

## LOCATING THE LOGIC OF TRANSITIONAL JUSTICE IN LIBERAL DEMOCRACIES: NATIVE TITLE IN AUSTRALIA

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### I INTRODUCTION

Transitional justice comprises ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.<sup>1</sup> Nothing in this definition limits transitional justice to post-conflict or post-authoritarian states. Yet, practically, the field is wedded to the paradigmatic transition – a liberal democratic state rising from the ashes of a collapsed authoritarian regime. Despite widespread recognition that transitional justice processes need to be contextualised, this image retains a powerful hold over the field’s theory and practice. Orthodox application of transitional justice measures is thus still primarily legalistic, focusing on violations of civil and political rights, and unsure of its place in conflicted or stable democracies where a total politico-legal rupture is absent. In this article I reconceptualise transitional justice away from the paradigmatic form, re-centre it on its philosophical fundamentals, and explore its relevance and utility for established liberal democracies<sup>2</sup> founded on legacies of historic injustice.

My approach involves discerning the teleology of transitional justice. A teleological approach has the benefit of abstracting the field away from the paradigmatic transition and the problematic assumptions that it entails. When distilled to its fundamental aim we see that the purpose of transitional justice is

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1 Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004) 4 [8], 9 [25] (‘Report of the Secretary-General’).

2 Also described as ‘consolidated democracies’: Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (John Hopkins University Press, 1996) 15.

the struggle for a more just social contract. This understanding accurately encompasses both paradigmatic applications of transitional justice, such as in South Africa and Chile, as well as the non-paradigmatic forms, such as in Northern Ireland and Australia. But transitional justice as a transformation from ‘unjust relations to just relations’<sup>3</sup> is not simply a process of constitutional redemption,<sup>4</sup> or a ‘deepening of substantive democracy’<sup>5</sup> – it is still *transitional* justice. The great significance of the field is its Janus-faced nature. While constitutional redemption is purely forward looking, transitional justice recognises that the past is always with us. In mediating the past, the present and the future, transitional justice understands that political commitment to a more just future can only be secured by acknowledgement of past wrongs and the promise of reparative action.<sup>6</sup>

In the last 50 years, established liberal democracies founded on historic injustice, or with a legacy of large-scale abuses, have begun to examine their past. In each case, the implicit or explicit justification for doing so has been reconciliatory – both in seeking fairer contemporary relations and in terms of building a shared normative history of the nation.<sup>7</sup> This is true for Australia. Beginning in the late 1980s and continuing today, albeit in a haphazard and belated fashion, the Australian government has sought to promote a formal process of reconciliation between non-Indigenous and Indigenous Australians.<sup>8</sup> As a starting point this process has involved traditional transitional justice measures such as truth seeking, recognition and acknowledgment of past injustice, and institutional reform. Primary examples include the 1997 *Bringing Them Home Report* on the Stolen Generations,<sup>9</sup> the 2008 Apology,<sup>10</sup> the 1991 Royal Commission into Aboriginal Deaths in Custody,<sup>11</sup> and the 2006 Inquiry into Stolen Wages.<sup>12</sup> However, while these processes and mechanisms are clearly

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3 Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8 *International Journal of Transitional Justice* 194, 214.

4 Luke Beck, ‘Jack Balkin’s Constitutionalism and the Expert Panel on Constitutional Recognition of Indigenous Australians’ (2014) 37 *UNSW Law Journal* 407, 427–31.

5 Fionnuala Ní Aoláin and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies’ (2005) 27 *Human Rights Quarterly* 172, 179.

6 Martti Koskeniemi, ‘Between Impunity and Show Trials’ (2002) 6 *Max Planck Yearbook of United Nations Law* 1, 4.

7 Roy Brooks, ‘The Age of Apology’ in Roy Brooks (ed), *When Sorry Isn’t Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press, 1999) 3, 3.

8 See, eg, *Council for Aboriginal Reconciliation Act 1991* (Cth). Note that under s 32 this Act ceased operation on 1 January 2001. For a critical examination of the formal reconciliation process running from 1991 to 2001, see Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Routledge, 2008).

9 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister of Australia) (known as the Apology to Australia’s Indigenous Peoples).

11 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

12 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006).

orientated towards transitional justice in their basic design and surrounding discourse, I focus on a different area of contestation.

Stable property rights are foundational for any society. In settler colonies, where the foundation of the state is tied to Indigenous dispossession, this is perhaps even more so. It is not surprising then that the High Court of Australia's decision in *Mabo v Queensland [No 2]* ('*Mabo*')<sup>13</sup> created political shock waves across the country. What is surprising is that no scholar has examined *Mabo* or the resultant *Native Title Act 1993* (Cth) ('*NTA*') under a transitional justice lens.<sup>14</sup> The absence of a total politico-legal rupture in Australia is significant, for it means that Indigenous Australians must work within the former (albeit modified) system. *Mabo* and the *NTA* have thus had unintended consequences. On the one hand they have standardised the system of land reform in Australia,<sup>15</sup> creating a narrow but clear legal pathway for Indigenous groups to ensure Australian law respects and protects their property rights over their traditional land. On the other hand, this process of standardisation has robbed the land-reform system of much energy and has dramatically reduced its utility and relevance for many Indigenous Australians. An appreciation of these conflicting dynamics could lead to a more satisfactory approach to property restoration in all states with discriminatory and unequal land distribution. This goal is vitally important in all such states, but acutely so for people whose lives and culture are intimately tied to land.

This article is divided into three parts. In Part II, I explore the intellectual history of transitional justice, locating its origins in a series of regime changes in South America in the 1980s. I then change tack and tease out some of the assumptions underlying the field, arguing that a range of implicit Western biases have conceptually constrained transitional justice to the paradigmatic context, and generally ignored Indigenous peoples. This is critical background for Part III, where I set out and answer the normative question: should the logic of transitional justice be decoupled from its paradigmatic form? An affirmative answer detaches the field from these problematic assumptions, allowing differentiation between transitional justice *as a field*, and transitional justice *processes and mechanisms* designed to achieve particular aims. In this sense, 'transitional justice' can be conceived of as an umbrella, under which sit a range of sui generis processes and mechanisms designed and applied in disparate situations according to context. While I acknowledge that an elastic notion of transitional justice is not an uncritical good, arguments seeking to exclude its application to established liberal democracies are not persuasive. Under a teleological approach, transitional justice can be understood as a process of

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13 (1992) 171 CLR 1.

14 For an analysis that tangentially touches on this issue, see Joe Williams, 'Confessions of a Native Judge: Reflections on the Role of Transitional Justice in the Transformation of Indigeneity' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 19.

15 Note, however, the statutory land rights regimes that exist at the state and territory level and overlap and compete with native title.

transforming past unjust relations into just relations. As such, the field has relevance for liberal democracies founded on, and confronting, legacies of historic injustice. The relevant question is what particular transitional justice *processes* should be applied.

Part IV analyses land reform in Australia as a process of transitional justice. I begin by examining the *Mabo* decision, arguing that despite not amounting to an explosive total politico-legal rupture, the decision shifted the normative foundations of the nation.<sup>16</sup> In doing so, it propagated significant moral capital that was employed by a receptive government to enact the *NTA*, a statutory compromise approaching ‘quasi- or pseudo-constitutional’<sup>17</sup> status that sought to tread the line between destabilising backward-looking corrective justice and forward-looking security of tenure. My focus on the *NTA* is on the process of native title determinations.<sup>18</sup> The vast majority of native title claims have been determined via consent.<sup>19</sup> In large part, these determinations can be seen as a series of individual, negotiated transitions between elements of predecessor and successor regimes. However, in practice, the promise of comprehensive agreements – of treaties by another name<sup>20</sup> – has not been met. The *NTA*’s inadequacies have led to creative use of non-native title settlements – agreements that continue the transition. Although my focus is on land, I conclude by noting how the logic of transitional justice should inform the broader contemporary push towards constitutional recognition of Indigenous Australians and beyond. While less clearly marking a liminal moment, this process marks a continuation towards a more just society that is also embedded in rectifying historic injustice.

## II THE PARADIGMATIC TRANSITION

The collapse of neighbouring South American authoritarian states in the late 1980s threw up a recurring, impossible question loaded with political, legal and moral conundrums: should corrective justice be prioritised, or must the country look forward and ‘bury the past’<sup>21</sup> in a spirit of constitutional redemption?<sup>22</sup> This question, and the various answers developed in each state, catalysed comparative study focusing on a range of mechanisms designed to: (1) end conflict;

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16 See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

17 Bret Walker, ‘The Legal Shortcomings of Native Title’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 14–15.

18 Although taking this focus I do not ignore the fact that the *NTA* ratifies substantial past injustice, preventing a significant majority of Indigenous people from relying on it to claim rights to their traditional lands.

19 See below Part IV(B)(1).

20 Writing in 1993, Garth Nettheim suggests that the negotiated settlements may become ‘treaties under another name’: Garth Nettheim, “‘The Consent of the Natives’: *Mabo* and Indigenous Political Rights’ (1993) 15 *Sydney Law Review* 223, 236.

21 Huw Watkin, ‘Irony Not Lost as Hun Sen “Buries” the Past’, *South China Morning Post* (Hong Kong) 30 December 1998, 9 (regarding Cambodia).

22 Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press, 1992) ch 5.

(2) reconcile the new nation to its past; and (3) sow the seeds for a just and equitable future. The model was quickly adopted and spread across the globe – first to transitions from communist rule in Eastern Europe, then most famously in South Africa. Today the model has travelled widely to weakly institutionalised post-atrocity countries such as Sierra Leone, Rwanda and Cambodia; and even belatedly and somewhat haphazardly to liberal democracies coming to terms with historic injustice.<sup>23</sup> However, the failings of transitional justice to achieve comparable successes in its new environs, and a recognition of its narrow focus on a peculiar set of violations, has led to a recent re-imagining of the field. In particular, a series of problematic assumptions underlying the paradigmatic transition have come to light. This Part begins by outlining the traditional concept of transitional justice, before exploring some of those assumptions. This background will set the scene for Part III’s focus on a critical normative question: should the logic of transitional justice be decoupled from its paradigmatic form?

### A What Is Transitional Justice?

Transitional justice refers to a set of moral, political, and legal questions that challenge societies confronting a legacy of systematic or large-scale human rights abuse. Comprising both judicial and non-judicial mechanisms, it aims to end impunity for rights violations and inculcate or establish the conditions for civic trust, with the ultimate aim being the creation of an inclusive, democratic, political community.<sup>24</sup> In explicitly grounding itself in a ‘holistic, restorative approach to justice’,<sup>25</sup> it sees justice, peace and democracy as ‘mutually reinforcing imperatives’ such that ‘neglect of one inevitably leads to the weakening of others’.<sup>26</sup> Transitional justice measures and processes are thus wide-ranging, including individual criminal prosecutions, truth and reconciliation commissions, vetting and lustration programs, institutional structural reform, access to police and government records, constitution building, and memorialisation and public apologies. These processes and mechanisms are

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- 23 The literature on transitional justice is voluminous. In addition to the sources cited in this article, for specific case studies on particular countries or particular measures, see the International Center for Transitional Justice’s research and publications pages: International Center for Transitional Justice, *Publications* (2016) <<https://www.ictj.org/publications>>; International Center for Transitional Justice, *Research* (2016) <<https://www.ictj.org/research>>. See also Ulster University, *Transitional Justice Institute* (2016) <<http://www.ulster.ac.uk/research-and-innovation/research-institutes/transitional-justice-institute>>; University of Oxford Faculty of Law, *Oxford Transitional Justice Research* <<https://www.law.ox.ac.uk/research-subject-groups/oxford-transitional-justice-research>>; *Transitional Justice Research Collaborative* <<https://transitionaljusticedata.com>>; Historical Justice and Memory Network, *Historical Dialogues, Justice, and Memory Network* (2016) <<http://historicaldialogues.org>>.
- 24 Pablo de Greiff, ‘Theorizing Transitional Justice’ in Melissa S Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice: NOMOS LI* (NYU Press, 2012) 31, 33–4; Rama Mani, ‘Rebuilding an Inclusive Political Community after War’ (2005) 36 *Security Dialogue* 511, 512. See also Pablo de Greiff, ‘A Normative Conception of Transitional Justice’ (2010) 50(3) *Politorbis* 17, 22–5.
- 25 Ronli Sifris, ‘The Four Pillars of Transitional Justice: A Gender-Sensitive Analysis’ in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 272, 272.
- 26 *Report of the Secretary-General*, UN Doc S/2004/616, 1, 9 [24].

drawn from a set of four pillars: truth, justice, reparations, and guarantees of non-repetition.<sup>27</sup>

Much of the difficulty transitioning states face involves balancing these goals. It is not hard to see how they may conflict. For example, criminal prosecution of former elites may endanger the security of the new government, particularly where the former elites retain political or military strength;<sup>28</sup> the promotion of an accurate historical record may require the granting of amnesties or guarantees of non-prosecution for perpetrators;<sup>29</sup> and, reparations payments may conflict with budgetary priorities such as healthcare, education, or policing and security.<sup>30</sup> But these goals can also be mutually reinforcing. Acting on an ‘ethic of responsibility’ may secure the new government’s security, opening up possibilities for prosecution of former leaders (long) after the immediate transition.<sup>31</sup>

A central element in transitional justice theory is the idea of mediating the past, the present and the future. Transitional justice is thus commonly conceived of as Janus-faced; any successful transition ‘must deal with abuses of the past ... [address] the crimes of the present’,<sup>32</sup> and establish conditions for a just social compact going forward. In this way transitional justice is retributive, restorative and redemptive, seeking to punish violations, repair the harms of the past and restore hope for the future. Trials, truth commissions and other like mechanisms are expected to ‘develop narratives about past violence, settle accounts and demonstrate the truth’.<sup>33</sup> Institutional acknowledgement and public denunciation of policies that perpetrated violence is thought to legitimate the new government’s institutions and promote reconciliation. It is no wonder that many scholars consider transitional justice overburdened or crippled by internal contradictions.<sup>34</sup>

The role of the international community is complex. Subtly, the presence of international actors can bring important technical expertise and comparative

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27 Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, UN Doc A/HRC/21/46 (9 August 2012).

28 Paul van Zyl, ‘Justice without Punishment: Guaranteeing Human Rights in Transitional Societies’ in Andrés Sajó (ed), *Out of and into Authoritarian Law* (Kluwer Law International, 2003) 53, 54–5.

29 See, eg, *The Azanian Peoples Organization v President of the Republic of South Africa* [1996] 4 SA 672 (Constitutional Court) [17]–[19], [22].

30 Many countries have imposed caps on reparation payouts to protect other budgetary priorities. See, eg, Romania’s Emergency Government Ordinance 62/2010 limiting moral damages for political imprisonment to €10 000 for direct victims: *Ordonanță de urgență nr 62/2010 din 30 iunie 2010* [Emergency Ordinance No 62/2010 of 30 June 2010] (Romania). See Lavinia Stan, *Transitional Justice in Post-communist Romania: The Politics of Memory* (Cambridge University Press, 2013) 177.

31 José Zalaquett, ‘Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations’ (1992) 43 *Hastings Law Journal* 1425, 1429–30.

32 Neil Kritz, ‘Progress and Humility: The Ongoing Search for Post-conflict Justice’ in M Cherif Bassiouni (ed), *Post-conflict Justice* (Transnational Publishers, 2002) 55, 86.

33 Anna Macdonald, ‘Local Understandings and Experiences of Transitional Justice: A Review of the Evidence’ (Paper No 6, Justice and Security Research Programme, July 2013) 19.

34 Kora Andrieu, ‘Political Liberalism after Mass Violence: John Rawls and a “Theory” of Transitional Justice’ in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge, 2014) 85, 97.

analysis to transitional institutions; building capacity in, and support for, those institutions. Playing a mediating role, their existence can also nudge conflicting parties and stakeholders towards compromise. However, it is the local communities themselves that must own the process – and here the role of international actors drifts into the paradoxical. Scholars and practitioners recognise that transitional justice measures must be adapted to the specific context in which they are applied; yet, at the same time, these measures must ‘reflect transcendent values that cannot be modified’.<sup>35</sup>

Although political regimes have collapsed throughout history,<sup>36</sup> transitional justice as a concept emerged in the wake of the breakdown of authoritarian regimes across South America in the 1980s. Paige Arthur’s intellectual history links its origins to a confluence of two major developments within these regime changes: the shift in human rights activism towards challenging impunity, and a realisation of the role that such activism could play instrumentally in promoting or catalysing democratic reform.<sup>37</sup> The guarded successes of the South American transitions, the rise of globalisation, and the triumph of economic capitalism catapulted transitional justice across the globe: from Eastern Europe, to South Africa, and onwards. Transitional justice became ‘the norm’.<sup>38</sup> However, the normalisation of transitional justice and its application across vastly diffuse societies has not had the desired results. In hindsight, the problem is clear. The South American transitions were de-contextualised and abstracted from their origins, and through a process of acculturation, practitioners and scholars applied supposedly ‘universalist’ legal models to situations that required distinct approaches.<sup>39</sup> The failings of this early global application of transitional justice led critics to examine the assumptions that underlay the paradigmatic model. The following section will tease out some of these problematic assumptions with the aim of questioning whether the logic of transitional justice has utility for non-paradigmatic societies.

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35 Rosalind Shaw and Lars Waldorf, ‘Introduction’ in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 3, 5, critiquing the *Report of the Secretary-General*, UN Doc S/2004/616.

36 Jon Elster examines Athenian ‘transitional justice’ processes in 411 BCE and 403 BCE: Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004) 3–23.

37 Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321.

38 Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69, 71.

39 James Cavallaro and Sebastián Albuja, ‘The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond’ in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, 2008) 121, 126.

## B Assumptions behind the Theory

There is increasing acceptance among scholars that the orthodox model of transitional justice largely evinces Western biases.<sup>40</sup> As Arthur's intellectual history illustrates, the concept evolved out of the dilemmas faced by human rights activists seeking to respond to Latin American states transitioning from authoritarian rule in the late 1980s and early 1990s.<sup>41</sup> The peculiar characteristics of South American *ancien régimes*, ie, relatively strongly institutionalised countries – vertically, horizontally and sectorally – became the focal point for the field.<sup>42</sup> In this way, conventional transitional justice theory prioritises individual criminal accountability and rule of law reform as part of the transition to democratic government, rather than structural injustice or the socio-economic deprivations that lie at the root of many conflicts. Additionally, the sudden collapse of these regimes and their corresponding 'transition to democracy' is problematic, suggesting that transitional justice is merely an issue for poorer countries of the Global South.

The prioritisation of individual criminal accountability and rule of law reform within transitional justice can be explained by its intellectual and historical origins. Shaped and influenced by human rights law, criminal justice, the liberal peace thesis and the South American transitions,<sup>43</sup> transitional justice focused on 'justiciable' violations<sup>44</sup> and targeted those who were individually criminally responsible. These essentially short-term mechanisms were designed to protect individuals from horizontal and vertical violations of bodily integrity, and leave problematic matters of distributive justice to the political process – post-transition – once negative rights had been secured. Thus criminal prosecution emerged as the central element of any transitional justice initiative. Although recent scholarship interrogates the possibility that socio-economic injustice may be treated as an international crime, international criminal law's role in this

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40 See, eg, Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275; Lia Kent, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor* (Routledge, 2013) ch 1; Khanyisela Moyo, 'Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies' (2015) 9 *International Journal of Transitional Justice* 70; Dustin Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2012) 26 *Harvard Human Rights Journal* 149; Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, 2008) 99, 101.

41 Arthur, above n 37, 323–4.

42 Ryan Goodman, Interview with Pablo de Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (NYU School of Law, 23 February 2015). On whether transitional justice can be characterised as a field at all, see Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 *International Journal of Transitional Justice* 5, 6.

43 Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-economic Wrongs' (2012) 21 *Social & Legal Studies* 171, 173.

44 With the implicit assumption that economic and social rights violations are not justiciable.



respect has so far been ‘marginal’.<sup>45</sup> Alternative mechanisms have adopted a similar approach, prioritising individual accountability. For example, Ruben Carranza notes that between 1974 and 2004, 34 truth commissions were established worldwide. Of these, only three ‘expressly engaged with economic crimes, socioeconomic rights violations or a set of crimes that necessarily incorporates past acts of corruption’.<sup>46</sup>

This almost singular focus on individual accountability privileges ‘legalistic approaches’,<sup>47</sup> adopting Kenneth Roth’s tripartite, ‘violation, violator, remedy’<sup>48</sup> methodology of human rights activism. Of course, as many scholars have pointed out, the division of rights is a matter of framing and ideology rather than a natural position.<sup>49</sup> Indeed, Roth himself notes that reconceptualising poverty and severe deprivation, not as a product of insufficient public goods but as a consequence of an officially promoted or tolerated policy of social exclusion, may lead to better protection and enforcement of economic and social rights.<sup>50</sup> In any case, respect for human rights requires that activists confront issues of distributive justice, rather than render them invisible.<sup>51</sup> That economic, social and cultural rights do not involve a precise correlation between violator and victim, or may be practically impossible to accomplish, does not deny the ‘ethical status of these claims’.<sup>52</sup>

The marginalisation of economic, social and cultural rights within transitional justice largely reflects the dominant, Western conception of a division between negative and positive rights.<sup>53</sup> However, the absence of socio-economic justice from transitional justice is more than ‘simply a repetition of the problems of human rights’,<sup>54</sup> and its neglect potentially creates fundamental challenges for the field. Most obviously, failure to incorporate wider notions of social justice ignores the fact that ‘historically constructed socioeconomic inequalities’ are

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45 Larissa van den Herik, ‘Economic, Social, and Cultural Rights: International Criminal Law’s Blind Spot?’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014) 343, 366; Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015).

46 Ruben Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes’ (2008) 2 *International Journal of Transitional Justice* 310, 315. These three truth commissions were in Chad, Liberia and Sierra Leone.

47 Nagy, ‘Transitional Justice as Global Project’, above n 40, 284.

48 Kenneth Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization’ (2004) 26 *Human Rights Quarterly* 63, 68.

49 See, eg, Henry Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy* (Princeton University Press, 1996); Stephen Holmes and Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W W Norton, 2000).

50 Roth, above n 48, 72–3.

51 Zinaida Miller, ‘Effects of Invisibility: In Search of the “Economic” in Transitional Justice’ (2008) 2 *International Journal of Transitional Justice* 266, 268.

52 Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009) 383.

53 Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) 40 *New York University Journal of International Law and Politics* 1, 4–7. On the division between rights, see Maurice Cranston, ‘Are There Any Human Rights?’ (1983) 112(4) *Daedalus* 1.

54 Miller, ‘Effects of Invisibility’, above n 51, 268.

often the driver of recurrent conflict,<sup>55</sup> and thus threatens the viability of transitional justice as an effective mechanism for securing justice. Equally, a narrow focus on individual accountability can ignore the gendered aspect of conflict. As primary caregivers and heads of households, women are disproportionate victims of socio-economic harm.<sup>56</sup>

Further, the notion of ‘transition’ itself presents challenges. Semantically, transition denotes a shift or change from one condition to another. This implies a point of ‘rupture’,<sup>57</sup> delineating the temporal pre-transition period from that of post-transition, and is suggestive of a ‘dramatic end of one era and the commencement of a new one’.<sup>58</sup> But a transition does not have to be ‘one “big bang” event’, and could instead refer to ‘incremental and progressive change over a long period’.<sup>59</sup> Equally, a moment of transition need not be completely destructive of the past, but can rather mark a slight but perceptible shift in the foundation of a nation. The field’s reification of a liminal moment denoting the sudden collapse of an authoritarian regime creates ontological biases. As the transition from Mubarak authoritarianism to el-Sisi authoritarianism in Egypt demonstrates, these moments are only *potential* transitional moments. What is important is a ‘substantive normative change’ in the political authority of the state.<sup>60</sup> As I will address in Part IV, the *Mabo* decision is an example of this slight, but perceptible normative change.<sup>61</sup> Equally, the gradual development of an Indigenous rights consciousness among non-Indigenous Australian society, moving towards constitutional recognition, is an example of an incremental normative shift.

Neither of these less explosive but no less momentous forms of transition are wholly accepted in paradigmatic transitional justice theory. Consequently, transitional justice scholars and practitioners struggle to approach structural injustice, for the very concept of an interregnum ‘can problematically obscure continuities of violence and exclusion’.<sup>62</sup> But of course, ‘there is no such thing as a radical new beginning’.<sup>63</sup> And yet, this simple fact has not prevented elite actors who organise and institute the transition from treating it as such. As Rosemary Nagy has noted, transitional justice processes in Iraq and Afghanistan focused exclusively on rights violations committed by Saddam Hussein and the

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55 Ismael Muvingi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’ (2009) 3 *International Journal of Transitional Justice* 163, 164.

56 Christine Bell and Catherine O’Rourke, ‘Does Feminism Need a Theory of Transitional Justice? An Introductory Essay’ (2007) 1 *International Journal of Transitional Justice* 23, 34.

57 Teitel, ‘Transitional Justice Genealogy’, above n 38, 86–7.

58 Zinaida Miller, ‘(Re)Distributing Transition’ (2013) 7 *International Journal of Transitional Justice* 370, 375.

59 Ní Aoláin and Campbell, above n 5, 213.

60 Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan, 2014) 56.

61 See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

62 Nagy, ‘Transitional Justice as Global Project’, above n 40, 280.

63 Pablo de Greiff, ‘Transitional Justice and Development’ in Bruce Currie-Alder et al (eds), *International Development: Ideas, Experience & Prospects* (Oxford University Press, 2014) 412, 413.

Taliban, artificially framing the transition problem as one of past violations rather than ‘the “now” of occupation, insurgency, and the war on terror’.<sup>64</sup> Australian government responses to the *Bringing Them Home Report* mirrored this approach, with then Prime Minister John Howard refusing to apologise on behalf of this generation, in relation to the acts of earlier generations.<sup>65</sup>

Regardless of whether the transition is characterised as one, or a series of events, another fundamental question arises: what are we transitioning from, and what are we transitioning to? While the answer to this question may be ‘slippery’,<sup>66</sup> the implicit understanding is that of a liberalising narrative,<sup>67</sup> of history as progress,<sup>68</sup> a ‘move from less to more democratic regimes’.<sup>69</sup> This teleological view of history helps to ‘install powerful ideological parameters that limit the field of possibility for new stories of transformation’.<sup>70</sup> Thus, the almost universal focus on states marked by authoritarianism or mass atrocity dismisses the potential relevance of transitional justice theory to liberal democracies, suggesting that these states do not themselves have ‘endemic problems with gross violations of human rights’.<sup>71</sup> If the transition is merely an instrument of democratisation,<sup>72</sup> what bearing does it have for the West? Apart from revealing unhelpful attitudes of paternalism and neo-colonialism,<sup>73</sup> this approach substantively denies the benefit that the logic of transitional justice may

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64 Nagy, ‘Transitional Justice as Global Project’, above n 40, 280.

65 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 1999, 9205–9 (John Howard, Prime Minister of Australia).

66 Bronwyn Anne Leebaw, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30 *Human Rights Quarterly* 95, 101.

67 Ruti Teitel, ‘Transitional Justice as Liberal Narrative’ in Ruti Teitel (ed), *Globalizing Transitional Justice: Contemporary Essays* (Oxford University Press, 2014) 95, 105.

68 Pierre Hazan, ‘Transitional Justice After September 11: A New Rapport with Evil’ in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 49, 55.

69 Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000) 5. See also Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace, 1995).

70 Michael Rothberg, ‘Progress, Progression, Procession: William Kentridge and the Narratology of Transitional Justice’ (2012) 20 *Narrative* 1, 7.

71 Thomas Obel Hansen, ‘Transitional Justice: Toward a Differentiated Theory’ (2011) 13 *Oregon Review of International Law* 1, 40.

72 See, eg, Will Kymlicka, ‘Transitional Justice, Federalism, and the Accommodation of Minority Nationalism’ in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 303, 328.

73 Indeed scholars have linked transitional justice’s emergence with ‘the end of the Cold War and the euphoria of the presumed triumph of free market ideologies’. Thus, from its very beginning transitional justice was assumed to be, or positively directed to be, a ‘midwife of a democratic, rule-of-law state’: Makau Mutua, ‘What is the Future of Transitional Justice?’ (2015) 9 *International Journal of Transitional Justice* 1, 1. See also Dustin Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’ (2015) 9 *International Journal of Transitional Justice* 150; Dustin Sharp, ‘Beyond the Post-conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique’ (2013) 14 *Chicago Journal of International Law* 165. Sharp argues that transitional justice is a ‘handmaiden to liberal political transitions’: Sharp, ‘Emancipating Transitional Justice’, above n 73, 150, essentially replicating ‘Western liberal economic and governance models’ across the globe’: Sharp, ‘Beyond the Post-conflict Checklist’, above n 73, 182.

have for politically-marginalised victims of historic injustice in established democracies.

Having regard to these assumptions, it is unsurprising that transitional justice has generally ignored Indigenous peoples and their perspectives.<sup>74</sup> Indeed, in its state-legitimizing function, the transitional justice framework can stand in tension with individuals who may not feel part of the central government.<sup>75</sup> Unfortunately, even where Indigenous peoples suffered the brunt of civil and political rights violations, such as in Peru and Guatemala, transitional justice processes designed to deal with those violations were often created without consultation,<sup>76</sup> either ignoring Indigenous views or the character and extent of their suffering. Even post-transition, Indigenous peoples may continue to suffer from normalised structural violence.

However, recently transitional justice mechanisms have begun to engage more directly with Indigenous perspectives,<sup>77</sup> and processes to deal with Indigenous rights claims are increasingly understood as connected with transitional justice.<sup>78</sup> For example, the Truth and Reconciliation Commission of Canada, organised by parties to the Indian Residential Schools Settlement Agreement, examined state-sponsored, institutional harm over a 150-year period.<sup>79</sup> Completed in 2015, the Commission was specifically intended to be part of a holistic and comprehensive response to the physical, psychological and sexual abuse suffered by over 150 000 First Nations children stolen from their families and sent to boarding schools to be assimilated into the dominant non-Indigenous culture. Similarly, the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission examined the United States state of Maine's child welfare policies under the *Indian Child Welfare Act 1978*, 25 USC § 1901–63 (1978). Organised and led by Chiefs of the Wabanaki Confederacy, the

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74 Abdullahi Ahmed An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice' (2013) 7 *International Journal of Transitional Justice* 197, 197.

75 See, eg, Kymlicka, above n 72, 322; Courtney Jung, 'Transitional Justice for Indigenous People in a Non-transitional Society' (Research Brief, International Center for Transitional Justice, October 2009) 2; Sarah Maddison and Laura J Shepherd, 'Peacebuilding and the Postcolonial Politics of Transitional Justice' (2014) 2 *Peacebuilding* 253.

76 I thank Eduardo Gonzalez for making this point at the Center for Human Rights and Global Justice's Twelfth Annual Emerging Scholarship Conference, New York University, 17 April 2015. See Ruth Rubio-Marin, Claudia Paz y Paz Bailey and Julie Guillerot, 'Indigenous Peoples and Reparations Claims: Tentative Steps in Peru and Guatemala' (Research Brief, International Center for Transitional Justice, June 2009).

77 See, eg, International Center for Transitional Justice, 'Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource' (Guide, 2012).

78 See below Part IV. See also the Treaty of Waitangi settlement process, which bears similarities with transitional justice processes: Winter, 'Transitional Justice in Established Democracies', above n 60; David Wishart, 'Belated Justice? The Indian Claims Commission and the Waitangi Tribunal' (2001) 25 *American Indian Culture and Research Journal* 81.

79 Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, Report (2015).

Commission was structured around Indigenous perspectives, emphasising ritual, performance, and oral participation.<sup>80</sup>

This shift to incorporate Indigenous perspectives within transitional justice is entirely rational as there are strong intersections between Indigenous demands and the telos of transitional justice. Where designed carefully, culturally appropriate and Indigenous-led, as was the case in Canada and Maine, transitional justice processes may have the potential to help realise Indigenous rights in both paradigmatic and non-paradigmatic contexts.<sup>81</sup> Nevertheless, owing to the position of Indigenous peoples vis-a-vis the state, success should be measured differently. Rather than assessing whether a particular mechanism performs standard functions such as memorialisation, its success must be measured by its 'capacity to transform the playing field'.<sup>82</sup> Each process must be able to transcend its own strictures, complement the transition as a whole and assist in turning political commitment into political action.<sup>83</sup>

### III DECOUPLING THE LOGIC OF TRANSITIONAL JUSTICE FROM ITS PARADIGMATIC FORM

The unveiling of problematic assumptions undergirding the paradigmatic transition creates both challenges and opportunities for the field. On the one hand, the recognition that transitional justice is loaded with inherent biases and assumptions suggests cogent reasons why its record, outside South America, has been 'mixed'.<sup>84</sup> It is not surprising that a field designed for relatively strongly institutionalised states transitioning from dictatorship to democracy has had limited successes in weakly institutionalised states experiencing recurrent horizontal conflict. This understanding has led many scholars to argue for an

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80 Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, *Beyond the Mandate: Continuing the Conversation*, Report (2015).

81 Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, 6<sup>th</sup> sess, Agenda Item 5, UN Doc A/HRC/EMRIP/2013/2 (29 April 2013) [77]–[99].

82 Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 217, 245–6.

83 Whether this has occurred in Canada is debatable: see Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (University of Toronto Press, 2013). The Maine Truth and Reconciliation Commission appears to have been more successful, albeit with more limited goals: Bennett Collins, Siobhan McEvoy-Levy and Alison Watson, 'The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission: Perceptions and Understandings' in Wilton Littlechild and Elsa Stamatopoulou (eds), *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (Institute for the Study of Human Rights, Columbia University, 2014) 140.

84 Mutua, above n 73, 1.

incorporation of economic, social and cultural rights violations,<sup>85</sup> corruption,<sup>86</sup> and structural injustices,<sup>87</sup> within transitional justice's ambit.

In response, many scholars have taken a more limited view based on pragmatic considerations. For example, Lars Waldorf has questioned whether a broader approach to justice would overburden the field and disappoint awakened expectations.<sup>88</sup> Certainly this is an important strategic question – does it make more sense to focus on the classic paradigmatic transition where international effort can make the most gain? However, in circumstances where conflict is clearly understood to have significant socio-economic dimensions, it does not make sense to ignore them in order to 'reify[y] historical dichotomies of civil and political versus economic and social rights'.<sup>89</sup> The same is true for issues of structural injustice. While I agree that in the abstract the broadening of transitional justice's agenda may be 'a worrying trend',<sup>90</sup> for transitional justice measures cannot simply be treated as though they were universal policy tools, I do not believe that transitional justice should ignore broader questions of justice in appropriate circumstances. In fact, the logic of transitional justice may have something to add for particular liberal democracies coming to terms with historic injustice. Local context is critical and we should not automatically exclude potentially relevant mechanisms.<sup>91</sup>

This Part is divided into two sections. In the first section I deal with challenges to extending transitional justice theory beyond its orthodox form. I argue that feasibility concerns, while remaining relevant, are not as pertinent for established democracies, and that attempts to limit the logic of transitional justice to the paradigmatic form denies its utility to historically victimised peoples in liberal democracies. In the second section I offer an approach to including liberal democracies within transitional justice. My approach seeks to re-centre transitional justice onto its philosophical fundamentals – the struggle for a more just social contract. In many respects my approach is not correctly identified as expanding the field, but narrowing it. A more concentrated understanding of transitional justice conceives of the field not as a toolbox, but as an umbrella.

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85 See, eg. Dustin Sharp (ed), *Justice and Economic Violence in Transition* (Springer, 2013); Miller, 'Effects of Invisibility', above n 51; Carranza, above n 46; Mvingi, above n 55; Sam Szoke-Burke, 'Not Only "Context": Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights' (2015) 50 *Texas International Law Journal* 465.

86 See Isabel Robinson, 'Truth Commissions and Anti-corruption: Towards a Complementary Framework?' (2015) 9 *International Journal of Transitional Justice* 33; Carranza, above n 46.

87 See Rama Mani, 'Editorial: Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253; Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2 *International Journal of Transitional Justice* 378.

88 Waldorf, above n 43, 179.

89 Sharp, 'Emancipating Transitional Justice', above n 73, 160.

90 Ryan Goodman, Interview with Pablo de Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (NYU School of Law, 23 February 2015).

91 Indeed economic and social justice can be encompassed within some orthodox definitions of transitional justice: Evelyne Schmid and Aoife Nolan, "'Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 362, 380–1.

Beneath this umbrella sit particular approaches to mediating between the past, present and future. In many cases traditional transitional justice processes may be relevant, but – *crucially* – not in all.<sup>92</sup> This conception should guide policy makers away from simply applying the same transitional justice measures across the globe, and towards designing and implementing *sui generis* transitional justice processes that are appropriate to context.

### A Transitional Justice and Liberal Democracies

Those who advocate for a constrained notion of transitional justice tend to base their argument on either a pragmatic or conceptual basis. First, that expanding the concept will overburden the field, weakening its practical ability to achieve its goals. And second, that expanding the field will rob it of its explanatory power, leaving it conceptually barren as a theoretical project. Both of these considerations have merit, though they are not complete defences. Feasibility concerns are especially relevant for states transitioning from mass conflict or authoritarianism, but they do not hold as much weight for liberal democracies with a stable politico-legal foundation.<sup>93</sup> Further, containing transitional justice to its paradigmatic case denies its conceptual tools to historically marginalised peoples in liberal democracies. In many liberal democracies, particularly settler states, structural injustices against Indigenous peoples are both a product and continuing cause of unjust relations. As a theoretical project, transitional justice can assist in rectifying these injustices.<sup>94</sup>

The essential concern of all states during a transition is to avoid a relapse into conflict or authoritarianism. The state of flux that marks the transition period must therefore be managed appropriately. This is a real risk for states experiencing a total politico-legal rupture, with evidence suggesting that almost half of all countries receiving international peacebuilding assistance relapse into conflict within five years, and almost three-quarters of peacebuilding operations result in authoritarian regimes.<sup>95</sup> The uncertain future of the Arab Spring suggests this is an enduring problem. With this in mind, some scholars suggest that transitional justice's backward-looking dimension must be limited in scope: only those elements of the past that will not threaten the present and future viability of the state can properly be examined, at least at the time of transition.<sup>96</sup>

This argument has two limbs, a focus limb and a process limb. Limiting the focus of transitional justice measures is said to limit the potential forums for conflict and dispute. This idea was adopted in the negotiated transition that marked South Africa's democratisation. The central institutional transitional measure, the Truth and Reconciliation Commission, had a mandate limited to examining gross human rights violations,<sup>97</sup> excluding everyday harms and

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92 For example, criminal prosecution is unlikely to be relevant in relation to land reform in Australia.

93 Political feasibility is of course another question: Ní Aoláin and Campbell, above n 5, 188.

94 As noted in Part II, transitional justice *has* begun to assist in rectifying these injustices.

95 Michael Barnett et al, 'Peacebuilding: What Is in a Name?' (2007) 13 *Global Governance* 35, 35.

96 See especially Zalaquett, above n 31; Ackerman, above n 22, 69–98.

97 *Promotion of National Unity and Reconciliation Act 1995* (South Africa) s 3(1)(a).

structural injustices perpetuated by apartheid. While the subject of legitimate criticism,<sup>98</sup> it is unlikely that a broader mandate that examined apartheid itself would have been either politically feasible or successful *initially*. Indeed, the focus limb should be thought of as intimately related to the process limb. Focused institutions with carefully calibrated (and achievable) mandates can build political coalitions for future reform. The success of each measure engenders hope and community support for future measures, endowing the entire project with ‘the meaning of justice’.<sup>99</sup> The protracted transition in Chile is a perfect example: the initial prioritisation of truth-telling measures gradually gave way to successful criminal prosecutions, achieved without threatening the stability of the state.<sup>100</sup> As the Argentine Alfonsín government discovered, threatening residual, though entrenched, power structures too early may limit possibilities for a complete transition.<sup>101</sup> These concerns suggest that a limited conception of transitional justice offers the best hope for successful transitions.

But is this really so? Rather than tend to a narrow aperture, this argument suggests that the *process* of transition is more important than its focus. Certainly at the point of rupture a narrow focus should be advocated, lest violence erupt, but what of societies not at risk of conflict? While the general relapse-into-conflict concern remains relevant for established democracies experiencing a minor rupture, I do not think that it is *as* relevant. A minor politico-legal rupture is simply unlikely to cause significant and protracted conflict sufficient to threaten the security or viability of the state. For example, while the *Mabo* decision caused substantial angst among sectors of the Australian community, the public vitriol extended only as far as calls for a constitutional referendum to overturn the decision,<sup>102</sup> ie, calls for reform *within* the system. Simply put, while the transition needed to be appropriately managed to secure foundations for a just future, there was never any danger of an armed uprising. If this is the case, then there is no need to exclude the application of transitional justice theory to established democracies. The concern is in ensuring that the transitional justice measures adopted are appropriate in the particular circumstances.<sup>103</sup> Indeed, managing the process of transition remains critical in liberal democracies, but not necessarily because of a danger of conflict. Rather, an inappropriately managed transition – either too quick, too slow, or only piecemeal and partial – risks losing support among constituencies on both sides, ultimately threatening the viability of the project itself.

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98 See, eg, Mahmood Mamdani, ‘Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)’ (2002) 32(3–4) *Diacritics* 33.

99 De Greiff, ‘Theorizing Transitional Justice’, above n 24, 36.

100 Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El Salvador* (Penn State University Press, 2010) 77–148.

101 Zalaquett, above n 31, 1427–8.

102 Richard Bartlett, ‘Political and Legislative Responses to *Mabo*’ (1993) 23 *University of Western Australia Law Review* 352, 353.

103 Note further that while all states must balance budgetary priorities, the position of established liberal democracies is considerably distinct from that of paradigmatic transitional states. Structural remedies or other costly orders may well be financially (if not politically) feasible.



The second argument that scholars employ to reason against an expanding notion of transitional justice is a conceptual point. As Naomi Roht-Arriaza states, ‘broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless’.<sup>104</sup> There is value in ensuring that political concepts are well defined.<sup>105</sup> This is particularly true for transitional justice, which faces significant practical problems of overburdened expectations and under-delivery. This may be a semantic issue. The linkage of the concept to a period of time – ‘the transition’ – rather than a particular institutional field or mechanism, such as peace building, institutional reform, or truth commissions, suggests a cannibalisation of alternative justice measures. Rather than seeing the concept as a useful, but limited, mechanism, scholars and practitioners are prone to mischaracterise it as exhausting all other potentially complementary mechanisms. In trying to do too much, transitional justice is overburdened and persistently threatens to disappoint awakened expectations. Rather than encompassing everything that is good, transitional justice needs to be better integrated into broader political, social and economic justice.

However, as the following section illustrates, a teleological account of transitional justice suggests that the building of a just society, or the transformation from less just to more just relations,<sup>106</sup> is the very essence of the field. The application of this concept in diverse contexts will require various measures. These measures, be they truth commissions, criminal prosecutions, etc, can be thought of as specific institutional applications underneath a transitional justice umbrella, rather than some amorphous understanding of transitional justice itself. This approach avoids the problematic assumption that undergirds paradigmatic transitional justice theory by distinguishing between the goal and the measures designed to achieve that goal. For example, if the transition to more just relations requires socioeconomic justice, particular *sui generis* mechanisms designed to achieve that goal can be designed and implemented. This approach also avoids overburdening particular transitional justice measures with responsibilities they may not be designed to execute – a valid critique of scholars seeking to constrain the expanding application of transitional justice theory.<sup>107</sup>

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104 Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’ in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006) 1, 2.

105 Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137, 138–40.

106 Balint, Evans and McMillan, above n 3, 195. As I note below, inherent in this definition is a temporal aspect, translating past injustices into contemporary political practices.

107 See, eg, Pablo de Greiff, ‘Articulating the Links between Transitional Justice and Development: Justice and Social Integration’, in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council, 2009) 28, 40.

## B Transitional Justice for Liberal Democracies

Despite broad consensus that transitional justice measures are important for countries confronting the legacy of mass abuse, the field ‘remains tremendously undertheorized’.<sup>108</sup> In part, this accounts for the difficulties some scholars have with applying the concept to liberal democracies confronting ruptures in their politico-legal foundation.<sup>109</sup> This is, however, changing. A teleological approach to transitional justice distils its fundamental aims and purposes, and distinguishes between the concept as a whole (the umbrella) and specific applications of transitional justice measures (criminal prosecution, truth-telling, memorialisation, etc). This methodology illustrates that the essential features of transitional justice are its temporality, aim and process.<sup>110</sup>

In short, implicit in the notion of transitional justice is the transformation of the social compact from less just to more just relations.<sup>111</sup> Formulated in this manner, its relevance for liberal democracies founded on legacies of historic (and continuing) injustice, is clear. While this notion shares many commonalities with concepts of redemptive democratisation, it remains distinctive. As opposed to purely forward-looking constitutionalism, the Janus-faced nature of transitional justice requires real engagement with the past. This requirement provides a ‘heightened, epiphenomenal opportunity’ for a state to re-evaluate and re-establish its politico-legal foundation.<sup>112</sup> The entire process may be immediate, or prolonged, protracted and ongoing, but it is this temporality, aim and process that marks transitional justice.

That transitional justice is intimately linked to democratisation can be deduced fairly readily. A valuable approach is that of Pablo de Greiff, who has sought to develop a general theory of transitional justice by abstracting particular transitional justice measures. In analysing this issue, de Greiff has developed a normative theoretical conception of transitional justice by reference to twin mediate and end goals. According to de Greiff, particular measures are *transitional justice measures* if, in the mediate term, they provide recognition to victims and foster civic trust, and, if their ultimate aim is to contribute to reconciliation and to democratisation.<sup>113</sup> In this ‘substantive conception of justice’, transitional justice measures are designed to affirm individuals as rights-holders, not merely eligible, but almost required, to participate in ‘collective

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108 De Greiff, ‘Theorizing Transitional Justice’, above n 24, 32; Buckley-Zistel et al ‘Transitional Justice Theories: An Introduction’ in Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge, 2014) 1, 1.

109 Thomas Obel Hansen, ‘The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field’ in Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge, 2014) 105, 119.

110 Cf Padraig McAuliffe, ‘Transitional Justice’s Expanding Empire: Reasserting the Value of the Paradigmatic Transition’ (2011) 2 *Journal of Conflictology* 32, 35 (arguing that the temporal application is the only distinctive feature of transitional justice).

111 This distillation of transitional justice seeks to avoid the field’s neoliberal emphasis noted in Part II.

112 McAuliffe, above n 110, 35.

113 De Greiff, ‘Theorizing Transitional Justice’, above n 24, 56.

problem resolution'.<sup>114</sup> This approach emphasises that the actual political support of the local community is integral for the legitimacy of the particular measures used, as well as for the new normative regime.

Democratic legitimacy is a frequent refrain in the transitional justice literature.<sup>115</sup> Even scholars who seek to reconceptualise the field away from liberal democracy-building do so on the basis that they perceive the current approach to democratisation as ignoring the interests of the local community. Dustin Sharp's transitional justice as peacebuilding approach argues stridently that critical peacebuilding concepts such as 'popular peace',<sup>116</sup> and the 'everyday peace',<sup>117</sup> which focus on recognising and respecting the interests of ordinary individuals, offer the potential of generating local legitimacy.<sup>118</sup> Sharp is clear – 'peacebuilding' should not be synonymous with the narrow 'state-centric liberal international peacebuilding paradigm' that has characterised transitional justice to date, but rather reprioritised to focus on 'the needs of communities and individuals'.<sup>119</sup>

Implicit in these accounts, and at the heart of transitional justice more broadly, lies the notion of democratic citizenship. Transitional justice is a 'tool of social integration', and a process of 'strengthening inclusive citizenship'.<sup>120</sup> The quest for a more just, participatory and inclusive society is not a subsidiary goal,<sup>121</sup> but the fundamental driving force of the field.<sup>122</sup> In this sense 'transitional justice' is merely another way of asking Jean-Jacques Rousseau's central question: can there 'be some legitimate and sure rule of administration in the civil order?'<sup>123</sup> I do not doubt that this essential problem may be *more* relevant to states transitioning from authoritarianism or mass conflict, but it is not *only*

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114 Ibid 55, 58.

115 See, eg. Arthur, above n 37, 324; Tricia Olsen, Leigh Payne and Andrew Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 *Human Rights Quarterly* 980, 1000.

116 Sharp, 'Emancipating Transitional Justice', above n 73, 164, citing David Roberts, 'Post-conflict Peacebuilding, Liberal Irrelevance and the Locus of Legitimacy' (2011) 18 *International Peacekeeping* 410, 414–18.

117 Sharp, 'Emancipating Transitional Justice', above n 73, 165, citing David Roberts, *Liberal Peacebuilding and Global Governance: Beyond the Metropolis* (Routledge, 2011).

118 Sharp, 'Emancipating Transitional Justice', above n 73, 164.

119 Ibid. See also Wendy Lambourne's notion of democratising the transitional justice process: Wendy Lambourne, 'Transitional Justice after Mass Violence: Reconciling Retributive and Restorative Justice' in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010) 214, 220.

120 De Greiff, 'Articulating the Links', above n 107, 56, 62.

121 Cf Chris Chapman, 'Transitional Justice and the Rights of Minorities and Indigenous Peoples' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 251, 251.

122 Helen Clark, 'A Role for Development in Transitional Justice: The Arab Spring and Beyond' (Speech delivered at the New York University Emilio Mignone Lecture on Transitional Justice and Development, New York University, 14 November 2011).

123 Jean-Jacques Rousseau, *The Basic Political Writings: On the Social Contract* (Douglas Cress trans, Hackett Publishing, 2<sup>nd</sup> ed, 2011) 156 [trans of: *Du contrat social ou principes du droit politique* (first published 1762)] (Bk I).

relevant to such states. Minority groups in established liberal democracies often experience structural injustice such that they and their interests are frozen out of political power.<sup>124</sup> This is particularly so for settler states and their relationship with their Indigenous peoples. As Albert Memmi has noted, a coloniser's identity 'is essentially that of a usurper' and 'colonizers are constantly concerned with trying to legitimate their usurpation'.<sup>125</sup> The result is an institutional governance structure that favours the coloniser at the total expense of the colonised. This 'cultural logic' remains static beneath its 'changing operational modalities'.<sup>126</sup>

In these circumstances, what accounts for Indigenous peoples' support of the social contract? By what right does the state justify its exercise of political authority? It is a disavowal or repudiation to this question that motivates claims for external self-determination, though absent a total politico-legal rupture, the success of such claims is unlikely. In that absence, appeals to self-interest,<sup>127</sup> utility,<sup>128</sup> or some combination of both,<sup>129</sup> are also unlikely to ground legitimacy. What is required is a process of 'belated state-building'<sup>130</sup> whereby the politico-legal foundations of the nation are made more (democratically) legitimate, such that free and equal citizens may be reasonably expected to endorse the new regime<sup>131</sup> – that is, where conditions for their consent have been realised.<sup>132</sup> As Ruti Teitel notes, transitional justice is the means by which this can occur: a state can 'reconstitute the collective across racial, ethnic, and religious lines', and legitimate itself 'in a contingent political identity'.<sup>133</sup> This involves endowing transitional justice measures 'with the meaning of justice initiatives'.<sup>134</sup> That is, making sure that these measures are mutually reinforcing, enjoy political support, and convince the marginalised *that circumstances are changing*. Individuals

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124 The natural consequence of a confluence of individual actions within an institutional structure can reinforce both opportunities and constraints for individuals to exercise their capacities in a truly free manner. See Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 52.

125 Albert Memmi, *The Colonizer and the Colonized* (Howard Greenfeld trans, Orion Press, 1965) 52 [trans of: *Portrait du colonisé précédé du portrait du colonisateur* (first published 1957)], cited in Robert van Krieken, 'Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation' (2004) 75 *Oceania* 125, 144.

126 Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-*Mabo* Era' (1994) 36 *Social Analysis* 93, 96.

127 Thomas Hobbes, *Leviathan* (Hackett Publishing, first published 1651, 1994 ed) 106 (Pt II Ch XVII [1]).

128 John Locke, *Second Treatise of Government* (Hackett Publishing, first published 1689, 1980 ed) 45–6 (Ch VII [85]).

129 David Hume, *Moral Philosophy* (Hackett Publishing, first published 1738–40, 2006 ed), 92, 96–7 (Bk III Pt II Sec II [13], [23]–[24]).

130 Erica-Irene A Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 *Transnational Law & Contemporary Problems* 1, 9.

131 John Rawls, *Justice as Fairness: A Restatement* (Belknap Press, 2001) 18–23. See also Paul Patton, 'Rawls and the Legitimacy of Australian Government' (2009) 13(2) *Australian Indigenous Law Review* 59.

132 Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004) 21–2.

133 Teitel, 'Transitional Justice as Liberal Narrative', above n 67, 111.

134 De Greiff, 'Theorizing Transitional Justice', above n 24, 36.

must be normatively affirmed as human beings of moral worth, whose interests will be taken into account in decision-making.<sup>135</sup>

This conception of transitional justice more accurately covers its disparate employment across the globe. The early South American transitions, as well as those in Eastern Europe and South Africa, involved a process of democratisation, where the unjust constitutional order of the old regime was repealed. In its place, more substantive democratic orders were developed.<sup>136</sup> The same is true for non-paradigmatic transitional societies. In Northern Ireland, the Good Friday Agreement specifically involved the creation of a new consociational democratic order aimed at ‘enhanc[ing] political and legal inclusiveness’.<sup>137</sup> Set along three ‘strands’, this included: a devolved Assembly with mandatory cross-community voting and a power-sharing executive; as well as North–South confederal dimensions (between Northern Ireland and the Republic of Ireland), and East–West confederal aspects (between Ireland and the United Kingdom).<sup>138</sup>

Two recent approaches have explored how a social contract conceptualisation has relevance for settler states confronting issues of historic injustice meted out to their Indigenous peoples. Stephen Winter explicitly grounds his theory of transitional justice in a liberal political philosophy. Drawing on Teitel’s understanding of transition as ‘a normative shift in the principles underlying and legitimating the exercise of state power’,<sup>139</sup> Winter characterises transitional justice as a process of transformation in legitimating regimes, that is, a transformation in the state’s justification for the exercise of political authority.<sup>140</sup> Jennifer Balint, Julie Evans and Nesam McMillan adopt a similar conception, re-imagining transitional justice as a transition ‘from unjust relations to just relations’.<sup>141</sup> The value in these related approaches is in abstracting the *concept* of transitional justice away from its paradigmatic form and the problematic assumptions that undergird it. Both approaches more naturally include situations such as Northern Ireland’s Good Friday Agreement and New Zealand’s Treaty of Waitangi process, by teasing out the implicit social contract emphasis within transitional justice.

This process of transformation or ‘deepening of substantive democracy’<sup>142</sup> can still appropriately be characterised as ‘transitional justice’, rather than as

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135 See Thomas Christiano, *The Rule of Many: Fundamental Issues in Democratic Theory* (Westview Press, 1996) ch 2.

136 See, eg, *Constitution of the Republic of South Africa 1993* (South Africa) (interim constitution) s 88, which entitled any party holding at least 20 seats in the National Assembly to claim a seat in Cabinet with the aim of forming a Government of National Unity. This compromise remains in the current constitution: *Constitution of the Republic of South Africa 1996* (South Africa) s 91(8).

137 Ní Aoláin and Campbell, above n 5, 175, 197–8.

138 Christine Bell, ‘Dealing with the Past in Northern Ireland’ (2003) 26 *Fordham International Law Journal* 1095, 1106.

139 Teitel, *Transitional Justice*, above n 69, 213.

140 Stephen Winter, ‘Towards a Unified Theory of Transitional Justice’ (2013) 7 *International Journal of Transitional Justice* 224, 227–8.

141 Balint, Evans and McMillan, above n 3, 214.

142 Ní Aoláin and Campbell, above n 5, 179.

part of a broader project of democratisation or constitutional redemption, if the Janus-faced dimension of transitional justice is emphasised. Indeed, any successful transitional justice process requires both backward- and forward-looking elements.<sup>143</sup> Looking backwards, measures must promote recognition and acknowledgment within the public sphere of a past characterised by wrongdoing.<sup>144</sup> Looking forward, this acknowledgment must be supported by public and political commitment to reparative action.<sup>145</sup> For example, the payment of reparations as a mechanism of transitional justice may begin from the point of corrective justice, but it is also expected to pursue more forward-looking goals encompassing the ‘felt justice needs’ of victims.<sup>146</sup> In terms of land reform, transitional justice might caution against mere restitution, recognising that monetary compensation as well as recognition and avenues to participate in decision-making are also necessary to embed substantive normative change. As will be explored in Part IV, the broader approaches to land reform developed outside the *NTA* process appreciate this necessity.

Constitutional redemption, on the other hand, is merely a forward-looking project.<sup>147</sup> While the existence of an interim constitution is directly related to past illegitimate or unjust exercises of governmental authority, its aim is to establish the conditions for a just future. It does not necessarily examine or confront issues of corrective justice, and it certainly does not do so in any holistic or comprehensive manner. The great significance of transitional justice is its direct emphasis on mediating between the past, present and future. It recognises a fundamental idea – that dealing with the past is important, but that doing so is important for forward-looking reasons. Transitional justice understands that it is difficult, if not impossible, for people to believe that they are part of a shared common political project when their rights have been violated in a disdainful or contemptuous manner.<sup>148</sup> Land reform in Australia has not before been explicitly conceived as a mechanism of transitional justice, but there is no reason that it should not be. In acknowledging the wrongs of dispossession and sowing the conditions for a just and equitable future, land reform – when done right – bears Janus’ face.

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143 Eric A Posner and Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’ (2004) 117 *Harvard Law Review* 761, 766.

144 Agitation to include Indigenous victims of the Frontier Wars in the Australian War Memorial recognises this fact: Paul Daley, ‘Why Does the Australian War Memorial Ignore the Frontier War?’ *The Guardian* (online), 12 September 2013 <<http://www.theguardian.com/world/2013/sep/12/australian-war-memorial-ignores-frontier-wae>>; Jim Campbell, ‘Cairns Elder To Lead Ceremony To Acknowledge “Frontier Wars”’, *Cairns Post* (online), 18 April 2016 <<http://www.cairnspost.com.au/news/cairns/cairns-elder-to-lead-ceremony-to-acknowledge-frontier-wars/news-story/dd6dcba47169f7f572b0686628f17b0e>>.

145 Honni van Rijswijk, ‘Stories of the Nation’s Continuing Past: Responsibility for Historical Injuries in Australian Law and Alexis Wright’s *Carpentaria*’ (2012) 35 *UNSW Law Journal* 598, 621.

146 Lisa Laplante, ‘The Plural Justice Aims of Reparations’ in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge, 2014) 66, 69.

147 Ackerman, above n 22, 69–98.

148 Ryan Goodman, Interview with Pablo de Greiff, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (NYU School of Law, 23 February 2015).

## IV TRANSITIONAL JUSTICE AND LAND REFORM

If transitional justice can be understood as a process of deepening substantive democracy or of transforming unjust relations into just relations, its logic has relevance for established liberal democracies founded on legacies of historic injustice. Some scholars have recognised this, and have examined particular institutional mechanisms designed to further reconciliation between Indigenous and non-Indigenous Australians under essentially transitional justice frameworks. The two most relevant processes are the seminal 1997 *Bringing Them Home Report* on the Stolen Generations,<sup>149</sup> and the Rudd Government's 2008 Apology.<sup>150</sup> Of course, commissions of inquiry and official apologies are more readily subsumed within a transitional justice discourse: 'Both are intended to represent a step forward in inter-group relations by marking an end-point to a history of wrongdoing and allowing political and social relations to start anew'.<sup>151</sup> Although the process of land reform is also clearly connected to transitional justice, it is only in the last few years that scholars have begun to analyse settler-colonial relations more broadly through this framework.<sup>152</sup> In this Part, I explore *Mabo* and the development of native title as a process of transitional justice. This study emphasises that despite positive steps, the transition remains incomplete.

### A *Mabo* and Substantive Normative Change

Instrumentally, exercise of control over defined territory is a prerequisite for statehood,<sup>153</sup> but land also plays a symbolic foundational role in the mythology of nation-building. For settler colonies, whose very existence is founded on dispossession, this creates difficulties.<sup>154</sup> It is important to note that these are not necessarily merely minor political difficulties but potentially significant politico-legal ruptures; for example, the extremely unequal land holding facing the new

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149 See Anne Orford, 'Commissioning the Truth' (2006) 15 *Columbia Journal of Gender and Law* 851; Sascha-Dominik Bachmann and Tom Frost, 'Justice in Transition: On Territory, Restitution and History' in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer, 2015) 83, 90–1. In relation to Canada, see Jung, 'Canada and the Legacy of Indian Residential Schools', above n 82; Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7 *International Journal of Transitional Justice* 52; Maddison and Shepherd, above n 75.

150 See Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9 *Human Rights Review* 465; A Dirk Moses, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15 *Citizenship Studies* 145; Janna Thompson, 'Is Political Apology a Sorry Affair?' (2012) 21 *Social & Legal Studies* 215.

151 Corntassel and Holder, above n 150, 465.

152 See, eg, Balint, Evans and McMillan, above n 3; Winter, 'Towards a Unified Theory of Transitional Justice', above n 140; Winter, *Transitional Justice in Established Democracies*, above n 60.

153 *Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1(b).

154 See, eg, the ongoing debate concerning the appropriateness of commemorating the arrival of the First Fleet in Australia as a national holiday: Chelsea Bond, 'The Day I Don't Feel Australian? That Would be Australia Day', *The Conversation* (online), 26 January 2015 <<http://theconversation.com/the-day-i-dont-feel-australian-that-would-be-australia-day-36352>>.

regime in Zimbabwe was not managed appropriately and led to a complete disintegration of its legitimacy.<sup>155</sup> In contradistinction, the careful recalibrating of a settler colony's legal and symbolic foundations can be understood as a minor but not inconsequential rupture. When they emerge, these delicate fissures provide an opportunity for a settler colony to revisit its foundational narratives and embark upon a process towards more just relations with its Indigenous peoples.

Australia has been comparatively slow to engage in this process. In the United States, as early as 1823, the Supreme Court recognised the inherent sovereignty of Native American tribes.<sup>156</sup> While this sovereignty is limited<sup>157</sup> and defeasible by congressional action,<sup>158</sup> it persists until and unless extinguished by Congress. In Canada, the Supreme Court held in 1973 that aboriginal title to land existed prior to colonisation and was not merely derived from statutory law,<sup>159</sup> a recognition that was subsequently constitutionalised.<sup>160</sup> In New Zealand, although once declared a 'simple nullity',<sup>161</sup> the Treaty of Waitangi has begun to take on increasing moral, if not legal importance. Described variously as 'part of the fabric of New Zealand society',<sup>162</sup> and 'of the greatest constitutional importance to New Zealand',<sup>163</sup> the Treaty does not impose fiduciary obligations on the Crown,<sup>164</sup> but remains 'the foundation for the future relationship between the Crown and the Maori race'.<sup>165</sup> In Australia, absent the signing of any treaties, it was assumed that upon the British Crown's acquisition of sovereignty in 1788 no Indigenous law, customs or rights, including interests in land, survived.<sup>166</sup> Though in 1979, the High Court indicated that this question was not completely settled,<sup>167</sup> it was not until *Mabo* that the Court took the question head-on.

The persistent failure of the common law to recognise Aboriginal and Torres Strait Islander land rights was ameliorated to some effect by political action.<sup>168</sup> Beginning in 1966, a number of dramatic individual settlements were reached

155 See Bill Kinsey, 'Zimbabwe's Land Reform Program: Underinvestment in Post-conflict Transformation' (2004) 32 *World Development* 1669; Ronald A Cass, 'Property Rights Systems and the Rule of Law' (Public Law and Legal Theory Working Paper No 03-06, Boston University School of Law, 2003).

156 *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

157 *Cherokee Nation v Georgia*, 30 US (5 Peters) 1 (Marshall CJ) (1831).

158 *United States v Wheeler*, 435 US 313, 323 (Stewart J) (1978).

159 *Calder v A-G (British Columbia)* [1973] SCR 313.

160 *Canada Act 1982* (UK) c 11, sch B, s 35 ('*Constitution Act 1982*').

161 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur NS 72, 78 (Supreme Court of New Zealand).

162 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (Chilwell J).

163 *New Zealand Maori Council v A-G* [1994] 1 NZLR 513 (Lord Woolf).

164 *New Zealand Maori Council v A-G* [2008] 1 NZLR 318, 336 (The Court).

165 *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, 714 (Bisson J).

166 See *A-G v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

167 See *Coe v Commonwealth* (1979) 24 ALR 118, 129-30 (Gibbs J), 135 (Jacobs J), 137-8 (Murphy J).

168 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27 *Melbourne University Law Review* 523, 529-32.



between Indigenous peoples and the Commonwealth, or various states.<sup>169</sup> Although some of these settlements delivered expansive rights, most notably the Pitjantjatjara Agreement which provided direct grants of inalienable freehold land,<sup>170</sup> many were ‘much more limited in scope’.<sup>171</sup> However, absent any legally enforceable right to land, these settlements remained essentially ad hoc, limited in utility for other Indigenous peoples, and predicated on a supportive political environment. Indeed, Western Australia failed to make any agreement during this period. Clearly an inequity existed.

Here then, the High Court faced a rule of law dilemma similar to those faced by states experiencing paradigmatic transitions, but with one important caveat – there was no *total* politico-legal rupture. Yet, despite this absence, the case still prompted the fundamental question facing all transitioning states: ‘to what extent does bringing the ancien régime<sup>172</sup> to trial, imply an inherent conflict between predecessor and successor visions of justice?’<sup>173</sup> Absent a complete rupture, the Court needed to reconcile past discriminatory and violent practices with contemporary mores, all within an unbroken and continuous legal system. The solution adopted by the Court strides the positions sketched out by H L A Hart and Lon L Fuller in their debate on legality and Nazi law.<sup>174</sup>

The difficulty facing the Court concerned the conception of what the rule of law requires in times of transition or transformation. Must, as Hart argued, the antecedent law, which served to dispossess Indigenous Australians of their land, be recognised and accepted as valid?<sup>175</sup> Or, in seeking to straddle the balance between restoring respect for law and respect for justice,<sup>176</sup> should the Court err on the side of contemporary values? Justice Brennan neatly summarised this puzzle:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.<sup>177</sup>

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169 *Aboriginal Lands Trust Act 1966* (SA); *Aboriginal Lands Act 1970* (Vic); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA); *Aboriginal Land Rights Act 1983* (NSW); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld). Note also the existence of land acquisition schemes which involve the buying back of land for Indigenous peoples on the open market: see, eg, *Aboriginal Land Fund Act 1974* (Cth).

170 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 15, 17.

171 Tehan, above n 168, 530.

172 That is, a system of no legal rights to land for Indigenous Australians.

173 Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ (1997) 106 *Yale Law Journal* 2009, 2018.

174 H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593; Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 630.

175 Hart, above n 175, 619–20.

176 Fuller, above n 174, 657.

177 *Mabo* (1992) 175 CLR 1, 29 (Brennan J).

As is well known, the Court found a way to mediate this path, holding that the common law recognised and protected the rights of Indigenous peoples to their traditional lands, in accordance with their laws and customs. By distinguishing between the Crown's acquisition of sovereignty and the Crown's ownership of land in the colony, the Court could hold that the Crown acquired only radical title, not absolute beneficial title. This created the conceptual space for the Court to then hold that pre-existing rights and interests in land could have survived the acquisition of sovereignty. Native title thus exists as a burden on the Crown's radical title.<sup>178</sup> But how did the Court get here?

Teitel has remarked that in periods of political flux, 'international law offers a useful mediating concept', between the antinomies of positivism and natural law.<sup>179</sup> Though grounded in positive law, international law incorporates 'values of justice associated with natural law', preserving the ordinary understanding of the rule of law as stable and settled, but creating space for transformation.<sup>180</sup> Though Teitel had in mind trials in post-communist Hungary, aspects of international and comparative law served an important role in Australia's normative shift.

Indeed, the solution to the Courts' dilemma was the invocation of the international law concept of terra nullius. Critical analyses of *Mabo* have teased out the inherent tension within the leading judgments – the 'rejected' doctrine of terra nullius was never justified as the legal basis to dispossess Aboriginal and Torres Strait Islander peoples,<sup>181</sup> and was irrelevant to the question at issue,<sup>182</sup> as neither the categorisation of Australia as a 'settled' colony,<sup>183</sup> nor Australian sovereignty itself, was directly challenged.<sup>184</sup> But if this was the case, then what was the point of invoking terra nullius? As Gerry Simpson notes, the Court employed the concept as an integral element in a 'symbolic legitimation ritual':<sup>185</sup>

With the domestic legal tradition so clearly at odds with political and historical requirements, what was required was a system of law or a different legal history that could enter the discourse and domesticate or legitimate a decision that might otherwise have been seen as excessively political.<sup>186</sup>

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178 Ibid 48–52 (Brennan J). As Maureen Tehan notes, the decision 'immediately extended the possibility of enforceable rights in land' to areas where no statutory land rights schemes existed, or where they were only of limited application and scope: Tehan, above n 168, 532.

179 Teitel, 'Transitional Jurisprudence', above n 173, 2029.

180 Ibid.

181 Andrew Fitzmaurice, 'The Genealogy of Terra Nullius' (2007) 38 *Australian Historical Studies* 1, 1.

182 See David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5. See also Richard Bartlett, *The Mabo Decision* (Butterworths, 1993) ix.

183 See *Mabo* (1992) 171 CLR 1, 41 (Brennan J), 58 (Deane and Gaudron JJ), 142 (Toohey J), 106–7 (Dawson J).

184 For other failed challenges to the Crown's acquisition of sovereignty, see *Coe v Commonwealth* (1979) 24 ALR 118, 129–30; *Wacando v Commonwealth* (1981) 148 CLR 1, 17–19 (Gibbs CJ); *Coe v Commonwealth* (1993) 118 ALR 193, 200 (Mason CJ); *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 683 (Kirby J).

185 Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195, 207. See also Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *Sydney Law Review* 5, 27–8.

186 Simpson, above n 185, 207.

The refutation of the doctrine served two purposes. It brought Australian law into conformity with contemporary notions of justice, while reinforcing the very legal system and society that had acted to dispossess Indigenous Australians.<sup>187</sup> Far from a ‘judicial revolution’, *Mabo* was a ‘cautious correction’ that included significant reassurances for non-Indigenous Australians, and would likely have limited impact on existing titles and land use.<sup>188</sup> Through the concept of terra nullius, the Court could mediate the relationship between the former and successor legal regimes, without sacrificing stability, or threatening a true political transformation.<sup>189</sup>

Comparative law provided further steady reassurances. Reference to decisions of Canadian, United States and New Zealand courts buttressed the majority opinions.<sup>190</sup> Rather than understand this as merely traditional common law methodology, under a transitional justice lens we see the Court searching for valid referent points it could use to justify, in moral, political, and legal terms, the transformative impact of its decision. These three states are not just common law jurisdictions but settler colonies that had and continue to share similar experiences. Native title may have been a radical concept domestically, but it had already been recognised in comparable countries – even during the moment of transition, when law is at its most unsettled, it is paradoxically law that offers permanence.

But law does not merely reflect community values; it constructs them.<sup>191</sup> As Robert van Krieken notes, ‘when the High Court asserts that it is responding to “the contemporary values of the Australian people”, it is in fact choosing to play an active role in the construction of those values’.<sup>192</sup> In this respect, the ‘unusually emotive’<sup>193</sup> language of the decision plays an important role. The majority is explicit: ‘judged by any civilized standard’, Indigenous dispossession ‘is unjust’,<sup>194</sup> and ‘unacceptable in our society’,<sup>195</sup> constituting ‘the darkest aspect of the history of this nation’,<sup>196</sup> and leaving a ‘national legacy of unutterable shame’.<sup>197</sup> The majority’s emphasis on coming to terms with the past goes well

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187 Ritter, above n 182, 33; Bain Attwood, ‘Unsettling Pasts: Reconciliation and History in Settler Australia’ (2005) 8 *Postcolonial Studies* 243, 250; Elizabeth A Povinelli, ‘The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship’ (1998) 24 *Critical Inquiry* 575, 588–9.

188 Garth Nettheim, ‘Judicial Revolution or Cautious Correction? *Mabo v Queensland*’ (1993) 16 *UNSW Law Journal* 1, 20–2.

189 *Mabo* (1992) 175 CLR 1, 29 (Brennan J).

190 For the cases cited see above n 156–61 and accompanying text.

191 Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago University Press, 1999) 30.

192 Robert van Krieken, ‘From *Milirrpum* to *Mabo*: The High Court, Terra Nullius and Moral Entrepreneurship’ (2000) 23 *UNSW Law Journal* 63, 75, citing *Mabo* (1992) 175 CLR 1, 29, 42 (Brennan J).

193 *Mabo* (1992) 175 CLR 1, 120 (Deane and Gaudron JJ).

194 *Ibid* 29 (Brennan J)

195 *Ibid* 40 (Brennan J), 182 (Toohey J).

196 *Ibid* 109 (Deane and Gaudron JJ).

197 *Ibid* 104 (Deane and Gaudron JJ).

beyond mere formal acknowledgment, delving into a ‘jurisprudence of regret’.<sup>198</sup> The striking language affirmed by Australia’s highest court plays distinct roles for two audiences. For Indigenous Australians it has a semantic dimension, articulating norms and values that endow the decision with ‘the meaning of justice’.<sup>199</sup> But talk is cheap. It is the application of the decision across the entire continent, rather than merely to the Murray Islands, that ensures this strident language is endowed with the meaning of justice. For non-Indigenous Australians the language has a didactic function, contributing to the ‘epistemological and interpretative changes necessary to comprehend transition’.<sup>200</sup> In clear and unambiguous terms, it explains the magnitude of the discrimination. This is key as it helps propagate moral capital – a critical element in securing any transition.

Moral capital is ‘the capacity to persuade’.<sup>201</sup> Moral and political leaders have a limited quotient of moral capital they can expend on particular projects. In this sense, moral capital is analogous to a political mandate. Just as a democratically elected government claims a mandate from the people to implement certain policies, at the moment of transition, the new regime has an enormous reserve of moral capital.<sup>202</sup> Although not a complete rupture, *Mabo* ‘marked the beginning of new national insight’,<sup>203</sup> with the majority’s condemnation of the prior justification for dispossession denoting ‘the now repugnant regime as the start point of the relevant transitional process’.<sup>204</sup> The then Prime Minister Paul Keating immediately recognised this fact, lauding it as ‘a milestone decision’, which ‘gives Australia a tremendous opportunity to get its relationship with the Aboriginal and Torres Strait Islander people right’.<sup>205</sup> Putting to one side for a moment the very real limitations of the *NTA*, the *Mabo* decision was the key catalyst in the successful enactment of native title legislation.<sup>206</sup>

Transitional moments are, by their nature, compromises. But of course, compromises can be both principled and unprincipled. Justice can be recognised and respected as an important value within transitional measures, or it can be traded off for ‘narrow, prudential concerns’.<sup>207</sup> The line may be blurred, but a

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198 Webber, above n 185, 10.

199 De Greiff, ‘Theorizing Transitional Justice’, above n 24, 36, 62.

200 Teitel, ‘Transitional Jurisprudence’, above n 173, 2078.

201 Amitai Etzioni, ‘Less is More: The Moral Virtue of Policy Minimalism’ (2011) 2(1) *Journal of Globalization Studies* 15, 17.

202 Ackerman, above n 22, 72.

203 Christabel Chamarette, ‘Terra Nullius Then and Now: *Mabo*, Native Title, and Reconciliation in 2000’ (2000) 35 *Australian Psychologist* 167, 170.

204 Winter, ‘Towards a Unified Theory of Transitional Justice’, above n 140, 230.

205 John Laws, Interview with Paul Keating, Prime Minister of Australia (Radio Interview, 17 June 1993) <<http://pmtranscripts.dpmc.gov.au/release/transcript-8895>>; cf the rhetoric of the Federal Coalition casting *Mabo* as a ‘problem’: Tim Rowse, ‘How We Got a *Native Title Act*’ (1993) 65(4) *Australian Quarterly* 110, 116.

206 Perhaps somewhat explaining Prime Minister Hawke’s failure in the 1980s: Gary Foley and Tim Anderson, ‘Land Rights and Aboriginal Voices’ (2006) 12 *Australian Journal of Human Rights* 83, 93–4.

207 Jonathan Allen, ‘Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission’ (1999) 49 *University of Toronto Law Journal* 315, 325.

principled compromise entails and has the potential to generate more legitimacy than a mere concession to expedience.<sup>208</sup> *Mabo* was a compromise, but it was a principled and pragmatic one that sought to enable ‘the interests of all parties to be substantially met’.<sup>209</sup> If stability was the Court’s overriding goal, it could have limited its application to Murray Islands; if corrective justice was the Court’s principal aim it could have questioned the normative foundation of Australian sovereignty. Both stability and justice are recognisable values, and both make a claim on people’s allegiance in situations of transition.<sup>210</sup> Balancing these values and mediating the past, present and the future is a distinctive feature of all transitional justice strategies. But *Mabo* was just the beginning; and quickly the *NTA* took on significant importance, for it would frame the future relationship.

## B Land and Negotiated Transitions

As Ronald Cass has remarked in relation to land reform in Zimbabwe, ‘claims for redress of historic grievances are unusual and stretch the bounds of legal systems’.<sup>211</sup> In settler colonies, whose very existence is founded on dispossession, this is all the more true – and yet, in the absence of a complete politico-legal breakdown, total land reform is both impossible and ethically suspect.<sup>212</sup> But transitional justice does have work to do here. Under the transitional justice umbrella sit particular *sui generis* mechanisms designed to transform the relationship between Indigenous and non-Indigenous Australians. This section will explore the impact of the *NTA*, as well as broader non-native title agreements, under an explicitly transitional justice lens. It finds that comprehensive and mutually reinforcing processes offer the best prospect for an equitable future.

### 1 The Native Title Act

In paradigmatic contexts, Bruce Ackerman argues that moral capital must be carefully managed in order to safeguard the transition: too heavy an emphasis on backward-looking corrective justice at the expense of forward-looking constitutionalism may ‘squander moral capital in an ineffective effort to right past wrongs’.<sup>213</sup> The negotiation surrounding the *NTA* treads this tension, with the government seeking to mediate conservative and Indigenous interests into a

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208 Ibid 352.

209 Richard Bartlett, ‘*Mabo*: Another Triumph for the Common Law’ (1993) 15 *Sydney Law Review* 178, 186. Though note, of course, that *Mabo* ratified substantial dispossession and introduced complex and difficult connection requirements. In addition, the court held that extinguishment of native title prior to 1975 does not require compensation: *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).

210 Allen, above n 207, 351.

211 Cass, above n 155, 24.

212 Jeremy Waldron, ‘Superseding Historic Injustice’ (1992) 103 *Ethics* 4, 26–8. Of course, restitution is only one of many potential remedies sought by Indigenous peoples: Douglas Sanderson, ‘Redressing the Right Wrong: The Argument from Corrective Justice’ (2012) 62 *University of Toronto Law Journal* 93, 112, 115; Duncan Ivison, ‘Political Community and Historical Injustice’ (2000) 78 *Australian Journal of Philosophy* 360, 361 n 6.

213 Ackerman, above n 22, 72.

workable foundation for future cooperation.<sup>214</sup> In addition to recognising and protecting native title, the *NTA* sought to: regulate future dealings affecting native title; validate past acts that had been invalidated because of the existence of native title; and, provide for the determination of native title and establish the National Native Title Tribunal ('NNTT') as a means to deal with those claims.<sup>215</sup> Like any negotiated transition, the new regime was not built on the bones of the old, but through compromise.<sup>216</sup>

However, two subsequent events dramatically shifted the dynamics. The 1996 election of the Howard Government brought to power many individuals who had argued that *Mabo* had been wrongly decided,<sup>217</sup> and had voted against the *NTA*. While the High Court's intervention in *Wik Peoples v Queensland*,<sup>218</sup> which declared that native title could co-exist with pastoral leases, significantly extending its reach, caused further disquiet among conservative interests. Though *Mabo* and the *NTA* were not radically transformative, they threatened established power structures within Australia. Those power structures retaliated in 1998 with the '10 Point Plan'<sup>219</sup> and the *Native Title Amendment Act 1998* (Cth). While this incorporated significant amendments to the NNTT, and increased flexibility in native title claims by introducing Indigenous Land Use Agreements ('ILUAs') – a creative mechanism that provided for voluntary, flexible and pragmatic settlements – it was specifically intended to deliver 'bucket loads of

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214 See Rowse, above n 205; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating, Prime Minister of Australia); Tehan, above n 168, 538–51.

215 *NTA* s 3.

216 See Paul Keating, 'Speech by the Prime Minister' (Speech delivered at the NSW Labor Party State Conference, Sydney, 13 June 1993): 'Aboriginal Australians [will be given] justice but ... in a way that [not only] keeps the country cohesive' but actually moves us 'closer to a united Australia': Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2883 (Paul Keating). On whether the *NTA* was a fair compromise, see Giselle Byrnes and David Ritter, 'Antipodean Settler Societies and their Complexities: The Waitangi Process in New Zealand and Native Title and the Stolen Generations in Australia' (2008) 46 *Commonwealth & Comparative Politics* 54, 59.

217 Patrick Emerton and Jeffrey Goldsworthy, 'The Brennan Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 261, 270.

218 (1996) 187 CLR 1.

219 'The Federal Government's 10 Point Response to *Wik*' (1997) 4(2) *Indigenous Law Bulletin* 12.

extinguishment'.<sup>220</sup> Judicial interpretation has since narrowed the operation of the *NTA* even further.<sup>221</sup>

Transitional justice theory suggests that in these early years the transition experienced difficulties. Scholars and practitioners acknowledge that to be effective transitional justice measures must be comprehensive and mutually reinforcing. This requirement serves twin goals: instrumentally it narrows the scope of each particular mechanism increasing the likelihood of each achieving success; symbolically it demonstrates the state's commitment to change, imbuing the entire enterprise with the meaning of justice and bringing with it the potential to renew and grow moral capital. The narrowing of the *NTA* by both Parliament and the High Court dissipated much of the initial goodwill and caused Indigenous Australians to question the state's commitment to the transition.<sup>222</sup> However, the problems run deeper than this. Recognising that dispossession meant that many Indigenous Australians would be 'unable to assert native title rights and interests',<sup>223</sup> the *NTA* was originally intended to be one element of a broader package. While the Special Fund for land acquisition has been enacted,<sup>224</sup> a promised social justice package has yet to eventuate. The continuing failure to enact this third limb places extra stress on the *NTA*,<sup>225</sup> destabilises its potential as an element of a substantive normative change, and degrades the transition of symbolic and practical justice.

Not all transitions are the same. Samuel Huntington's typology of transitions distinguishes between: 'transplacements' (negotiated transitions between government and opposition elites); 'transformations' (where ruling elites lead the transition); 'replacements' (where opposition groups lead the process); and 'interventions' (where democratic institutions are imposed by external forces).<sup>226</sup>

220 John Highfield, Interview with Tim Fisher, Deputy Prime Minister of Australia (Radio Interview, 4 September 1997), cited in Tehan, above n 168, 554.

221 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*'); *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'); Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2<sup>nd</sup> ed, 2009); Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 254–62. However, more recent decisions 'have restored a little optimism about realising some of *Mabo*'s broader potential': Sean Brennan, 'The Significance of the *Akiba* Torres Strait Regional Sea Claim Case' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29, 29–30. See *Akiba v Commonwealth* (2013) 250 CLR 209; *Karpany v Dietman* (2013) 252 CLR 507; *Western Australia v Brown* (2014) 253 CLR 507; *Queensland v Congoo* (2015) 320 ALR 1. See also Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015).

222 In the aftermath of *Yorta Yorta* and *Ward*, Noel Pearson lamented: 'Ten years in the sunshine of the Rule of Law was all that black Australians were fated to enjoy': Noel Pearson, 'Native Title's Days in the Sun Are Over', *The Age* (Melbourne), 28 August 2002, 15.

223 *NTA* Preamble.

224 *Aboriginal and Torres Strait Islander Act 2005* (Cth) pt 4A. On whether it is achieving its compensatory purposes, see Ernst & Young, 'Review of the Indigenous Land Corporation and Indigenous Business Australia' (Review, 17 February 2014).

225 See Australian Law Reform Commission, above n 221, 43 [1.40]–[1.43], 110–111 [3.95]–[3.99].

226 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991) 113–14.

Notwithstanding the changed dynamics, the enactment of the *NTA* most accurately reflects Huntington's transplacement model. First, dominant groups within government and Indigenous organisations recognised that neither had the respective moral or political force to determine the future regime unilaterally.<sup>227</sup> And second, within their own constituencies, reformers inside government and moderate Indigenous voices commanded more political support than extremists.<sup>228</sup>

Like the political negotiations that formed the *NTA*, the *NTA* itself privileges conciliation rather than litigation.<sup>229</sup> While all applications for a 'determination of native title' are initially commenced as proceedings in the Federal Court,<sup>230</sup> the Court practises an intensive case management scheme to identify points of agreement, and to refer particular issues to mediation.<sup>231</sup> The push towards conciliation has generally been successful.<sup>232</sup> As of 1 June 2016, 352 native title determinations have been made. Of these, 276 were by consent, 40 were litigated, and 36 were unopposed.<sup>233</sup> In many respects, the focus on mediation and conciliation is similar to the paradigmatic transition towards more just relations,<sup>234</sup> with the NNTT and the Federal Court operating as sites for a series of individualised negotiated transitions across the country. To some extent all forms of mediation may bear similarities to negotiated transitions – both are intended to provide a more sustainable foundation for future cooperation between the parties.<sup>235</sup> Mediation under the *NTA*, however, is sufficiently distinct from more ordinary forms of mediation,<sup>236</sup> that its similarities with Huntington's transplacements may be fruitfully analysed.

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227 Ibid 152.

228 Ibid 124. See also Courtney Jung and Ian Shapiro, 'South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order' (1995) 23 *Politics & Society* 269, 278.

229 *NTA* Preamble.

230 *NTA* ss 13, 61.

231 Australian Law Reform Commission, above n 221, 358 [12.7]. This policy began in 2012, previously all applications were referred to mediation: see *NTA* s 86B.

232 As to whether conciliation is an appropriate goal, see Walker, above n 17, 20.

233 Of these, 288 have determined that native title exists in at least part of the determination area. There are another 333 native title applications currently lodged with the Federal Court and 30 lodged ILUA: National Native Title Tribunal, *Statistics: Current Applications* (1 June 2016) <<http://www.nntt.gov.au/Pages/Statistics.aspx>>.

234 Nettheim, 'The Consent of the Natives', above n 20, 235–6. The High Court has considered that conciliation can enable Indigenous and non-Indigenous parties to 'establish an amicable relationship between future neighbouring occupiers': *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 617 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).

235 Guillermo O'Donnell and Philippe Schmitter argue that negotiations 'enhance the possibility that the process will lead to a viable political democracy': Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (John Hopkins University Press, 1986) 39. See also Thomas J Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1 *Journal of Empirical Legal Studies* 843.

236 Graeme Neate, 'Negotiating Comprehensive Settlements of Native Title Claims' (Paper presented at the LexisNexis Native Title Law Summit, Brisbane, 15 July 2009) 26.



To begin with, formally, while most mediation involves only two parties who have an existing relationship, native title proceedings can involve hundreds of parties. Determination of native title operates as a judgment in rem; therefore it is important that all parties ‘who hold or wish to assert a claim or interest in respect of the defined area of land’ are represented.<sup>237</sup> Aside from increasing the complexity of any settlement, the multiplicity of parties, interests and approaches mirrors the initially complicated stages of negotiated political transitions.<sup>238</sup> Questions about whose or what interests should be represented, what each participating party’s aspirations are, and finalising areas of common ground are exceedingly difficult. It is disappointing but not surprising that proceedings under the *NTA* can take several years, or more.<sup>239</sup> In August 2014, the Gumbaynggirr People were finally successful in finalising a consent determination that had taken 17 years.<sup>240</sup>

The number of participants or interests that need to be represented in each negotiation belies a further distinction with ‘ordinary’ mediation. While most mediation is built upon solid bedrock of shared understanding or awareness of issues, native title mediation ‘involves an attempt to understand and reconcile culturally different (and divergent) views of land and waters’.<sup>241</sup> Many non-Indigenous Australians have difficulty conceptualising Indigenous Australians’ relationship to country and its role as the basis of cultural, spiritual and personal identity. Dispossession of land can have traumatic consequences for Aboriginal and Torres Strait Islanders, including ‘loss of personal identity’.<sup>242</sup> This radical disconnect between participants is more pronounced than, but shares similarities with, paradigmatic transitions where the normative conception of the state is at issue.

Of course, native title mediation is not completely analogous to Huntington’s transplacements. For example, the framework within which mediation under the *NTA* occurs is distinct from that of political transitions. Ordinarily, dictatorial or authoritarian states are only compelled to the negotiating table by the sustained

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237 *Western Australia v Ward* (2000) 99 FCR 316, 368–9 [190] (Beaumont and von Doussa JJ). This may include a number of Indigenous groups who may have conflicting claims over particular areas, pastoralists, mining interests, and state and federal governments etc.

238 For example, South Africa’s multi-party Convention for a Democratic South Africa (‘CODESA’) negotiations, held in 1991 and 1992, included 19 parties. This formula proved unworkable, and direct negotiations between the National Party government and the African National Congress followed. The bipartisan consensus subsequently reached on major issues placed significant pressure on other groups during the 1993 Multi-party Negotiating Forum to either accept agreement or be frozen out of negotiations: see Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement* (Hart Publishing, 2000) 19–62.

239 The NNTT has reported that the average time to reach a consent determination is six years and three months, compared to seven years for litigation: National Native Title Tribunal, ‘National Report: Native Title’ (Report, February 2012) 2, cited in Australian Law Reform Commission, above n 221, 99–100 [3.52].

240 *Phyball v A-G (NSW)* [2014] FCA 851.

241 Neate, above n 236, 27.

242 Ronald Paul Hill, ‘Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* Decision, and the Meaning of Land’ (1995) 17 *Human Rights Quarterly* 303, 310, 313–17.

moral and political pressure of opposition groups. As noted above, prior to *Mabo*, this was the only option for Indigenous peoples to press their claims.<sup>243</sup> Though some groups were at times successful, comprehensive reform was unavailable. Since *Mabo* and the *NTA*, claims for land reform have been raised within a legal framework. This is significant, for it ensures that a resolution *will* occur. For political transitions on the other hand, there is simply no guarantee that talk will result in a settlement, and at times, the possibility that negotiations may collapse and the parties relapse into actual or threatened conflict is high.<sup>244</sup> The presence of a secure legal framework in the native title context essentially forces all sides to the negotiating table.

For this phenomenon to operate effectively the law must be both clear and certain. As the Australian Law Reform Commission has noted, uncertainty over the requirements of the *NTA* led to a number of test cases and only a relatively small number of determinations (45 determinations) in its first 10 years. Confidence in the *NTA*, as well as developing skill and expertise among practitioners, led to dramatic increase in determinations over the second 10-year period (223 determinations).<sup>245</sup>

However, the existence of a legal framework is not an unconditional good. Mediation presents itself as neutral. Yet, this neutrality is generally only of a formal sense, in that a mediator aims to ensure equality of process, rather than counter substantive inequalities of power.<sup>246</sup> Similarly to the position of opposition groups in transplacements, Indigenous Australians seeking to claim native title find that the process is structured against their interests.<sup>247</sup> To prove native title, Indigenous applicants must show that they possess rights or interests to land or waters under and by virtue of traditional laws and customs they acknowledge and observe.<sup>248</sup> The traditional laws and customs must amount to a normative system, have existed before the assertion of British sovereignty and have continued ‘substantially uninterrupted’ since sovereignty.<sup>249</sup> While lack of physical presence does not necessarily defeat a claim,<sup>250</sup> the history of widespread dispossession across Australia and courts’ privileging of documentary evidence,<sup>251</sup> to say nothing of resource imbalances between state and territory governments and Indigenous claimants, make connection difficult to prove.

243 See above nn 168–71 and accompanying text.

244 Jung and Shapiro, above n 228, 279. For South Africa see the Boipatong and Bisho massacres: Spitz and Chaskalson, above n 238, 28–9.

245 Australian Law Reform Commission, above n 221, 105 [3.77], [3.79].

246 Owen M Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073, 1076.

247 Balint, Evans and McMillan, above n 3, 210, citing Damien Short, ‘The Social Construction of Indigenous “Native Title” Land Rights in Australia’ (2007) 55 *Current Sociology* 857–76; Walker, above n 17.

248 *NTA* s 223(1)(a)–(b).

249 *Yorta Yorta* (2002) 214 CLR 422, 444 [47], 456 [87] (Gleeson CJ, Gummow and Hayne JJ); *Bodney v Bennell* (2008) 167 FCR 84, 128 [168] (The Court).

250 *Bodney v Bennell* (2008) 167 FCR 84, 129 [172] (The Court).

251 Anne Carter, ‘The Definition and Discovery of Facts in Native Title: The Historian’s Contribution’ (2008) 36 *Federal Law Review* 301, 316–19.

Further, native title must be consistent with rights or interests already granted under the common law.<sup>252</sup>

The *NTA* does provide a legal structure for Indigenous Australians to assert their rights, but the statutory imbalances are not without consequences. The increasingly complex, technical and legalistic procedures for determining claims has ‘constrained’<sup>253</sup> its potentially transformative role. No doubt the absence of a total politico-legal rupture in Australia is a significant cause of this failure. In managing the transition, the *NTA* robbed calls for meaningful land reform of political salience. In this context, calls for a fundamental re-think of the approach to land reform have been made,<sup>254</sup> in particular, there is a push towards non-native title settlements and broader settlement agreements. The logic of transitional justice suggests that complementary approaches will assist in ensuring a meaningful transition.

## 2 Broader Approaches to Land Reform

The *NTA* may be the most well-known, but it is not the only transitional process aimed at securing land justice. A number of complimentary mechanisms conferring varying levels of rights have been developed. In keeping with the model of transitional justice as an umbrella, these broader approaches to land reform can be seen as particular sui generis processes aimed at transforming the relationship between Indigenous and non-Indigenous Australians towards more just relations. While these processes offer potential individually, it is as a mutually reinforcing and collective enterprise that they offer the best prospect for an equitable future.

A recent non-native title example is the *Traditional Owner Settlement Act 2010* (Vic) (*TOSA*). Designed ‘to advance reconciliation and promote good relations’ between the state and Indigenous Australians,<sup>255</sup> the *TOSA*

252 *Native Title Act 1993* (Cth) s 223(1)(c); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 60 [76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Akiba v Commonwealth* (2013) 250 CLR 209, 219 [9] (French CJ and Crennan J); *Ward* (2002) 213 CLR 1, 91 [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Fejo v Northern Territory* (1998) 195 CLR 96, 126 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Western Australia v Brown* (2014) 253 CLR 507, 521 [33] (The Court).

253 Attorney-General (Cth), ‘Native Title Ministers’ Meeting’ (Communiqué, 28 August 2009), cited in Australian Law Reform Commission, above n 221, 112 [3.105]. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Social Justice and Native Title Report 2013’ (Australian Human Rights Commission, 5 November 2013) 76; Tom Calma, ‘Who’s Driving the Agenda?’ in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 253, 262; Brennan, ‘Statutory Interpretation’, above n 221, 255.

254 See, eg, Ciaran O’Faircheallaigh who argues that ‘as currently defined in Australian jurisprudence and public policy, native title is of limited value as a basis for Aboriginal economic participation’ because it fails to recognise an inherent right to Aboriginal self-government: Ciaran O’Faircheallaigh, ‘Native Title, Aboriginal Self-Government and Economic Participation’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 158, 158.

255 *TOSA* s 1. Note also that the *TOSA* was a recommendation of the Steering Committee for the Development of a Victorian Native Title Settlement Framework. This Steering Committee was chaired by Professor Mick Dodson and included significant Indigenous participation: Steering Committee for the Development of a Victorian Native Title Settlement Framework, ‘Report’ (Report, Department of Justice, December 2008).

enables Victorian traditional owners to pursue a negotiated ‘recognition and settlement agreement’<sup>256</sup> directly with the state government outside the native title determination process. The overarching settlement agreement may include four sub-agreements relating to: land, land-use, funding, and natural resources.<sup>257</sup> The express inclusion of the power to make funding agreements is particularly important as it recognises that although land is a necessary condition for self-determination, it is not by itself sufficient – economic development is critical to securing an equitable future. These agreements are registered as ILUAs under the *NTA*,<sup>258</sup> and are therefore legally binding. For many Indigenous groups the breadth of the available outcomes is appealing. For example, the 2013 settlement package between the Dja Dja Wurrung and the Victorian government included: transfer of two historically and culturally significant freehold properties; transfer of six parks and reserves as ‘Aboriginal title’ and joint management of those lands; acknowledgement of past injustices; hunting, fishing and gathering rights; as well as almost \$10 million in funding by the state for investment in economic development initiatives chosen by the Dja Dja Wurrung.<sup>259</sup> Although the *TOSA* has only operated for a number of years it has been praised by the Aboriginal and Torres Strait Islander Social Justice Commissioner as setting ‘the benchmark for other states to meet when resolving native title claims’.<sup>260</sup>

One of the measures within the Dja Dja Wurrung settlement is joint management of land and resources. If conducted on a firm basis of formal recognition and active participation in decision-making processes, collaborative land and resource management strategies can empower local communities.<sup>261</sup> These processes also have the potential to break down the disjunction between Indigenous and non-Indigenous cultural norms, providing an opportunity for ‘cross-cultural development of management processes and conflict resolution’.<sup>262</sup> In assisting the construction of a shared understanding, and affirming the normative agency of Indigenous Australians, joint management can serve as an appropriate mechanism in Australia’s continuing transition.

Joint management has evolved out of environmental conservation. Upon ratifying the 1992 *Convention on Biological Diversity*,<sup>263</sup> the Australia government began to develop the National Reserve System, a network of

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256 *TOSA* pt 2.

257 *TOSA* pt 3 (land); pt 4 (land use); pt 5 (funding); pt 6 (natural resource management).

258 *TOSA* ss 10, 30.

259 See Department of Justice and Regulation (Vic), *Dja Dja Wurrung Settlement* (21 September 2015) State Government of Victoria <<http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement>>.

260 Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Native Title Report 2011’ (Australian Human Rights Commission, 28 October 2011) 8.

261 Alfonso Castro and Erik Nielsen, ‘Indigenous People and Co-management: Implications for Conflict Management’ (2001) 4 *Environmental Science and Policy* 229, 230.

262 David Lawrence, ‘Managing Parks/Managing “Country”’: Joint Management of Aboriginal Owned Protected Areas in Australia’ (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1996–97) 24.

263 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993).

protected areas across the country.<sup>264</sup> In conjunction with this project, the government introduced the concept of ‘Indigenous Protected Areas’ (‘IPAs’). IPAs are established by a voluntary declaration by traditional owners with the aim of increasing Indigenous control in management and decision-making over land, as well as recognising its cultural, spiritual and economic significance. Today there are 67 IPAs constituting 40 per cent of the total protected area under the National Reserve System and 7 per cent of the entire country.<sup>265</sup> Evidence suggests that Indigenous control at the outset of the process, ‘rather than government conservation agencies making a “space” for Indigenous involvement’ is critical to ensuring positive outcomes in terms of empowerment, equity and social justice.<sup>266</sup> Although not conceived of as a transitional justice measure, the process of self-determination and norm-affirmation inherent in the declaration and management of IPAs serves transitional justice goals.

IPAs are not the only forum for joint management. The Kakadu National Park model serves as another example of successful cooperation.<sup>267</sup> In Kakadu, land owned by the Bininj and Munggyu is leased to the state for the purpose of the national park, which is overseen by a board of management composed of a majority who represent traditional owners.<sup>268</sup> Although the Bininj and Munggyu own only about 50 per cent of Kakadu National Park, the entire Park is managed as if it was all Aboriginal land:<sup>269</sup> traditional owners continue to exercise their hunting, fishing and gathering rights and are integral in developing conservation and management strategies.<sup>270</sup> If not designed appropriately, the explicitly conservationist framing inherent in some joint management programs can

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264 National Biodiversity Strategy Review Task Group, *Australia’s Biodiversity Conservation Strategy 2010–2030* (Report, National Resource Management Ministerial Council, 2010) 88 <<http://www.environment.gov.au/biodiversity/publications/australias-biodiversity-conservation-strategy>>.

265 Department of the Environment (Cth), *Ownership of Protected Areas* <<http://www.environment.gov.au/land/nrs/about-nrs/ownership>>.

266 Marcia Langton, Lisa Palmer and Zane Ma Rhea, ‘Community-Oriented Protected Areas for Indigenous Peoples and Local Communities: Indigenous Protected Areas in Australia’ in Stan Stevens (ed), *Indigenous Parks, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture and Rights* (University of Arizona Press, 2014) 84, 95. See also Samantha Muller, ‘Towards Decolonisation of Australia’s Protected Area Management: The Nantawrrina Indigenous Protected Area Experience’ (2003) 41 *Australian Geographical Studies* 29.

267 Javier Beltrán (ed), ‘Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies’ (Best Practice Protected Area Guidelines Series No 4, World Commission on Protected Areas, 2000) 132.

268 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 374–83; Department of the Environment (Cth), ‘Kakadu Board of Management’ (18 February 2013) <<http://laptop.deh.gov.au/parks/kakadu/management/board-management.html>>.

269 Director of National Parks, ‘Kakadu National Park Management Plan 2016–2026: A Living Cultural Landscape’ (Management Plan, Department of the Environment (Cth), 2016) 16 <<http://www.environment.gov.au/system/files/resources/1f88c5a3-409c-4ed9-9129-ea0aadd4f33/files/kakadu-management-plan-2016-2026.pdf>>.

270 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 303BAA, 359A.

potentially conflict with Indigenous rights, particularly to development.<sup>271</sup> As with the Kakadu and Dja Dja Wurrung approaches, joint management should be conceived of as merely part of the whole – transitional justice theory indicates that land security, Indigenous governance structures, and the capacity for future cultural and economic development, are critical to the success of any joint management system.<sup>272</sup> The 2016–2026 Management Plan for Kakadu National Park recognises this fact; in contemplating the success of cooperation so far it outlines future priorities, including increasing Indigenous business opportunities.<sup>273</sup>

The growth of broader approaches to land reform within Australia is encouraging. As the National Native Title Council has advocated, native title needs to be seen as a ‘means to an end, not an end in itself’.<sup>274</sup> Refocusing on the goals that the *NTA* was intended to deliver – recognition of Indigenous peoples, redressing disadvantage, and establishing the conditions for relational self-determination – suggests that broader land settlement frameworks, including governance rights, has considerable merit. In recognising and affirming Indigenous peoples as rights holders and negotiating on a nation-to-nation basis, creative use of broader land settlements has the potential to both foster civic trust and contribute to meaningful reconciliation. When situated within a holistic, comprehensive and mutually reinforcing package of measures, these approaches are likely to have positive outcomes in transforming relations in Australia.<sup>275</sup>

Recognition that participation, consultation and consent are integral to achieving positive outcomes for Indigenous Australians in relation to land management and ownership, makes Australia’s posture at international law perplexing. Australia’s continuing refusal to ratify ILO Convention 169<sup>276</sup> and our belated support for the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>277</sup> belies our acceptance of the principles that these soft-law

271 Tobias Haller and Marc Galvin, ‘Introduction: The Problem of Participatory Conservation’ in Marc Galvin and Tobias Haller (eds), *People, Protected Areas and Global Change: Participatory Conservation in Latin America, Africa, Asia and Europe* (National Centre of Competence in Research, 2008) 13, 24.

272 Langton, Palmer and Ma Rhea, above n 266, 84; Lawrence, above n 262.

273 Director of National Parks, above n 269, 104.

274 See National Native Title Council, Submission No 16 to Australian Law Reform Commission, *Review of the Native Title Act 1993 (Cth)*, 19 January 2015, 2. See also Sean Brennan et al, ‘The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 2, 2: ‘native title is no conveyor belt, automatically transporting people from a place of political or economic marginalisation to somewhere better’.

275 The recently approved Noongar settlement contains many aspects of this approach. For the agreement, see Land, Approvals and Native Title Unit, *South West Native Title Settlement (Noongar Settlement)* Government of Western Australia <<https://www.dpc.wa.gov.au/lantu/Claims/Pages/SouthWestSettlement.aspx>>. For a discussion of the agreement, see Glen Kelly and Stuart Bradfield, ‘Negotiating a Noongar Native Title Settlement’ in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 249.

276 *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991).

277 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

instruments affirm. These instruments provide an ‘important framework’ for the Australian state to ‘re-engage Indigenous communities’ in relation to land reform.<sup>278</sup> Just as importantly from a transitional justice perspective, the symbolic and expressive value in engaging constructively with these mechanisms can imbue the entire land reform enterprise with the meaning of justice. For non-Indigenous Australians it has ‘important educative value’, explaining the relational concept of self-determination;<sup>279</sup> for Indigenous Australians it can demonstrate that the Australian state intends to meaningfully engage in a process of transition.

## V CONCLUSION

The negotiated transitions occurring within and across Australia today share elements with paradigmatic transitions. The process may be more protracted, but it is no less conflicted. Similarly with more orthodox transitions, particular measures do not always clearly move from less just to more just relations,<sup>280</sup> and even *Mabo* may be understood as not causing a minor normative rupture, but rather continuing the ‘process of denying or containing Indigenous sovereignty’.<sup>281</sup> While *Mabo* transformed Aboriginal and Torres Strait Islander peoples’ agitation for inclusion in Australian property law from moral claims into legal rights, they remained (and remain) very much the weaker partner.<sup>282</sup> This political weakness has translated into a native title claims process that reflects this imbalance, constraining the transformative potential of the *NTA* as a

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278 Megan Davis, ‘Adding a New Dimension: Native Title and the *UN Declaration on the Rights of Indigenous Peoples*’ (2009) 93 *Australian Law Reform Commission Reform Journal* 17, 17.

279 Megan Davis, ‘Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*’ (2008) 9 *Melbourne Journal of International Law* 439, 468.

280 Stephen Winter argues that ‘legitimacy is scalar’, and therefore transformational processes ‘can be legitimating without resulting in a fully legitimate state’: Winter, ‘Towards a Unified Theory of Transitional Justice’, above 140, 242. Transformational processes can often flip between the two poles – a fact reflected in surveys on local attitudes towards transitional justice measures: Phuong Pham et al, ‘So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia’ (Report, Human Rights Center, University of California Berkeley, 2009); cf Phuong Pham et al, ‘After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia’ (Report, Human Rights Center, University of California Berkeley, 2011). The latter survey found that while trust in the judicial sector has increased, perception of corruption and impunity among elites has also increased.

281 Balint, Evans and McMillan, above n 3, 205; Michael Dodson and Lisa Strelein, ‘Australia’s Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State’ (2001) 24 *UNSW Law Journal* 826, 835–6.

282 Nettheim, ‘The Consent of the Natives’, above n 20, 224; See also *Ward* (2002) 213 CLR 1, 231 [529] (McHugh J):

You do not have to be a Marxist to recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power. On any view, that is what the dominant classes in Australian society did – and in the eyes of many still do – to the Aboriginal people.

mechanism of transitional justice. However, creative approaches to land reform have been, and are continuing to be, developed. This is positive.

More broadly, the contemporary push for constitutional recognition of Indigenous Australians can be conceived of as another *sui generis* mechanism underneath Australia's transitional justice umbrella. Recognition offers a 'heightened, epiphenomenal opportunity' for the Australian state to re-evaluate and re-establish its politico-legal foundation.<sup>283</sup> This framing suggests that trading away substantive recognition for narrow prudential concerns, as suggested by some commentators,<sup>284</sup> will achieve neither practical reconciliation nor symbolic legitimacy. The utility of a transitional justice lens is in the understanding that any transition must be comprehensive, holistic and mutually reinforcing; constitutional recognition must aim at recognising Indigenous Australians, fostering civic trust, and contributing to a more just social contract.<sup>285</sup> 'After many years of isolation and exclusion' Indigenous Australians must feel as though the *Constitution* belongs to them.<sup>286</sup> Ad hoc and partial mechanisms are rarely successful.

Constitutional recognition is an important process of the transition, but it should not be seen as the *only* process. Just like the 1967 referendum,<sup>287</sup> and *Mabo*, substantive constitutional recognition is only a threshold change; something must be done with the considerable moral capital that it will propagate. There are many candidates, including: enactment of the long-delayed social justice package providing compensation for dispossession; reform of the *NTA* to revitalise the promise of *Mabo*;<sup>288</sup> and extension of comprehensive settlements conducted on a nation-to-nation level. If adopted, these three proposals would assist in continuing and confirming the transition, holistically transcending each individual reform's strictures. If implemented and managed effectively, transitional justice indicates that this project can increase rather than dissipate moral capital. Indeed, as Indigenous responses to the Victorian government's recent decision to begin formal negotiations towards a treaty indicate,<sup>289</sup> appropriate individual steps *do* imbue the entire process with the meaning of justice.

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283 McAuliffe, above n 110, 35.

284 See, eg, Damien Freeman and Julian Leaser, 'The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians' (Proposal, 2014) <<http://damienfreeman.com/wp-content/uploads/2014/11/DTF-14.pdf>>.

285 De Greiff, 'Theorizing Transitional Justice', above n 24, 56.

286 Daes, above n 130, 9; Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the *Constitution*: Report of the Expert Panel' (Commonwealth of Australia, 2012) 10–11; Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 1.

287 *Constitution Alteration (Aboriginals) 1967* (Cth).

288 See, eg, Australian Law Reform Commission, above n 221, 29–33.

289 Calla Wahlquist, 'Indigenous Leaders Praise Victoria's Commitment To Talk about Treaty', *The Guardian* (online), 3 March 2016 <<http://www.theguardian.com/australia-news/2016/mar/03/indigenous-leaders-praise-victorias-commitment-to-talk-about-treaty>>.



Nevertheless, this requires strong political commitment and real will within the non-Indigenous Australian community towards enacting beneficial legislation and removing structural injustices that mar Indigenous participation and self-determination in the nation. The ultimate goal – and one I believe is achievable – is the restructure or reorientation of Australia’s political institutions to ensure that the interests and values of Aboriginal and Torres Strait Islander peoples are taken into account at all stages of the processes of government. That is, that Indigenous Australians are treated with the dignity and respect that they deserve.<sup>290</sup> Indigenising Australia’s political structures and outlook will enable Australia’s First Peoples to recover or develop relational self-determination. That the drive towards constitutional recognition appears to be losing momentum<sup>291</sup> is therefore disheartening. Substantive constitutional recognition is not the only step, but it is the *next* step. The experience and logic of transitional justice makes clear that there will be many more steps after that.

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290 This requires an ongoing commitment that, unfortunately, may not exist today: Harry Hobbs, ‘The Uluru Decision Highlights What’s So Wrong with Indigenous Policy’, *The Guardian* (online), 21 April 2016 <<http://www.theguardian.com/commentisfree/2016/apr/21/the-uluru-decision-highlights-whats-so-wrong-with-indigenous-policy>>.

291 Natasha Robinson, ‘Confusion Surrounds Push To Recognise Aboriginal People in *Constitution*, First Peoples Congress Warns’, *ABC News* (online), 27 April 2016 <<http://www.abc.net.au/news/2016-04-27/confusion-surrounds-push-for-indigenous-recognition-constitution/7360084>>.