

# Australia: Challenges to the Settler State's Pursuit of Transitional Justice

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ANNA CARTER-ROBERTS, AUG 18 2019

There are serious but surmountable theoretical limitations of Transitional Justice (TJ) when applied to settler states, however the predominant challenges to TJ in the case of Australia arises from the country's insecure national identity. The most prominent divide in Australia as a settler state is between the Anglo-Australian majority and the First Nation Aboriginal minority. Australia's colonial experience was unique and the effects are still felt in their society today. The recent events of the so-called 'Stolen Generations' (SG) and the way in which the government and wider society have responded to the attempted Aboriginal cultural genocide is arguably the biggest defining issue for modern Australia. Firstly, this essay will briefly outline the essential components of the Australian context, characterising historical events into two broad injustices, and defining the core terms. Secondly, a macro discussion of the key literary debates surrounding TJ when applied to settler states will conclude that there are issues that must be addressed if it is to succeed in a postcolonial context like Australia – but that this is possible. Thirdly, a micro analysis of Australia's experience will highlight the two most significant factors that relate to its weak 'Self' identity and inhibit the TJ agenda: Lacking political will and misrepresentation of the Aboriginal 'Other'.

### Context and definition of terms

Having emerged in the late 1980s as a discrete field studying the role of law during political transition, TJ is now the dominant international framework for remedying mass atrocities and historical injustices (Balint & Evans, 2011, p.2). The International Center for Transitional Justice defines TJ as the way in which countries that emerge from periods of repression and conflict seek to address "large-scale or systematic human rights violations so numerous and serious" that the country's usual justice system would be inadequate in responding (ICTJ, n.d). The TJ agenda seeks to achieve accountability for past injustices while simultaneously engendering a wider societal transition that facilitates reconciliation and reconstruction (Balint & Evans, 2011, p.2). TJ incorporates a broad range of mechanisms to build shared national identities in order to overcome the legacies of oppression and domination of one group over another (Maddison & Shepherd, 2013, p.253).

Perry (1996, p.167) defines a postcolonial settler society as one in which "the predominant population arises from immigrants and the indigenous population have become a displaced minority". The settler community invades and develops its own distinct identity and sovereignty over a number of years (Barker & Lowman, n.d). Wolfe identifies that in many Australasian colonies, the settlers came to stay, unlike in Africa or other extractive colonies (1994). Other notable features include historical injustices being unsatisfactorily addressed, a collective identity that is unsettled, and no possibilities for the main communities to 'exit', through partition for example (Verdeja, 2017, p.227).

Australia represents a settler state characterised by prolonged division, failures to redress and state-administered violence (Keynes, 2018, p.113). It is possible to classify the injustices experienced by Aboriginal Australians into two broad categories each raising a unique set of challenges. Firstly, injustices resulting from colonisation date back to 1788 following the arrival of Captain Cook; this includes the initial invasion, forced dispossession, violent conflict and the denial of Aboriginal sovereignty to name but a few. Settlement was based on the assumption of *terra nullius* – that the land belonged to no one, and with the subsequent occupation based on this fiction, settlement in Australia must be seen as an "exertion of force by and on behalf of the British Crown" (Referendum Council, 2017, p.12).

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Secondly, the systematic assimilation through government-sanctioned forcible removals of Aboriginal children during 1900-1980 constituted the SG (HREOC, 1997, p.126). Some of these injustices persist today and their legacies define the modern Australian state.

Since the 1980s, Australia has been undertaking an official reconciliation agenda which has resulted in insufficient structural reform and continues to neglect Aboriginal Australians' own reconciliation and reform proposals (Keynes, 2018, p.114). Maddison argues that successive government policies such as attempted assimilation, cultural maintenance and intervention have been unsuccessful in bridging the gulf between Aboriginal and non-Aboriginal Australians (2011, p.1). Recent official interventions in Australia include: two significant national inquiries (HREOC 1991 & 1997), the 1992 High Court Mabo case in which *terra nullius* was overturned, and the formal apology to "all Aborigines and Stolen Generations" in 2008 (Balint & Evans, 2011). Despite these notable efforts, scholars consider public discussions about Australia's history to be particularly divisive and damaging (Birch, 2007; Macintyre & Clarke, 2004). As a result the relationships between non-Aboriginal and Aboriginal Australians are "profoundly stuck", and resolving the fundamental tensions is still an issue of pressing national significance (Maddison, 2011, p.xvi).

## Transitional justice literature and key debates

Previously, TJ was not considered relevant to settler states and has largely ignored the extent to which mature liberal democracies might require "post-conflict reconciliation and restorative justice" (Cunneen, 2008, p.159). One central flaw of TJ is its narrow judicial remit or tendency to privilege, conceptually but in practice also, legal accountability within an individual framework at the expense of structural injustices (Lambourne, 2009; Nagy, 2008). This is a concerning limitation in Australia's case because as Wolfe asserts, settlement should be understood as a "structure rather than an event" based on a persistent "cultural logic of elimination" and ongoing assertion of state sovereignty (1994, p.96). However, more recently, TJ scholars have been extending their frameworks and reconceptualising away from the conventional approach in hope of better addressing structures of injustice against Aboriginal Australians, largely because existing models work to strengthen, as opposed to challenge, the legitimacy of the settler state (Bentrovato, 2017; Davies, 2017; Keynes, 2018; Maddison & Shepherd, 2013).

Balint & Evans (2011) argue for the historicisation of TJ in order to incorporate Indigenous peoples within its scope, however, this logic is destabilised by the Australian example where the Aboriginal experience is vocalised extensively, but is simply not being recognised or reflected in policy changes. This is because within Australia, attempts to construct a past that is perceived as both shared and true has so far proved impossible. Fundamentally, knowledge must be accompanied by acknowledgement if TJ is to achieve goals of reconciliation, unity and a mutual respect. It is important to recognise how ambitious achieving 'justice' in 'transition' truly is, especially when faced with the perennial challenge of a divided Australian society arising from a splintered national identity.

Australia's insecurities relating to its national identity arise from its convict past – in which no historical narrative sparks pride – its relatively recent federation from Britain in 1901, and its European ancestry which all restrict the ability to develop a uniquely Australian identity. Moreover, in much of the last century, Australia's national identity debate was conducted from a position of weakness and uncertainty in the world. Geographical isolation from western allies left Australia vulnerable, seeking security with Asia, and trying to balance its relationships with the East and West (SMH, 2004). These uncertainties about Australia's identity pose a distinct set of challenges to the TJ agenda and are not reflected in the literature. For example, truth-seeking – a mechanism of TJ – can become problematic if it conflates searching for an objective truth with an agenda of identity formation and nation-building.

Colonialism constitutes a form of structural violence and the continued consequences are highlighted by scholars who cite the over-representation of Aboriginal people in custody, general social disadvantage, and an absence of official commitments to fully redress the "unfinished business of the past" (Cunneen, 2001; Blagg, 2008; Anthony & Cunneen, 2008). Rarely is the TJ framework applied to violence and historical injustices that are inherent in settler societies, revealing an apparent omission in the literature. Although in the last decade some scholars have sought to address this gap, it still remains an underdeveloped area of scholarship (Keynes, 2018; Maddison & Shepherd, 2013; Lekha Sriram, 2007). In essence, empires were founded on genocidal violence against Aboriginal peoples as

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well as the creation and perpetuation of structures of injustice and inequality – TJ was not initially designed to address this kind of injustice (Moses, 2008).

In addition, it is possible to understand TJ as an exercise of power in itself, as it involves identifying who has been silenced, who must now speak, and who should be punished (Maddison & Shepherd, 2013, p.256). Moreover, Maddison & Shepherd further argue that TJ is an entirely “postcolonial enterprise” in which a stable democracy is considered the end point to a period of transition, thus excluding Aboriginal claims against the persistent dominance of Western liberalism and the consequential marginalisation of Aboriginal law and sovereignty (2013, p.261). Some scholars go further, contending that TJ and its mechanisms are actually designed to obscure and divert focus from those who have benefited from the system by isolating acute violence away from structural violence such as colonisation (Nagy, 2012; Van der Merwe, 2009). Colonial structures that persist – whether in institutions, policies or culture – act to maintain the power imbalance between the colonised and the colonisers. For this reason, TJ may simply be seen as a component of a hegemonic discourse that reinforces the social and political status quo as opposed to challenging it.

It is possible to question whether Australia can even be considered a post-colonial state; despite political allegiance to Britain – the founding metropole – being severed in 1901, Australia did not cease being colonial in nature (Barker & Lowman, n.d). Notwithstanding concepts of post-colonialism, Australia adopted and manifested traits and characteristics of Britain into its own identity, policy and practice. Again this highlights that Australia's national identity was not formulated in isolation but is a reflection of British colonisation.

An additional challenge posed to the TJ agenda in Australia's case is the assumed point of rupture in which a society has recently moved away from violence. Conventionally, the TJ literature focuses on societies that transition from war to peace, authoritarianism to democracy and so on. In reality, mass injustices persisted long after the British colonial authorities left. Additionally, scholars of TJ have typically understood transition as bounded and a process that immediately follows a conflict as opposed to a component of the peace building. To reiterate what Maddison & Shepherd suggest and applying it to the Australian case, transition has been a much lengthier process that is more complex and challenging than frequently portrayed in the literature (2013, p.253). In the instance of Australia's first injustice some have argued that the High Court Mabo ruling in which the notion of *terra nullius* was overruled, represents a point of rupture where Australia definitively left its colonial structures in the past (AIATSIS, 2015). However, there has been no clear point of transition with the legacies of colonisation persisting into modern society and the ruling indicating a continuation of the perpetual processes that deny Aboriginal sovereignty.

So although TJ has essentially ignored the impact of colonialism in the past, its holistic and ameliorative agenda remains useful in examining how just outcomes might be achieved in settler societies (Balint & Evans, 2011, p.1). By broadening the scope of TJ, to not only address colonial structures of violence but also appreciating how this may have impacted on a settler state's national identity, is crucial in recognising the causes behind state-inflicted violence and the pursuit of reconciliation, truth and justice. Ultimately, the TJ literature does not acknowledge how a weak national identity in so-called post-colonial states can detrimentally affect the pursuit of TJ goals. This is especially important in Australia which avoided “decolonising gestures” that were experienced in extractive colonies in much of Africa for example (Cavanagh, 2012, p.24).

### **The Australian experience: Political will and Misrepresentation**

When examining the pursuit of TJ within Australia, two specific challenges arise that inhibit the TJ agenda. Firstly, the lack of political will to address the highly politicised issue of Aboriginal sovereignty within Australia seriously impedes TJ. Efforts to debate past injustices and present guilt have been repeatedly characterised as against the national interest (Maddison, 2011, p.xv). However, it is the role of government to initiate dialogue with the Australian people to debate their national purpose and identity. Reluctance to reflect on historical injustices is a result of fear that the past gives legitimacy to the present and future. As Aboriginal Australians never ceded their sovereignty, if the truth is acknowledged, there is a risk of delegitimising the existing dominant settler government. Again this links back to anxieties resulting from an insecure national identity, in which the government refuses to address a past that could jeopardise efforts to build a cohesive identity based on the ‘white’ Anglo ideal (Curran & Ward, 2013, p.37).

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Moreover, if adopting a liberal perspective, the act of apologising collectively is impossible on the grounds that responsibility for injustices lies solely with the individual(s) that committed the act (Lawn, 2008, p.22). This view dominates in the West because apologies can be seen as a threat to constructions of selfhood. For example, former Prime Minister Howard, in a highly publicised speech about the SG, prioritised personal concern over communitarian values, stating that although he sympathised with the victims he could not apologise as he had not authorised the removal of Aboriginal children himself (Lawn, 2008, p.24). TJ in essence is rooted in accountability as well as redress for victims, however, the Australian government and its institutions have lacked accountability to the Aboriginal population that have been systematically excluded from the processes of government and now make up a mere 2.5% of the population (Commonwealth of Australia, 2012, p.xv).

However, Barkan describes an "Age of Apology" where a proliferation of collective apologies for large-scale historic injustices materialised around the turn of the century (2000). Public sentiment has evolved since the 1990s and the governments of the day have reflected these changes in policy. In 2008, the Rudd government officially apologised for the SG (Rudd, 2008). Nevertheless, official apologies have been called "hypocritical" (Hirst, 2006, p.80) and "exhibitionistic" (Beauchamp, 2007, p.84). Critics of Australia's apology movement oppose the economic calculation inherent in collective apologies, that acts to entrench the interests of the dominant group (Goode & Jacobs, 2002). However, these authors have not investigated the effect of the official apology on the survivors of the SG or on how it has impacted the bargaining power of Aboriginal advocacy political groups. Perhaps these scholars see apologies as self-serving, to relieve guilt or in the name of national unity. Regardless, selfish motivations do not negate the benefit that can be gained by the recipient, in terms of political leverage for example (Lawn, 2008, p.30). Additionally, Calma, the Commissioner of the HREOC national enquiry, highlighted that the way Australians respond in the present to injustices of the past impacts survivors and how they relate to their trauma (2007).

Secondly, the misrepresentation of the Aboriginal 'Other' by the mainstream Anglo-Australian government in official rhetoric poses a significant challenge to the TJ programme in Australia. One sizeable issue relates to the portrayal of Aboriginal Australians as one homogeneous group that strive for the same forms of justice. Aboriginal Australians comprise a diverse set of cultures that have existed in a wide array of environments, communicating across many hundreds of languages (Referendum Council, 2017, p.16). This rich diversity of origins was "ruptured by colonisation" but led to a history united by a struggle to survive (Referendum Council, 2017, p.16). In spite of this, different Aboriginals had their own distinct experiences of colonisation as well as during the SG era, as a result, some Aboriginal communities aspire for recognition of their sovereign status, others demand a political voice, and some simply aspire for civic and public education on Aboriginal history (Referendum Council, 2017, p.16).

Thus, it is wrong to assume that all Aboriginal Australians are striving for the same goals within the TJ landscape and these differences should be acknowledged and addressed by the government administration. This misrepresentation constitutes discursive efforts to construct a clear 'Other' which is essential to collective societal identity formation and establishing counter-representations of the 'Self' (Hall, 2001, p.104). However, efforts to establish a homogenous 'Self' are futile in a nation where 49% of the population are first or second-generation immigrants (ABS, 2017). In any case, the heterogeneous cultural landscapes are ignored within nationalistic discourses in Australia (Ali & Sonn, 2010, p.419).

## Conclusion

This essay has explored two predominant forms of injustice in Australia's history – colonisation and the SG. Secondly, a discussion of the theoretical limitations of TJ demonstrated a struggle to adapt to the settler state context given the absence of a definitive point of transition and the failure to recognise colonialism as a structural injustice. Thirdly, an analysis of Australian societal relations demonstrated that the two most significant factors inhibiting the implementation of the TJ framework are lack of political will and misrepresentation of the Aboriginal 'Other'.

Although there has been increasing application of TJ in settler states, Australia poses a unique set of challenges. For example, its more recent federation than most other settler states, its European ancestry and its convict history have all contributed to an insecure national identity that undermines the TJ agenda. Only when efforts to establish a homogenised national identity cease, Australia accepts its multicultural population and embraces its Aboriginal

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heritage, will society move forward together as a collection of harmonious communities. Indeed a process of decolonisation is still possible which would go some way to improving the prospects of the TJ agenda. However, in order to reap the full benefits from TJ, the Australian government must openly promote debate and dialogue while critically reflecting on the past, offering both symbolic and material recognition, as well as granting the Aboriginal population the ability to determine their own future by inviting them into the political mainstream. Ultimately, if the TJ agenda is to succeed in the Australian case, it will require considerable effort at a governmental and individual level to challenge the homogenous white Anglo-Australian ideal, to critically reflect on the Aboriginal experience, and to embrace the multicultural and shared historical experiences of the entire population.

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