commission of South
Africa, the Truth and Reconciliation Commission of Peru and the Commission
for Historical Clarification of Guatemala, these have been isolated examples that
have functioned more to recognize the structural bases of contemporary injustice
than to provide the necessary means to effectively confront and redress them. 23

While structural injustice may originally be caused by a specific enterprise or
experience (such as colonialism), it endures beyond the moment of violation,
shaping and constraining the conditions of life experienced by both the dominant
population and particular groups. Lia Kent has considered this in light of the
transitional justice mechanisms implemented by the UN in East Timor, illustrat-
ing the way in which they were inherently ill-equipped to address the legacies of
structural violence in that country, including, for example, poverty, poor health,
limited education and lack of economic opportunities for survivors. 24 In
Australia, too, structural injustice is most clearly evident in the socioeconomic
gulf between indigenous and non-indigenous communities, and in particular in
the disproportionately high incarceration rate of indigenous men, women and
young people. 25 As Rama Mani explicates, such broader social and structural
‘inequalities are not easily reduced to questions of individual responsibility and
accountability and hence are not adequately addressed through existing transi-

21 Ratna Kapur, ‘Normalizing Violence: Transitional Justice and the Gujarat Riots,’ *Columbia
Journal of Gender and Law* 15(3) (2006): 889. See also, Nagy, supra n 15; Paige Arthur,
22 Orford, supra n 3; Joanna R. Quinn, ‘Introductory Essay: Canada’s Own Brand of Truth and
Reconciliation?’ *International Indigenous Policy Journal* 2(3) (2011): 1–3; Kapur, supra n 21; Nagy,
supra n 15.
23 Jennifer Balint and Julie Evans, ‘Transitional Justice and Settler States’ (paper presented at the
Australian and New Zealand Critical Criminology Conference, Sydney, Australia, 1–2 July 2010).
24 Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East
25 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Sydney: Allen
and Unwin, 2001).
tional justice approaches. Lisa Laplante, arguing that truth commissions should be more focused on pursuing social justice through an emphasis on economic, social and cultural rights, highlights the current preferencing of individualistic civil and political rights. Indeed, Robert Meister regards this downplaying of distributive justice questions as constitutive of the mode of justice offered through transitional justice frameworks. Premised on a demarcation of individual perpetrators (who are responsible for the wrongs of the past) and the broader population of beneficiaries (who were not directly involved in any atrocities but benefitted, and can continue to benefit, from the unjust societal arrangements that enabled them), transitional justice functions to place issues of social and distributive justice outside its scope.

To some extent, this relative marginalization of structural issues can be explained with reference to various conceptual constraints that inform conventional transitional justice paradigms. Paige Arthur demonstrates how some of assumptions that characterize transitional justice can be traced to the fact that the field was developed in relation to a distinct set of historical circumstances. Empirically grounded in the social, political and historical conditions that shaped the Latin American and Eastern European transitions to democracy and the prevailing academic and practitioner approaches to conceptualizing them, transitional justice is based on certain experiences of social and political reform and certain understandings of what might constitute justice. This helps to explain, for example, why transitional justice is structured around the pursuit of legal accountability and institutional reform designed to establish the foundations for a new, legitimate liberal democratic form of governance. Moreover, it explicates why transitional justice is concerned with guaranteeing the broad enjoyment of civil and political rights as the basis of such a democratic society, which, in turn, leads to its comparative inattention to economic and social justice reforms.

The ability of transitional justice successfully to account for structural injustice and result in structural change is also arguably stymied by its reliance on a certain temporal framework. Transitional justice is premised on the idea of a ‘point of rupture,’ a specific point of change from violence and oppression to a ‘new dawn.’ The model assumes a moment of political change and upheaval, an overt change of regime to democracy. This, in turn, leads to a certain understanding of the past, the present and the future as discrete and sequential. As such,

26 Mani, supra n 13.
27 Laplante, supra n 13.
29 Arthur, supra n 16.
30 Ibid.
31 Arthur, supra n 21.
32 Arthur, supra n 16.
33 Nagy, supra n 15; Miller, supra n 13.
34 The key theorist is Teitel, supra n 11, who outlined the role of legal processes in political transition.
transitional justice assumes a linear notion of time as progress,35 in which the past and the future are seen as separable and successive, instead of intertwined and co-implicated. This makes it difficult for transitional justice adequately to acknowledge, and hence redress, the enduring structural arrangements that may have resulted in past as well as present injustice and the ongoing effects of past inequities on present and future generations.

Moreover, when viewed within the broader context of modern European expansion, which had such dramatic consequences for precolonial societies, transitional justice seems relatively presentist in its concerns. With mandates for truth commissions and trials that cover quite short time frames, the complex impacts of colonial pasts are effectively elided. Instead, transitional justice predominantly engages with contemporary episodes of injustice and their recent histories. Accordingly, transitional justice processes in East Timor focused on the harms perpetrated by Indonesians following their invasion in 1975 – their mandates did not stretch to those of the colonial Portuguese period. As Kent shows, however, it was during the colonial period that land was taken, which shaped later structural injustice.36 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. Meanwhile, in Rwanda, despite recognition that a Belgian colonial past contributed to the genocide in 1994, this past did not feature in legal processes either nationally or internationally. The field’s failure to appreciate the global and local historical causes of current injustices constitutes an effective blindness to the role of European colonialism in perpetrating, facilitating or perpetuating mass harm. Such Eurocentrism complicates the potential of transitional justice to address more comprehensively the kinds of mass harms suffered by recognized ‘postconflict’ populations as well as by indigenous peoples in settler societies.

The capacity of transitional justice to address structural injustice is hampered by a further conceptual constraint, namely its focus on strengthening, rather than challenging, the state.37 Given its historical foundations and its current association with broader rule of law reform programmes, transitional justice is oriented towards laying the foundations for a legitimized, or relegitimized, democratic nation-state. In its positive conceptions, this involves using transitional justice to establish both a reformed government infrastructure (that gains authority from its willingness to acknowledge the injustice of and depart from previous state practice) and a reconstituted social body (that is committed to learning from past

36 Kent, supra n 24.
inequities and ensuring they do not happen again). In its negative conceptions, however, such state building involves the appropriation of the event and testimonies of the suffering of victims as an opportunity to pursue broader governmental and societal goals. In order to establish a reconstituted national polity, based on the acknowledgement of the past as a basis for ‘moving forward’ into the future, victims are asked to testify to injustice but also to leave it in the past, relinquishing, as Meister suggests, any claim to more substantive redress than they may be provided. In this way, transitional justice processes can be utilized as a form of governance and nation building, rather than of justice for victims.

The failure of existing transitional justice approaches to provide substantive redress for structural injustices, coupled with their inattention to the legacies of past harms and their invocation as a tool of nation building, significantly compromises their utility as a mode of addressing the harms arising from colonialism, including harms experienced in settler states such as Australia. In order to contribute to building a more robust transitional justice framework, the following section considers how settler colonial theory and practice can help explicate the concept of structural justice and thus enable a revision of conventional transitional justice approaches.

**Recognizing Structural Injustice: Settler Colonial Theory**

The enduring effects of global practices of colonialism are now widely acknowledged. Disrupting the assumption that colonization ended with the formal cessation of colonial governance, postcolonial theorists have highlighted the resilience of colonial forms of knowledge and structural arrangements, which continue to define global and national relations and shape the life experiences and aspirations of the groups and individuals they encompass. The notion of the present as a *post*colonial time has been abandoned in favour of an acknowledgement of the intertwined and contiguous nature of the past, present and future in a postcolonial world.

Settler colonial theory both calls upon and revises the generalizations of postcolonial theory to account for the distinctive nature and ongoing impact of colonialism in settler states where there was never even a formal withdrawal of colonial administrators. Here, the continuity between the past and the present is more literal: with a lack of any transition to a decolonized state, settler states

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38 Orford, supra n 3.
39 Meister, supra n 28.
effectively remain colonial formations. Moreover, settler colonial theory identifies the unique structural relations that obtain between colonizer and colonized in settler societies where the colonizer never leaves and where economic interest lies in securing permanent sovereignty in the land.41 Such an analysis points to the structural nature of settler colonial harms whereby the violence of the original dispossession of indigenous peoples – together with their subsequent subordination to colonial interests – helps to constitute settler sovereignty, producing a polity that seeks continually to fortify its legitimacy by marginalizing indigenous claims.

Settler colonial theory complicates the quest to draw clear distinctions between past and present, while also explaining the significance of long-term, structural injustice and the need for structural reform. At a broad conceptual level, settler colonial theory thereby addresses some of the key criticisms leveled at transitional justice by creating new possibilities for recognizing and responding to the contemporary reverberations of historically instituted harms. Moreover, in association with related theoretical approaches, it can contribute in more specific ways to developing a fuller understanding of historically based structural injustices.

In the first instance, settler colonial theory is interested in the operations of sovereignty as a concept whose capacity to transcend its social origins supports its apparent neutrality as a key organizing principle of western political and legal theory and practice. The insights of postcolonial and critical historico-legal scholars have informed this strand of settler colonial scholarship through identifying the correlation between the emergence of sovereignty discourse and modern Europe’s quest for expansion to the so-called New World.42 Throughout this period, theologians and jurists strove to rationalize the violence and discrimination that characterized Europe’s imperial incursions against its self-representation as uniquely endowed with universal, civilized and Christian values.43

Through tracing the genealogy of what we now know as international law, this interdisciplinary work has identified the discrimination that inheres in the notion and practice of sovereignty, which was made particularly manifest in the ‘doctrine of discovery.’ In seeking to adjudicate European rivalries in relation to the lands of others, this legal precept was gradually consolidated starting in the 16th century and remained consistent in its understanding of who would qualify as sovereign. Whichever European colonizer claimed first discovery would be accorded dominion, but no matter which indigenous peoples were colonized they would never be accorded more than the right of occupation. In constructing Europeans as bearers of so-called universal rights and values, sovereignty

43 Anthony Pagden, Lords of All the World: Ideologies of Empire in Spain, Britain and France (New Haven, CT: Yale University Press, 1995).
discourse accordingly withheld its attributes from those it deemed to deviate from these norms. For centuries, indigenous peoples have been caught up in sovereignty’s normative thrall, which has accommodated a number of disqualifying characteristics, ranging from different religious and/or cultural practices to inadequate modes of land use.\footnote{Anghie, supra n 42.}

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), this scholarship highlights the ideological (and, of course, legal) force of sovereignty’s seeming neutrality in the present. The approach helps explain sovereignty’s fortress status both in domestic law and as the basis for membership in 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.\footnote{Ibid.; James Anaya, \textit{Indigenous Peoples in International Law} (Oxford: Oxford University Press, 2004).} Consequently, identifying the interests that have informed sovereignty discourse points to the importance of recognizing the limits to reforms that continue to be conceived and shaped within western worldviews and jurisprudences alone.

In the second instance, critical historico-legal approaches to settler colonial theory highlight the constitutive violence of law, particularly during the so-called frontier period in settler colonies. In the case of Australia, the expansion of settlement was commonly accompanied by settler calls to make certain repressive laws apply to Aboriginal people alone. Ranging from exemplary executions to the refusal of testimony, summary justice provisions and racialized legislation designed to break up families and communities, through to the extremes of martial law in times of apparent crisis, such suspensions of the rule of law 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 territorial basis for sovereignty: indigenous peoples’ resistance had shown that the discursive claims of international law over who should or should not be sovereign were far from self-evident on the ground.\footnote{Julie Evans, ‘Where Lawlessness Is Law: The Settler-Colonial Frontier as a Legal Space of Violence,’ \textit{Australian Feminist Law Journal} 30(1) (2009): 3–22.}

In addition, settler colonial theory underscores the specific structural features of settler colonialism. As noted above, the recent theorization of the uniqueness of the historical experiences of indigenous peoples in settler societies and, therefore, of the distinctiveness of the settler colonial nation-state has challenged accepted postcolonial understandings of enduring injustices.\footnote{Wolfe, supra n 41.} Arising within the international movement for decolonization, and informed largely by the responses of
diasporic intellectuals to the problem of why mass injustices persist despite the formal departure of colonial powers, postcolonial approaches commonly assume a formal politico-legal point of transition. 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 colonizers vis-à-vis the ‘mother country,’ rather than those of the colonized, 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 theorizing the practice of settler colonialism, Patrick Wolfe, 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 colonized, rather than in seeking to control their labour to exploit its resources. Settler sovereignty is predominantly premised on the ongoing denial of indigenous claims, an assertion already authorized 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.48

Wolfe argues that 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.49 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 has shown,50 the Mabo High Court decision (which recognized a limited form of indigenous land rights)51 and resultant native title legislation do not so much mark a point of rupture as signal a continuation of the process of denying or containing indigenous sovereignty, an assertion that is apparent in the overwhelming difficulties claimants have had in bringing their cases before the courts52 and in securing legal determinations in their favour.53 Thus, if decolonization, in Michael Humphrey’s words, can be seen

48 Ibid.; Evans, supra n 46.
49 Wolfe, supra n 41 at 96.
51 Mabo and Others v. Queensland (No. 2) (1992) 175 CLR 1.
‘from the transitional justice perspective’ as ‘an instance of transition where there was no accountability, in other words, where impunity prevailed,’ the continuance of settler colonialism can only constitute an ongoing injustice that has not been adequately acknowledged, ceased or addressed.

Moreover, in addition to articulating the salience of distinctive economic imperatives in settler states, settler colonial theory makes a major analytical contribution to understanding structural injustices by identifying the ways in which particular discursive frameworks serve to justify and embed them. In demonstrating the correlation between the material purposes and ideological operations of settler states, this scholarship powerfully elaborates the full scope of the impact of colonialism and settler colonialism on both indigenous and non-indigenous peoples. Through attributing sovereignty to Europeans alone, sovereignty discourse effectively inaugurated settler colonies as nascent settler states that would eventually be legitimated through and within the international order. Meanwhile, within the domestic realm, a range of similarly racialized discourses and practices continues to be available for appropriation, ready to shore up prevailing assumptions that indigenous peoples might not deserve redress for what has been taken from them. In these ways, settler colonial theory clarifies the circumstances in which the ideological or discursive harms arising from colonialism risk becoming so great that they prevent meaningful public – as well as official – acknowledgement of structural injustice and engagement with questions of structural justice.

Taken together, these insights from settler colonial theory shed light on the nature of structural injustice (as both materially and discursively configured) and underscore the need for structural change in settler colonial societies. By highlighting the inequity that informs global and national structures such as sovereignty and drawing attention to the distinct nature of the enduring unjust arrangements that define settler colonial states, the theory positions such structural injustices as integral to the historical and contemporary harms perpetrated against indigenous peoples. In doing so, it opens up the possibility that structural reform must be central, rather than ancillary, to any attempt to address the past.

As one Assembly of First Nations leader, Ovide Mercredi, in Canada explains, ‘Our fundamental problem is the nature of our relationship with Canada. Structural change in laws and policies is essential.’


56 Cited in Bonner and James, supra n 10 at 19.
Structural and Historical Injustice: The Australian Settler State

As former British settler colonies, Australia, New Zealand, Canada and the US share common histories of settlement that have helped shape the life experiences and aspirations of indigenous peoples within each country, including their over-representation in a wide range of welfare indicators and, most dramatically perhaps, in relation to the criminal justice system. It is to the details of the Australian case that we now turn in order to expand on the particularity of the structural and historical injustices in settler states.

While the Australian colonies were initially envisaged as repositories for British convicts, the seemingly widespread availability of land and associated opportunities for economic advancement soon attracted large numbers of free settlers. With the rapid expansion of pastoralism, the colonies eventually displayed the distinctive characteristic of permanent settlements elsewhere in the British Empire: indigenous peoples’ unproductive ‘wastelands’ were converted into private property that could support an agricultural capitalist economy. As dispossession unfolded during the so-called frontier period – and surviving indigenous peoples were removed to reserves or lived as fringe dwellers – settlers literally ‘replaced’ them on their lands, enabling Britain to realize on the ground the sovereignty it already claimed discursively through international law.57

Throughout the 19th century the Australian colonies held out opportunities that generations of settlers accustomed to the strictures of Old World societies could barely imagine. Ideas about equality and individual freedom flourished and by the time of federation in 1901 the newly independent Australia was at the forefront of liberal democratic thought and practice.58 For indigenous peoples, on the other hand, the impacts of British settlement were devastating.

Settlement proceeded in waves across the Australian colonies. While the lands of indigenous peoples of the southeast were swiftly brought within British control, frontier conditions existed in the territories to the north, centre and west of the vast continent well into the 20th century. Despite important local differences, settlement observed common patterns, as indigenous peoples’ sovereignty was transformed and transferred and settler sovereignty secured, first, through the discursive denial of their sovereignty at international law and, second, through their actual territorial dispossession, their subsequent confinement on marginalized lands or reserves and their overwhelming subjection to the politics and practices of assimilation designed to address ‘the Aboriginal problem.’59

57 Deborah Bird Rose, Hidden Histories: Black Stories from Victoria River Downs, Humbert River and Wave Hill Stations (Canberra: Aboriginal Studies Press, 1991); Wolfe, supra n 41; Evans, supra n 46.
59 Wolfe, supra n 41; Veracini, supra n 41.
In common with the coercive legal and administrative regimes that were visited upon indigenous peoples in New Zealand, Canada and the US, and in contrast to the sovereign freedoms held out to settler populations, Aboriginal and Torres Strait Islander peoples throughout Australia were subjected to exceptional modes of governance.\(^{60}\) As the individual colonies asserted their independence and eventually united as a federation, Australian settler governments largely continued to deny recognition of indigenous sovereignty and law.\(^{61}\) Underscored by already well-worn colonial discourses on civilization and progress, a vast array of discriminatory policies and practices sought to reduce the numbers of people counting as Aboriginal, to limit their life experiences and movements and to secure the breakdown of their culture, including through the separation of children from their families.\(^{62}\)

In the present, Aboriginal people remain susceptible to exceptional, forceful and paternalistic ‘intervention’ by the state. As recently as 2007, for example, the federal government passed the Northern Territory National Emergency Response to deal with alleged sexual abuse of children in communities, an action initially supported by the deployment of 600 soldiers and the suspension of the 1975 Racial Discrimination Act.\(^{63}\) Meanwhile, as critical criminologists have long observed, the impact of the colonial past is dramatically reflected in the rising overrepresentation of indigenous peoples in custody. At the time of writing, adult Aboriginal and Torres Strait Islanders were 14 times more likely to be imprisoned than the dominant population in Australia. For indigenous young people, the detention rate is 35 times higher than for their non-indigenous counterparts. Significantly, while imprisonment rates have otherwise stabilized in Australia, rates for Aboriginal and Torres Strait Islanders have increased by more than 50 percent in recent years.\(^{64}\) This is a matter of urgent concern that works to reproduce not only indigenous peoples’ historical distrust of the police but also their social disadvantage more generally through exacerbating family dislocation,


\(^{61}\) While there was, at least until the late 1830s, some limited recognition of indigenous law and jurisdiction where British law was not – or could not be – imposed, the notion and practice of an exclusively settler sovereignty prevailed once the frontier lands were secured. See, Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010); Damen Ward, ‘A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia,’ *History Compass* 1 (2003): 1–24.

\(^{62}\) Wolfe, supra n 41; Human Rights and Equal Opportunity Commission, supra n 7.


poverty and cultural breakdown and working to reinforce harmful racialized preconceptions.\(^{65}\)

While settler colonial theory sets out to explain the historical, discursive and structural features that define Australia as a settler polity, the activism of indigenous peoples\(^{66}\) — and of concerned settlers — has of course also underpinned important reforms, particularly in relation to civil and political rights and various rights to land.\(^{67}\) In Australia, as elsewhere, concern about the continuing ramifications of the lack of consent to the original assertion of sovereignty informs persistent activism and research around matters of indigenous justice in national and international arenas, by both indigenous and non-indigenous peoples seeking to establish more lawful ways forward, including through taking account of non-western frameworks and ontologies.\(^{68}\)

Yet, at an official level, settler states have been reluctant to embrace such efforts at reform, as demonstrated in their prolonged opposition to the UN Declaration on the Rights of Indigenous Peoples and in the entrenched interests of powerful stakeholders who remain committed to preserving the status quo.\(^{69}\) In maintaining commitments to western frameworks, settler polities are not readily open to the view that indigenous ways of conceptualizing and exercising ‘sovereignty’ might also inform collective considerations of how to live together justly. Meanwhile, in the case of Australia, where no treaties were accorded to indigenous peoples,\(^{70}\) public discussions about the past risk also being framed as damaging and divisive rather than beneficial and unifying.\(^{71}\)

In this context, a key strand of academic critique of the existing official responses to indigenous injustice, such as apologies and court cases, is that such approaches have in fact been used in settler states to strengthen rather than challenge their sovereignty and legitimacy,\(^{72}\) by placing them in a position to determine which indigenous claims to injustice will and will not be recognized and by confining, interpreting and responding to such claims through the


\(^{66}\) See, Maynard, supra n 4; Bain Attwood, *Rights for Aborigines* (Sydney: Allen and Unwin, 2003); Belmessous, supra n 4.

\(^{67}\) Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Melbourne: Oxford University Press, 2009).

\(^{68}\) Black, McVeigh and Johnstone, supra n 12.

\(^{69}\) After 20 years of negotiation, the UN General Assembly adopted the declaration in September 2007. Only four negative votes were cast, by Canada, Australia, New Zealand and the US. Australia finally adopted the declaration in April 2009, New Zealand in April 2010, Canada in November 2010 and the US in December 2010.

\(^{70}\) The doctrine of *terra nullius* prevailed. See, Behrendt, Cunneen and Libesman, supra n 67; Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Melbourne: Penguin, 1982). Also see, Quinn, supra n 22.


\(^{72}\) Jung, supra n 6.
framework of the colonial legal system. For example, the Native Title Tribunal process in Australia has been widely criticized for its restrictive operation and its requirement that applicants show continuous connection to land, where in many cases, due the history of dispossession, this is impossible. Meanwhile, other attempts to establish governmental responsibility for settler colonial harms (through, for example, legal actions) have been actively contested by the state rather than being state-initiated or supported.

Overall, the pattern of reform in Australia has tended to be ad hoc and partial rather than systemic and comprehensive as befits more fulsome attempts to redress complex structural injustices. Efforts at reform can be characterized as welfare rather than justice oriented and as shying away from a thorough reimagining of sovereign relations between indigenous peoples and the state. Key initiatives, such as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) and the governmental apology (2008), have only addressed specific instances of human rights violations. There has been no apology, for example, for colonization per se, nor a thorough engagement with the historical and contemporary impact of the full extent of settler colonial governance, repression and exploitation of indigenous communities since colonization. Such limited approaches to engaging with the past are problematic in that they can obscure other colonial harms and modes of redress and the structural, continuing nature of these harms. As Alexander Reilly has observed of the governmental apology, for example, it is one thing to express

73 For an account of these critiques, see, Moses, supra n 5.
76 These include two significant national inquiries (the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1991 and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in 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 of 1993 (and the Native Title Amendment Act of 1998); a now defunct National Council for Aboriginal Reconciliation, which was mandated to operate for 10 years from 1991 and now operates minimally as Reconciliation Australia; and, in 2008, a formal apology to ‘all Aborigines and Stolen Generations’ (see, Rudd, supra n 7). A range of state-based reforms around justice issues followed the RCIADIC, although implementation of the recommendations varies markedly across jurisdictions.
regret about policies of the past but quite another ‘to guarantee that similar laws
could not be passed again.’78

Transitional Justice as Structural Justice

Productive possibilities stem from approaching settler colonial injustice through
a transitional justice framework. For example, conceptualized as a proper subject
of transitional justice, settler colonial injustices may become more appreciable as
harmful. Framing settler colonial harms through transitional justice discourse and
as comparable to (although not the same as) other more recent mass harms that
have gained more academic and public attention may enable non-indigenous
citizens in settler colonial contexts to recognize injustices in their nations that
otherwise may be hard to discern as a result of dominant official narratives. In the
naming of these injustices using transitional justice frameworks, they can also
become justice, not welfare, issues.

Transitional justice offers a programme of legal processes that can enable pol-
tical and social change. As a legal-based response to harm, transitional justice
approaches privilege the role of law in political change, as well as demonstrating
the ability of law, as highlighted by Teitel, to be both responsive and progressive,

78 Alexander Reilly, ‘Sovereign Apologies,’ in Evans et al., supra n 78 at 214.
79 Adam Czarnota, ‘Law as Mnemosyne and as Lethe: Quasi-Judicial Institutions and Collective
Memories,’ in Lethe’s Law: Justice, Law and Ethics in Reconciliation, ed. Emelios Christodoulidis
80 ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and
relations through which both indigenous and non-indigenous communities may more collectively and holistically address the past and its ongoing effects.

The use of a multifaceted framework to conceptualize and address settler colonial injustice could function as a useful counter to the highly politicized, and often ad hoc and piecemeal, top-down governmental responses that have been offered to date. In Canada, a restrictive focus on the experiences of certain residential school claimants was used by the government to shift attention from the question of group-based and socioeconomic rights for indigenous Canadians. In Australia, government reconciliation initiatives can be understood as a case of reconciliation without justice, particularly in the context of a continuing colonial framework. In other contexts, symbolic acknowledgements of past injustice, such as apologies, truth commissions and commissions of inquiry, have generally been used in lieu of rather than in combination with other initiatives to redress the past, such as reparations.

Yet, particularly in the context of redressing indigenous injustice, settler colonial theories are needed to revise critically dominant transitional justice approaches. By unsettling any clear distinction between the past and the present, such theories can be used to challenge the artificiality of the temporal framework that currently shapes transitional justice, stymying its ability to recognize and redress long-term harm. By underscoring the significance of history, as well as its enduring implications, these theories serve to counter the current failure of transitional justice to ‘look backward’ to causes and histories as well as to look forward to broader, more structural solutions. Settler colonial theory also provides conceptual tools to question the current conceptualization and mobilization of transitional justice as a state-building enterprise. This interrogation is particularly important if transitional justice is to be extended to settler societies. As Courtney Jung highlights, transitional justice is a blunt tool if it simply serves to consolidate the sovereignty of the settler state. Settler colonial theories and experiences can help to explicate the nature of structural harms, as practically and ideologically manifest.

Recent scholarship on structural injustice recognizes the need for a more comprehensive mode of accounting for mass harms than approaches that focus predominantly on state-based actions and/or individual culpability. Political philosopher Catherine Lu’s development of Iris Marion Young’s early theoretical work on structural injustice is pertinent to our efforts to highlight the long-term

81 Jung, supra n 6.
84 Jung, supra n 6.
historical injustices arising from colonialism.\textsuperscript{85} Lu notes that injustices such as colonialism are facilitated and legitimated through complex local and global networks whose redress requires expansive rather than narrow analytical frameworks.\textsuperscript{86} Injustice is conceived of as a product of inequitable structures as well as individual action. In this view, a structural justice model would involve a shift from individualistic and state-focused modes of redress towards a more thoroughgoing evaluation of the structural vestiges of ‘past’ harms and an openness to deep and wide-ranging reforms, including indigenous jurisprudences, which would transform social, political, legal and economic arrangements that enabled the harms. A structural justice would pay attention to both the causes and the legacies of the initial harms.

Thus, what emerges from this discussion is a proposal for an enhanced transitional justice model that draws on the field’s strength as a programme of legal processes enabling social and political change, while also focusing on structural and historical harm. This model is characterized by its foregrounding of structural justice, which opens the state and its foundations up to question rather than simply reaffirming them and acknowledges the contiguity between the harms of the past and those of the present. It is attentive to the complex nature of structural injustice, which is politically, socioeconomically, legally and ideologically located and ingrained in practical societal arrangements and institutions as well as dominant public discourses.

This call to broaden the scope of transitional justice sits more comfortably with certain approaches to the field than others. By some accounts, extending transitional justice approaches beyond the context of a moment of political transition to account for more than civil and political violations may compromise the distinctiveness of the transitional justice framework. However, the purpose here is not to suggest that transitional justice become conflated with the general pursuit of socioeconomic redistribution through equitable governance. Rather, our model seeks to build on the field’s key concerns – namely to acknowledge and redress mass harm as a matter of justice and as a means of grounding a shared future – to imagine a justice-based, rather than welfare-based, model for dealing with the past and its legacies that is not unduly blind to certain episodes of injustice and certain dimensions of societal and individual harm.

In current academic work on transitional justice in settler colonial contexts, some hesitations have been expressed about the potential disjunctures between transitional justice approaches and settler colonial realities. One such concern is the clear lack of transition that characterizes such contexts. Nagy, for example, notes that ‘while it is important to acknowledge and address systemic human


rights abuse, it is also rather awkward to affix the label “transitional” to justice long denied in liberal democracies.  

It may be, however, that we need to think about transition differently – as not solely transition to a democratic regime as initially understood in the transitional justice paradigm, but also as transition from unjust relations to just relations and the transformation of the social, political, economic and legal frameworks such as those that underlie settler colonialism. It is the structural injustice of settler colonialism, and colonialism generally, that continues as the core injustice into the present. This includes the ongoing denial of indigenous sovereignty and the potential to place indigenous peoples outside the rule of law in governance.

A transitional justice framework enhanced by the notion of structural justice may also provide the theoretical resources to rethink the relation between justice, injustice and transition and to reconsider what it means to pursue just outcomes as a society. It may indeed prompt consideration of how justice measures could themselves facilitate a process of transition rather than simply respond to it. Jung writes of the ‘transformational capacity’ of transitional justice measures, while Wendy Lambourne has discussed how transitional justice may be understood as a ‘transformative justice’. On this view, transitional justice, – reconceived as a discourse and practice that enables as well as accompanies transition – could be more proactive in orientation. Rather than pursuing redress for past injustice as a singular goal, transitional justice may be directed towards ensuring substantive justice through prompting societal, political and economic change that addresses the structural underpinnings of harm and injustice in societies.

A robust transitional justice model with a broader justice agenda may also be better placed to identify and analyze the range of different harms that might constitute the target of transitional and other justice measures. A focus on a wider spectrum of events of injustice may further a recognition of the different types of harm that may require redress – from the traditional focus of transitional justice on physical harms to acknowledgement of the significance of socioeconomic, ‘cultural’ and ‘intergenerational’ injuries.

Unsettling the presentist and linear temporal focus of transitional justice can also facilitate the elaboration of a justice framework premised on a complex and nuanced approach to ‘past’ harms. Recognition of the ongoing resonance of these harms could pave the way for a theorization of the nature of historical harms. Building on existing acknowledgements of the intergenerational transmission of trauma in affected families and communities, there is scope to inquire further into the attributes of historical injustices that remain unaddressed. Do such injustices simply endure, manifesting as they did when inflicted; do they become compounded over time; or, indeed, does the character of the injustices change with

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87 Nagy, supra n 15 at 281. See also, Jung, supra n 6; Arthur, supra n 16.
88 Jung, supra n 6.
89 Lambourne, supra n 13.
90 Jung, supra n 6; Meister, supra n 28.
the passage of time, altered by either their longevity or societal failure to effectively acknowledge and address them?

Moreover, a more inclusive approach could result in new practical interventions. That is, if transitional justice processes are extended to address expansive histories of past oppression, their scope may need to be temporally broad. Rather than focusing on the establishment of specific mechanisms that operate for a defined period, the emphasis may shift to ongoing and long-term interventions designed comprehensively to address structural injustices. Such approaches may be particularly relevant in settler colonial societies where injustices have been so enduring. Meanwhile, as Jung notes, standalone initiatives such as apologies and truth commissions must be situated within broader programmes designed fully to redress the past. What remains critical, however, is that these are not simply conceived within western frameworks but also informed by indigenous worldviews, and that they seek to transform inequitable institutional frameworks that have been largely unquestioned.

Conclusion

As we have illustrated, the practical realities of settler colonial societies demand more of transitional justice. They foreground the need for the field’s frameworks to more substantively recognize and address structural and enduring injustices, manifested in the continuing denial of sovereignty and the ‘exceptionalism’ accorded to indigenous peoples. In this respect, settler colonial theory usefully draws attention to the structural injustices (and constitutive violence) that underpin the inauguration and ongoing existence of settler colonial formations. Moreover, in highlighting the colonial history of seemingly neutral western concepts, it can shed light on the current failings of transitional justice, particularly its inability to engage with structural harm, which is relevant not only for postcolonial and settler colonial societies but also for other postconflict contexts.

Institutional reform, which in some senses shaped the early agenda of transitional justice approaches in Latin America and Eastern Europe, may again be foregrounded as an integral element of addressing the past. An approach to settler colonial harm based on transitional justice and settler colonial perspectives may have the capacity to prompt new ways of engaging with historical injustice that are comprehensive in orientation, informed by indigenous as well as non-indigenous frameworks and premised on the pursuit of structural change in order to redress long-term and short-term harms.

We are proposing a new justice model for transitional justice that is premised on recognizing the continuities between the past, present and future and that

91 Arthur, supra n 16.
92 Jung, supra n 6.
93 For related discussion, see, Mark Rifkin, ‘Indigenizing Agamben: Rethinking Sovereignty in Light of the “Peculiar” Status of Native Peoples,’ Cultural Critique 7 (2009): 88–124; Black, McVeigh and Johnstone, supra n 12; Birch, supra n 80.
recognizes the structural frameworks that both constitute and continue current
and past injustices. This model draws upon the strengths of transitional justice as
a law-based programme of redress and the insights of settler colonial theory that
highlight the continuities between past and present and the impact of settler
colonialism in societies like Australia as an example of ongoing structural injust-
ice. This enhanced transitional justice model is premised on the importance of
structural justice, and also the role of law in initiating change, and of addressing
structural injustices that are often neglected by conventional justice responses.

In settler colonial states, where questions of historical and structural injustice
risk being downplayed and discredited, the imperative to explore new ways of
conceptualizing and responding to the harms inflicted on indigenous peoples, a
transition from unjust to just relations, remains strong. An enriched transitional
justice may enable greater recognition of colonial harm and hence foster concept-
tual and practical approaches to more substantively address the structural injust-
ces that persist in settler colonial, postcolonial and even postconflict states. Such
an approach may enable the redress of harm as well as establish the grounds for a
just future.