



## Article

# Mirroring Truths: How Liberal Democracies Are Challenging Their Foundational Narratives

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**Abstract:** Long-established liberal democracies with histories of settler colonialism—from the United States and Canada to Australia and Scandinavia—are beginning to explore their histories of violence and dispossession. This, in many ways, is long overdue, but the desire to come to terms with past injustices should not obscure the challenges that still stand in the way of any reasonable effort to do so. We argue that transitional justice can be applied to colonial history in liberal democracies, but there are major conceptual and practical obstacles that need to be overcome if this is to happen in meaningful ways. We explore three of these obstacles here that are particularly significant: the doctrine of intertemporal law, the unequal power balance between the Global North and the Global South, and national identity. If these are to be overcome, it is important to tie historical to present injustices and to incorporate, beyond violations of physical rights, violations of economic and social rights that are particularly relevant for understanding continuities between past and ongoing violations. These rights are commonly neglected even by states that recognize a broad set of liberal rights and have the capacity to ensure that they are realized, and represent a promising avenue for pursuing a truly inclusive, equitable, and universal understanding of justice.

**Keywords:** transitional justice; colonial history; liberal democracies; economic and social rights; truth commissions



**Citation:** Fernandez-Torne, Carles, and Graeme Young. 2023. Mirroring Truths: How Liberal Democracies Are Challenging Their Foundational Narratives. *Social Sciences* 12: 438. <https://doi.org/10.3390/socsci12080438>

Academic Editor: Oliver Schmittke

Received: 14 May 2023

Revised: 7 July 2023

Accepted: 23 July 2023

Published: 1 August 2023



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## 1. Introduction

Liberal democracies are seeing their foundational narratives challenged. In Canada, the treatment of Indigenous people has been the object of continuous inquiries, including the Truth and Reconciliation Commission (2009–2015), which examined human rights violations that occurred in Indigenous residential schools over the period of 1874–1996, or the National Inquiry into Murdered and Missing Indigenous Women and Girls (2016–2019). In the United States, slavery and racism are being re-examined in light of ongoing structural violence against black people. Grassroots truth-seeking initiatives are mushrooming to confront a past of gross violations of human rights. In Australia, the Human Rights and Equal Opportunity Commission (1995–1997) investigated the separation of Aboriginal and Torres Strait Islander children from their families and the Yoo-Rook Justice Commission has examined the impact of European colonization on the Aboriginal communities of Victoria State (2021). In Scandinavia, the Greenlandic Reconciliation Commission (2014–2017) has investigated the policies of dispossession and assimilation suffered by Indigenous peoples. Others include the Commission to Investigate the Norwegianization Policy and Injustice against the Sámi and Kven/Norwegian Finnish Peoples (2018–2023), or the Truth and Reconciliation Commission for the Tornedalians, Kvens, and Lantalaiset in Sweden (2020 to date).

These inquiries mirror what other countries emerging from armed conflict or authoritarian rule are also doing to come to terms with a recent past of human rights violations. Particularly, in relation to truth-seeking mechanisms, more than forty truth commissions

have been established in post-conflict and post-authoritarian contexts over the last forty years. Often these commissions have been established with high expectations. They are expected to help post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators, and recommend reparations and institutional reforms (United Nations Secretary-General 2004, para. 50). But beyond truth commissions, the question remains whether a transitional justice framework is suitable to address a legacy of violations committed in colonial contexts.<sup>1</sup>

These parallel processes present a unique opportunity to critically reflect on the theory and practice of transitional justice, particularly in relation to how it is applied, where, and by whom. We aim to take advantage of this opportunity, holding a mirror between the Global North and Global South and breaking down the division that separates the two in transitional justice processes as a result. Transitional justice, we argue, can be applied to liberal democracies, but there are major obstacles that need to be overcome if it is to do so. There is, we maintain, a potential path to overcome these obstacles that involves focusing on economic and social rights and recognizing the connections that exist between historical and ongoing violations, and it is only by following this path that a form of justice that is truly inclusive, equitable, and universal can ultimately be realized.

Methodologically, this is a conceptual article that presents a series of critical points about how we understand the applicability of a transitional justice framework to the way liberal democracies are dealing with a history of colonial crimes. We examine a variety of scholarly sources to highlight major conceptual issues and use examples from a number of countries where relevant to explore these points in further detail. The article's main objective is to explore the extent to which transitional justice can be applied to liberal democracies with a legacy of colonial crimes. Particularly, we focus on former settler states or colonial empires by critically examining potential obstacles that would stand in the way of their dealing with a legacy of oppression and violations of human rights.

This article proceeds in two sections. The first examines whether transitional justice is an appropriate framework to deal with a legacy of violations stemming from colonial rule in liberal democracies. It then explores three main challenges to an expansion of transitional justice to address the legacies of colonialism: the doctrine of intertemporal law, unequal power relationships that shape the application of transitional justice in the Global North and the Global South, and the challenges that examining colonial histories pose to national identity in liberal democracies. Final reflections on these challenges and the extent to which they can be overcome are offered in the conclusion. Here, we stress the importance of focusing on economic and social rights and linking past with present violations.

## **2. Transitional Justice and Colonial History in Liberal Democracies**

To consider if and how transitional justice can be applied to colonial histories in liberal democracies, it is important to explore each of these contexts in turn. We therefore begin with colonial histories before turning our attention to liberal democracies, showing that neither is outside of the scope of transitional justice.

### *2.1. Can Transitional Justice Deal with a Legacy of Violations from Colonial Rule?*

There are two main reasons why the transitional justice framework has not been used to deal with a legacy of violations of human rights or international humanitarian law committed under colonial rule. The first is that transitional justice has been circumscribed to violations in the recent past; second, it is traditionally narrowly focused on violations of civil and political rights. The two are examined in this section.

First, transitional justice has mainly focused on violations in the recent past that coincide with a period of armed conflict or authoritarian rule. This focus on examining violations in the recent past has made it easier to analyze a time-limited period that coincides with an armed conflict or an authoritarian regime in which violations of human rights and international humanitarian law have been committed. In addition, the objective of prosecuting those responsible, or collecting the testimonies of victims, also

imposes clear temporal limits. Fundamentally, dealing with more recent events is of great importance in the collective memory and in promoting justice and reconciliation efforts (van der Merwe and Moyo 2020, pp. 51–52).

Circumscribing the transitional justice process to violations in the recent past, however, has led to ignoring the impact that the colonial past has had on the armed conflict or dictatorship that is the subject of analysis. Rolston and Ní Aoláin have referred to a “blindness about colonialism within transitional justice” (Rolston and Aoláin 2018, p. 335). Balint and Evans refer to three cases in which short-term harm did not take into account the colonial past: in East Timor, the focus was on the damage perpetrated after the invasion by Indonesia in 1975, although it was during the Portuguese colonial period that the land was taken away, giving rise to the subsequent structural injustice; in South Africa, the focus was on the damage perpetrated after the rise to power of the National Party in 1948, leaving aside the complex history of Dutch and British colonial exploitation; and in Rwanda, the Belgian colonial past did not appear in the legal proceedings at either the national or international level (Balint and Evans 2010, p. 4).

In some other cases, the final reports of truth commissions have acknowledged a relationship between the colonial past and a more recent armed conflict or eruption of violence. In Liberia, the final report of the truth commission examined the origins of the conflict in the history and founding of the state, but did so without addressing the structural problems of the colonial era that enabled the conflict (van der Merwe and Moyo 2020, p. 51). In Sierra Leone, the final report of the Truth and Reconciliation Commission examined the socio-economic divisions between the Colony and the Protectorate as a root cause for future civil conflict (Final Report of the Sierra Leone TRC 2004, vol. Three A, chap. 1, part I). And in Kenya, the Truth, Justice, and Reconciliation Commission examined the role of colonialism in the establishment of the state. Still, these truth commissions have only been mandated to examine violations committed in the recent past, leaving a legacy of violations under colonial rule unaddressed. Ignoring these violations undermines the reasons that led to the armed conflict and dictatorship under figures that were either handpicked by the colonial power or emerged as opposition to the former colonial power.

A second factor that limits the ability of transitional justice to deal with a legacy of violations from a colonial past is its narrow focus on violations of civil and political rights and not on more profound violations of economic and social rights (Cahill-Ripley 2014). Transitional justice has been accused of dealing with the symptoms and violations of rights to bodily integrity rather than the root causes of conflicts, which are structural and systemic violence in the economic, political, and social spheres, including the historical roots of conflicts. In short, transitional justice does not address underlying structural inequalities and leaves historical grievances unresolved. This traditionally narrow focus on civil and political rights makes sense if we consider the context in which transitional justice mushroomed around the end of the Cold War. In that context, transitional justice was primarily a transition to a model of liberal democracy focused on violations of civil and political rights. In Latin American countries, such as Argentina, Uruguay, or Chile, transitions were from autocratic rule to democracy and transitional justice dealt mainly with violations to physical rights, such as enforced disappearances, extrajudicial killings, or torture. More generally, the broader shift to neoliberalism that immediately proceeded, and occurred alongside, the association of transitional justice with liberal democracy meant that the dominant form of liberal democracy in which transitional justice has been applied provides reduced space for concerns about inequality and democratic economic control<sup>2</sup>. Economic and social rights, in this context, have not received the prominence or legitimacy that they might otherwise have been afforded, leaving them comparatively neglected in efforts to promote justice.

Expanding transitional justice from liberal democracy building to peacebuilding entailed a re-conceptualization of the field (Sharp 2015, p. 158). While, initially, this peace was understood as ‘negative’—e.g., cessation of hostilities—critical approaches to peacebuilding have helped to promote a broader understanding of ‘positive’ peace—i.e.,

the absence of structural violence—and what Galtung has referred to as social justice, which is understood as an egalitarian distribution of power and resources (Galtung 1969). Social justice expands the understanding of peace to economic development and societal attitudes that foster peace. Positive peace entails a focus on promoting economic and social rights. The expansion of transitional justice from liberal democracy building to peacebuilding has also brought about an expansion from dealing with violations to civil and political rights to dealing with violations of economic and social rights.

## 2.2. *An Expansion Already Underway*

Expanding transitional justice to deal with a legacy of violations as a result of colonial rule presupposes the need to justify this expansion. Following the points discussed here, this can take place in two dimensions: an expansion from a recent past to more historical events; and from a narrow approach of violations of physical rights to more profound violations of social and economic rights and structural inequalities. This expansion is already underway. First, transitional justice has expanded to cover more historical patterns of abuse, particularly in settler states such as Canada, Australia, or New Zealand (van der Merwe and Moyo 2020, p. 58). This has come hand-in-hand with commissions of inquiry and truth commissions. The Truth and Reconciliation Commission of Canada (2009–2015) investigated the period from 1874 to 1996. Previously, the Royal Commission on Aboriginal Peoples that was established in Canada (1991–1996) investigated the period from before 1500 to 1996. In Australia, the Human Rights and Equal Opportunity Commission (1996–1997) investigated the separation of Aboriginal and Torres Strait Islander children from their families in the period between 1919 and 1975 (Bringing them Home 1997). More recently, the state of Victoria in Australia established the Yoo-Rook Truth Commission to examine past and ongoing injustices experienced by Traditional Owners and First Peoples in Victoria in all areas of life since colonization. For its part, in 1975, New Zealand established the Waitangi Tribunal, a standing commission of inquiry. The Waitangi Tribunal makes recommendations on claims brought by Māori relating to legislation, policies, actions, or omissions of the Crown that are alleged to breach the promises made in the Treaty of Waitangi.

Beyond commissions established in settler states, others established in former colonies that are today independent states have also looked into the colonial past. The mandate of the Mauritius Truth and Justice Commission (2009–2011) covered more than 370 years (1638–present); it was tasked to undertake an inquiry into the legacy of slavery and indentured labor in Mauritius and to determine appropriate measures to be extended to descendants of slaves and indentured laborers, and to investigate complaints of the dispossession of land. For its part, the Tunisian Truth Commission included the pre-independence period in its mandate. The Truth and Reconciliation Commission in Burundi, which was initially established to examine atrocities committed between 1962 and 2008, will, according to its new mandate, investigate colonial crimes committed since 1885, when the Berlin Conference divided up the African continent among the colonial powers<sup>3</sup>. In Asia, the Truth and Reconciliation Commission of the Republic of Korea, with operations starting in 2005 and lasting until 2010, examined the period from 1905 to 2005, including Japan's colonial rule from 1910 to 1945 (Hayner 2011, p. 65). In all these cases, truth commissions have looked into violations committed a long time ago as a result of colonialism, be it in settler states or in former colonies that became independent.

Second, as for an expansion to deal with economic and social rights, de Merwe refers to a normative shift in the definition, meaning, and scope of transitional justice (van der Merwe and Moyo 2020, p. 52). This shift can be seen in several transitional justice policies adopted by international and regional bodies. Most of these changes are not specifically aimed at addressing colonial era abuses, but they broaden the scope of transitional justice in a way that brings these abuses more clearly within its reach. According to Merwe, one of these changes is the inclusion of social and economic rights in transitional justice (van der Merwe and Moyo 2020, p. 55). On the one hand, at a practical

level, the TCs in Sierra Leone, Liberia, and Kenya have included violations of economic, social, and cultural rights, as well as broader socio-economic issues, in their investigations of past events. However, while these commissions have investigated violations of economic, social, and cultural rights, in all three cases these investigations have not led to processes that seek to confront these violations, such as reparations or economic reforms (van der Merwe and Moyo 2020, p. 56). Still, important developments have taken place to incorporate economic and social rights into transitional justice in practice, and while examples of concrete benefits are minimal or even non-existent, a foundation for this to change is perhaps being laid. In this vein, in Tunisia, socio-economic justice issues were an essential part of the transitional justice process. Not only individuals but also regions could be considered victims of socio-economic marginalization, an essential component of repressive rule (Salehi 2022, p. 104). At a regional level, the African Union's transitional justice policy addresses social and economic rights. Of particular note are land reform and protection of property rights, including traditional property, as well as affirmative development policies intended to increase the representation of historically marginalized groups and/or regions (African Union 2019, para. 67–70).

### 2.3. *Theorizing Transitional Justice in Liberal Democracies*

The need to theorize transitional justice in the context of colonial history is matched by the need to theorize transitional justice in liberal democracies. Perhaps the most significant point here is the reality that liberal democracies with colonial histories are often firmly established democratic states and are therefore not undergoing periods of transition as these are traditionally understood. Winter defends that established democracies can and do undergo transitional processes in the form of radical change to their legitimating regimes. He asserts that the redress practices of established democracies are a form of transitional justice. Winter contends that transformations in legitimating regimes constitute transitional politics, that grievous wrongdoing by a state burden its legitimacy, and that transitional justice works to resolve that burden (Winter 2013, pp. 2–3). Similarly, Valls defends that the transitional justice framework does apply to the case of racial justice in the United States. He considers the Civil Rights era and the ensuing changes as a regime transition as 'governmental policy shifted to no longer practicing the systematic violation of basic human rights of its racially subordinated populations, and to no longer tolerating, as a matter of policy, their violation by other private citizens.' (Valls 2003, p. 61).

Notwithstanding these arguments, the project of theorizing transitional justice within established democracies confronts resistance. Since established democracies are neither emerging from war nor by definition becoming democracies, they do not practice transitional justice simply because the relevant institutions are 'not established as part of a political transition' (Winter 2013, p. 2). Hence, the main critique seems to be the lack of a political transition. This argument assumes a traditional understanding of a liberalizing transition that has a 'normative component in the move from less to more democratic regimes' (Teitel 2000, p. 5). However, it does not take into account that transitional justice has also been applied to contexts without a liberal political transition, such as Rwanda, Chad, Uganda, or Ethiopia, and to contexts without any political transition at all, such as Kenya or Colombia (Sharp 2015, p. 156). Equally, the transitional justice framework has also been applied to contexts such as Syria, where armed conflict persists and there is no transition to peace. If the transitional justice framework has been applied in contexts lacking a process of liberalization as well as to contexts lacking a transition from armed conflict to peace, the lack of political transitions in established democracies should not be used as an argument to dismiss their practice of transitional justice.

More importantly, we might actually be witnessing a process of liberalization in established democracies that find themselves needing to confront a legacy of violations as a result of historic injustices. A past of wrongdoing can undermine state legitimacy, particularly when that state has incorporated human rights norms that create a legal, political, and moral duty to address past violations. It is not surprising that the inquiry into

over a century of forced assimilation policies towards First Nations in Canada has led to an official process of truth-seeking, acknowledgment, atonement, and attempts to redress. The discovery of mass graves near residential schools is further burdening Canada's legitimacy and pushing the state to continue unearthing the truth about historic injustices. This need to confront a legacy of historic injustices takes into account 'the grounding within society of a normative shift in the principles underlying and legitimating the exercise of state power' (Teitel 2000, p. 213). Precisely, transitional justice has been built on the idea of breaking with the past, a clear cut between 'then' and 'now' (Nagy 2008, p. 280). The liberal betterment in established democracies comes down to an embrace of human rights norms. Established democracies are just implementing similar frameworks that they have been fostering in post-conflict and post-authoritarian regimes. These transitional justice policies, mostly promoted in the Global South, have become a mirror in which societies in established democracies are now re-discovering their past of violations and abuses.

### 3. Three Challenges to Transitional Justice in Liberal Democracies

It is important, however, to recognize the significant obstacles that stand in the way of applying transitional justice to liberal democracies. The doctrine of intertemporal law, power imbalances between the Global North and Global South, and national identity are all particularly relevant here.

#### 3.1. The Doctrine of Intertemporal Law

A primary challenge to the expansion of transitional justice to examine violations committed under colonial rule is the doctrine of intertemporal law. This challenge is linked to the legal character of transitional justice based in international human rights and humanitarian law. The doctrine of intertemporal law is invoked to exclude the possibility of prosecutions for crimes that predate Nuremberg and that precede the adoption of the declaration of human rights and the establishment of crimes under international criminal law, such as genocide, war crimes, and crimes against humanity. The argument is that only criminal norms that were valid at the time of the alleged conduct may be applied. Since genocide, crimes against humanity, or war crimes had not been codified, it is not possible to argue that such crimes were committed by colonial powers. In particular, the German government has invoked the doctrine of intertemporal law to argue that the genocide of Ovaherero and Nama (1904–08) is a genocide from today's perspective, but not from the perspective of when the crimes were committed (European Center for Constitutional and Human Rights 2022).

The reality is that the doctrine of intertemporal law has not always been applied equally. For example, at Nuremberg, where the major Nazi war criminals were tried between 1945 and 1949, substantive and procedural rules were established *ex post*. The London Charter, which legally established the Nuremberg trial, was written by the winners, the United States, Great Britain, France, and the Soviet Union. The Charter expanded the crimes and penalties for actions that did not constitute crimes at the time they were committed, establishing the crime against peace and codifying war crimes, crimes against humanity, and individual criminal responsibility for international crimes. As Makau Mutua points out,

*Views diverge about whether it is good or bad to criminalize actions that were repugnant, but not crimes when they were committed. However, one thing is clear: the Nuremberg trials demonstrate that the international community, represented by the big powers, can rewrite existing rules to punish past wrongs. It has been done' (Mutua 2020).*

Moreover, in the particular case of the Ovaherero and Nama genocide, we cannot deny that communities already existed, communities which enjoyed international legal personality. As Goldmann has pointed out: 'Under the rules of international law during the period in question, peoples and other entities—whether called states or not—enjoyed international legal personality when it consisted of a defined *population* occupying a specific *territory* and equipped with a mechanism for the exercise of *power*' (Goldmann 2018, para. 44).

Where there is consensus is that responsibility can be invoked for crimes that took place after 1945. Some of these examples include the struggles for independence in Indochina, Southeast Asia, and Africa, which were confronted by colonial powers, such as Britain, France, Belgium, the Netherlands, and Portugal, 'with tactics of counterinsurgency and colonial rule, including the bombing of civilian populations, the forced displacement of parts of the population, and mass imprisonment and torture. Many of these acts qualify as war crimes; some also constitute crimes against humanity' (Kaleck 2020, pp. 10–11). While the commission of war crimes was a common feature of colonial wars during this period, there have never been serious efforts to investigate colonial crimes before national or international tribunals, nor to prosecute perpetrators or to hold governments accountable. Instead, impunity has been the norm. In France, the 1968 amnesty law, together with the restrictive definition of crimes against humanity, has allowed impunity for torture and other crimes committed in Algeria and, ultimately, has allowed the state to maintain some control over past interpretations of the Algerian war (Loytomaki 2013, p. 221).

For transitional justice to enjoy universalism, it cannot fail to focus on human rights violations committed during the colonial period. Otherwise, we should accept the thesis promulgated from post-colonial theories that 'international law comprises a series of doctrines and principles developed in Europe (...) that were then imposed on the wider world' (Kaleck 2015, p. 25). In this vein, Third World International Law (TWAAIL) scholars have consistently criticized the Eurocentric ethos of the international law project that spread during the process of colonization and the expansion of colonial rule from the sixteenth to the nineteenth century (Eslava and Pahuja 2012). In short, a transitional justice that limits its focus to post-conflict and post-authoritarian contexts demonstrates that international human rights law favors the powerful countries that led the international law project.

### 3.2. Double Standards: Prioritizing Transitional Justice in the Global South

A second challenge to an expansion of transitional justice to look into the legacy of colonialism is the tendency to implement transitional justice processes in the Global South, while it is developed in and led by the Global North. This is not a problem that is unique to colonial histories; indeed, it is important to recognize that the failure to apply transitional justice perspectives to the Global North is a broader phenomenon that also encompasses events and experiences surrounding civil conflict and authoritarian rule that transitional justice is traditionally employed to address.

An example is the European Union's policy framework to support transitional justice, which emerges as a framework for the EU to play a more active role in supporting transitional justice in the Global South (EU Policy Framework 2015). Interestingly, this EU framework does not refer to the need for some European states to implement transitional justice processes to deal with their own past. Spain's democratic transition after the Franco dictatorship and a divisive civil war is a particularly illuminating case. Far from being a discussion of the past, the Spanish transition continues to be politicized (Human Rights Council 2021, para. 31). While the socialist party (PSOE) enacted the *Historic Memory Act* in 2007, during their time in government, from 2012 to 2018, the conservative party (Partido Popular) did not fund the mechanisms created to exhume the bodies of victims who were forcefully disappeared. More recently, in October 2022, the Spanish Parliament, now with a socialist majority, passed the *Democratic Memory Act* to expand the processes and mechanisms for Spain to deal with a past of violations of human rights and international humanitarian law (Fernandez-Torne and Ouziel 2022). In short, the question is why does the EU framework to support transitional justice processes not refer to the need for European countries to deal with their own past of human rights violations, but rather only promotes such processes within countries in the Global South. Such double standards deride universal principles around which liberal notions of rights and the rule of law are based.

Furthermore, the EU framework does not examine the impact of European colonial powers on the current situation in countries of the Global South that are undergoing armed

conflict or authoritarian rule. As a matter of fact, there is ‘historical amnesia’ concerning the relationship between the European Union and colonialism (Hansen and Jonsson 2014) and a lack of EU politics of memory regarding the human rights violations committed during the colonial period. As it has been pointed out, ‘all European efforts for transnational historical remembrance have focused almost exclusively on the Holocaust and National Socialism as well as Stalinism. The EU remains curiously quiet about the memories of imperialisms and colonialism’ (Sierp 2020, p. 688). In considering the shortcomings of EU memory policies and its focus on 20th-century National Socialism and Stalinism, Prutsch considers colonialism and imperialism a common memory that is as European as the Holocaust. He further notes,

*Reducing the problem of ‘reworking the past’ to National Socialism and Stalinism runs the risk of evading the issue of shared European accountability for the past. When talking about European historical memory, one also needs to address the question whether responsibility for atrocities and injustice committed might not also partly be ‘European’ (Prutsch 2015, p. 27).*

A possible explanation to the exclusion of colonial crimes from a “European memory” could be the need for a national level elaboration before being addressed at a European level, as the case of Nazism and Stalinism indicate (Sierp 2020, p. 700). Such a national elaboration seems to be underway. In the last few years, there has been a widespread push within European countries to establish transitional justice mechanisms to deal with a legacy of violations committed during colonial rule. Thus, Germany has been dealing for years with the genocide against the Ovaherero and Nama populations in present-day Namibia. The Netherlands has apologized and paid reparations to victims of the massacres that took place in Indonesia. Belgium has set up a parliamentary commission to examine its colonial past, notably in Congo; and Norway, Sweden, and Finland are each setting up their own truth commissions to deal with their past and present in relation to the fate of their minorities—such as Tornedalians, Sami, and Kvens, among others. France has been considering initiatives to confront the Algerian war. While the 2021 report by Benjamin Stora, submitted to the French president, proposed, among other measures, establishing a Truth and Memory Commission, Macron has not yet acted on this initiative.

### 3.3. National Identity

A final, and perhaps particularly intractable, challenge to the application of transitional justice to liberal democracies is similarly political and pervasive: in long established democracies, the recognition of past and present injustices fundamentally challenges core aspects of national identity. Experiences of colonial and racial violence, exclusion, and dispossession are difficult to integrate into well-established narratives that are structured around a relatively consistent adherence to core liberal values. Yet, we maintain, integrating these experiences and recognizing continuities between past and present forms of injustice is essential if these values and their emphasis on equality, rights, and justice are to be realized.

Subjecting the past to a critical re-examination can have profound consequences for the present. National identity is informed, to a large extent, by a collective understanding of a shared history that assigns significance to, provides interpretations of, and invests meaning in historical events and experiences. These understandings can foster group identity, cohesion, and belonging, thereby providing a sense of community and tying people to common political institutions and projects. In liberal democracies, these understandings can be rooted in narratives that use history to profess a foundation in, and/or detail apparent progress towards, rights, freedoms, justice, and equality.

Applying a transitional justice perspective to contemporary liberal democracies can complicate these narratives. If understandings of the past can inform understandings of the present and visions of the future, then the idea that a country should meaningfully confront past violations—acknowledging them and pursuing some form of redress—can be a politically difficult task that is likely to face a considerable amount of resistance.



History—how it is commemorated, how it is taught, and how it is invoked in social and political discourse—therefore becomes a significant site of struggle over national identity, a reality that is becoming increasingly apparent in a variety of contexts. Two examples deserve further attention here.

Recognizing this ingrained geographic unevenness surrounding where transitional justice processes are implemented, it is now appropriate to turn to contemporary liberal democracies that have an extensive history of settler colonialism, which is the primary focus of this paper. Canada provides a useful case study here. As acknowledged above, Canada has implemented a Truth and Reconciliation Commission that is focused on the country's Residential School system and has undertaken a National Inquiry into Missing and Murdered Indigenous Women and Girls. The former described the Residential School policy as "cultural genocide" (Angus Reid Institute 2015) and the latter used the term "genocide" and found Canada responsible (Austen and Bilefsky 2019). Poll results released by the Angus Reid Institute in 2015 found that 70% of Canadians surveyed agreed with the Truth and Reconciliation's description of the Residential School policy as "cultural genocide"; close to half of the respondents said that the Truth and Reconciliation Commission has been "worthwhile" for "Canada as a whole" (48%) and that "not enough attention" has been given to Aboriginal issues in the country in recent years (42%) (Angus Reid Institute 2015). In the most recent federal election in 2021, 41% of Canadians placed how much they care about Indigenous issues and reconciliation at 6 or 7 on a 7-point scale (Angus Reid Institute 2021). Such figures suggest that there is still significant room for improvement, a fact that is particularly salient in the context of the discovery of hundreds of unmarked graves at former Residential School sites since 2021<sup>4</sup>. Furthermore, Indigenous peoples in Canada continue to face ingrained structural problems; 25% of Indigenous Canadians, and 40% of Indigenous Canadian children, live in poverty (Canadian Poverty Institute n.d.), and Indigenous people make up 32% of the federal prison population despite constituting less than 5% of the population of the country (Major 2021).

Despite its clear shortcomings and the amount of work that remains to be done, the experiences of Canada diverge from those of the United States, a country that also has an extensive history of settler colonialism, but one that it has done little to begin to confront. This lack of commitment to its colonial past contrasts with recognition of the country's extensive history of slavery, segregation, and racial discrimination and inequality<sup>5</sup>. Still, divisive debates and political conflicts over how this history should be understood and what its impact on the present might be are indicative of similar tensions around identity in liberal democracies with histories of rights violations. Race is a salient feature of American society, and one that has significant political resonance; ahead of the 2020 election, a survey by Pew Research Center found that 52% of respondents indicated that "[r]ace and ethnic equality" was "very important" to their vote, the eighth highest score for the issues surveyed—at the same level with immigration (Pew Research Center 2020). A narrative that places issues of racial injustice at the center of American history and contemporary life, however, stands in stark contrast with a view of the country as founded on the liberal principles that continue to play a significant role in American politics and identity. This is perhaps most clear in debates about the teaching of 'Critical Race Theory' in American schools (Ray and Gibbons 2021). Views about racial inequality are also highly politicized, suggesting that they have become deeply entrenched in the country's partisan politics (Pew Research Center 2020).

While the exact relevance of transitional justice for liberal democracies can vary with the nature of the precise historical processes under consideration, and different historical circumstances and contemporary political and social realities should not be ignored, it is important to recognize the commonalities that exist between states and societies that have histories of rights violations. Perhaps most importantly, a transitional justice perspective could have the potential to link past injustice and contemporary injustice, establishing clear historical connections between past and present violations. If states are implicated in past injustices that they do little to address, there is a clearer case for the argument that they have

an obligation to correct past wrongs. This, as outlined here, may face significant challenges. Still, the duty of addressing past injustice constitutes a core principle of universalism that is at the heart of liberal democracy.

#### 4. By Way of Conclusion: Can These Challenges Be Overcome?

In holding a mirror between transitional justice efforts for recent periods of human rights violations in the Global South against transitional justice efforts for colonial crimes by the Global North, what is reflected back at us are three major obstacles that currently limit the application and effectiveness of transitional justice for colonial crimes. As examined in this article, the doctrine of intertemporal law is a major institutional and normative pillar to our approach to justice in theory and practice; the Global North and the Global South are commonly held to double standards in the context of transitional justice and the violation of rights more generally; and citizens' socio-political views on their state or country's history determines how they understand current events, with histories of violations of human rights perpetrated by liberal democracies often being contentious or poorly understood due, at least in part, to the fact that it is difficult to reconcile these violations with established understandings of national identity.

Perhaps the most useful way to overcome this impasse is to recognize what unites past human rights abuses in places where transitional justice has historically been applied and in its new frontiers in liberal democracies. Notwithstanding the fact that these violations were committed a long time ago, or rather more recently, what both contexts show are ongoing violations. In post-conflict or post-authoritarian regimes, these violations are very present mostly in terms of violations of physical rights. In long-established liberal democracies, attention should be given to the effects of the colonial enterprise, which are most visible today in terms of discrimination against Indigenous groups and other victims of colonialism, such as African Americans in the US, as well as to the failure to fulfil basic economic and social rights. This is true in a number of the examples we have discussed: in Canada, where ostensible efforts to promote reconciliation still largely fail to address structural injustices and pervasive forms of poverty; in the United States, where recognition of, and efforts to address, violations of the rights of Indigenous peoples are even less developed; and, in a different way, in Namibia and other countries in the Global South that must confront a highly unequal global economic system.

By ushering in transitional justice policies in the Global South to deal with a recent past of violations, liberal democracies in the Global North have shown the way towards fulfilling the rights of victims of violations. However, these same liberal democracies are reluctant to implement transitional justice when they were the perpetrators. If liberalism is to be truly universal—and the international order, which is founded on and seeks to uphold liberal values, is to truly embrace the principles of equality and the rule of law—then all must have the same duties and obligations and must be subject to the same consequences if they fail to uphold these.

**Author Contributions:** Conceptualization: C.F.-T. and G.Y.; methodology: C.F.-T. and G.Y.; investigation: C.F.-T. and G.Y.; writing—original draft preparation: C.F.-T. and G.Y.; writing—review and editing: C.F.-T. and G.Y. All authors have read and agreed to the published version of the manuscript.

**Funding:** This research received no external funding.

**Institutional Review Board Statement:** Not applicable.

**Informed Consent Statement:** Not applicable.

**Data Availability Statement:** Not applicable.

**Conflicts of Interest:** The authors declare no conflict of interest.

## Notes

- <sup>1</sup> The topic was the focus of the report by Fabian Salvioli, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, submitted to the General Assembly in 2021 (United Nations General Assembly 2021).
- <sup>2</sup> It is relevant here to consider the rise of global neoliberalism in the context of decolonization. See Slobodian (2018).
- <sup>3</sup> According to the law passed on 6 November 2018, the commission's new mandate was not only extended four years, but also extended to investigate and establish the truth about "serious violations of human rights and international humanitarian law committed between 26 February 1885 and 4 December 2008", in particular to establish "individual responsibilities and those of state institutions, legal persons and private groups" and to "determine the role of the colonizing powers in the cyclical violence that has afflicted Burundi". Loi N°1/022 du 6 Novembre 2018, portant modification de la Loi N°1/18 du 15 Mai 2014, Droit, Pouvoir et Paix au Burundi, Article 6. Available at: [http://www.cvr.bi/wp-content/uploads/2021/01/CVR-Loi-du-6-Novembre-2018-vraie-version\\_compressed.pdf](http://www.cvr.bi/wp-content/uploads/2021/01/CVR-Loi-du-6-Novembre-2018-vraie-version_compressed.pdf) (accessed on 7 June 2023).
- <sup>4</sup> This is, at the time of writing, particularly relevant in the context of Pope Francis' visit to Canada and his agreement with the use of the word "genocide" to describe the Residential School system. Deer, Ka'nhehsí:io, "Pope says genocide took place at Canada's residential schools," CBC News, 30 July 2022. Available at: <https://www.cbc.ca/news/indigenous/pope-francis-residential-schools-genocide-1.6537203> (accessed on 7 June 2023).
- <sup>5</sup> Indeed, the trade of human beings and the commodities that they produced through forced labor was deeply entwined with the history of colonialism, with constant territorial expansion and involvement in the trans-Atlantic slave trade key features in the country's political, economic, and social history (accessed on 7 June 2023).

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