

## Research Brief

# Transitional Justice for Indigenous People in a Non-transitional Society

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**Research Project**

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**Identities in Transition**

In post conflict societies, histories of exclusion, racism and nationalist violence often create divisions so deep that finding a way to agree on the atrocities of the past seems near-impossible. This project seeks, first, to ensure that transitional justice measures are sensitive to the ways in which targeting people on the basis of their ethnic or religious identity may cause distinctive harms and, second, to clarify the difficult political challenges that arise in societies where communities are not ready to cooperate, or even agree on a definition of who the victims are. If transitional justice can find ways to act as a means of political learning across communities, foster trust and recognition, and if it can serve to breakdown harmful myths and stereotypes, then this will be at least a small step toward meeting the challenges for transitional justice in divided societies. The project is managed by Paige Arthur, Deputy Director for Institutional Development at ICTJ.

The framework of transitional justice, originally devised to facilitate reconciliation in countries undergoing transitions from authoritarianism to democracy, is increasingly used to respond to certain types of human rights violations against indigenous peoples—even in cases where there is no regime transition. The Canadian government has attempted to use such measures as reparations, a truth commission, commemoration and an official state apology to address the legacy of the Indian Residential Schools. This paper outlines some of the potential complexities involved in processing indigenous demands for justice through a transitional justice framework.

There are three broad areas in which the interests and goals of governments and indigenous peoples may clash. First, governments and indigenous peoples may differ over the scope of injustices that transitional justice measures can address. Second, governments may try to use transitional justice to draw a line through the past and legitimate present policy, whereas indigenous peoples may try to use the past to critique present policy and conditions. Third, governments may try to use transitional justice to assert their sovereign and legal authority, while indigenous peoples may make competing claims to sovereignty and legal authority.

**The Scope of Injustice**

A transitional justice framework addresses only a discrete segment of the historical injustices that have structured relations between states and indigenous peoples. In Canada, the government has attempted to use apologies and reparations to narrow the scope of government obligation and to shut down other indigenous demands. The government of Stephen Harper has explicitly offered an apology, a truth and reconciliation commission and a controversial human rights bill (C-21) as an alternative to the Kelowna Accord—a five billion dollar First Nations development package that was canceled when the Conservative Party entered office in 2006.

At the same time, the government has taken a neoliberal approach to economic development on reserves, focusing on resource exploitation and small business

development, rather than the priorities identified by First Nations and laid out in the Accord: education, housing, social welfare and health. The Harper government has also been insistent that its commitment to human rights justifies its refusal to ratify the UN Declaration on the Rights of Indigenous Peoples, a key demand of many indigenous leaders.

From the perspective of indigenous people, transitional justice measures should be designed to open up political space and to extend government responsibility beyond residential school survivors alone. Indigenous leaders have insisted that the legacy of the residential schools extends beyond individual survivors to include collective and cultural harms suffered by aboriginal communities, languages and cultures. They demand a framework that allows truth commissioners to reach out to aboriginals who are not school survivors and to support “community healing,” with outreach programs intended to draw whole communities, and not only survivors, into a common dialogue.

Indigenous leaders try also to extend the concept of transitional justice beyond the residential schools policy alone, to open up a broader debate on historic injustice. The residential school system was not an aberration in Canadian government policy toward First Nations, but rather part of a larger web of racist and oppressive government policies that have unjustly structured and limited the scope of indigenous life and life chances.

### **The Temporal Implications of “Transitional” Justice**

The scope of transitional justice is not only limited spatially, to a particular segment or type of injustice, but is also contested temporally. For the government, one goal of transitional justice is to draw a line through history. Such government initiatives as apologies, truth commissions and reparations are designed in part to allow the government and the dominant (settler) society to say “OK, now we’re finally even,” to the aboriginal peoples. The “transition” is to an even playing field in which the government can no longer be held accountable for past wrongs.

For indigenous leaders, transitional justice is not a wall, but a bridge. Aboriginal peoples have an interest in using apologies, compensation and truth commissions to draw history into the present, and to draw connections between past policy, present policy and present injustices. Whereas the government may try to use transitional justice to signal a break with the past, indigenous activists may try to use the past as a way to critique the present. The “transition” is to a relationship in which connections between past and present are firmly acknowledged, and in which the past guides present conceptions of obligation.

One of the most conspicuous connections between the residential school system and present government policy toward First Nations is child welfare. There are currently more than three times as many aboriginal children in the care of child welfare agencies

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as there were in residential schools at the height of the system—one in every ten aboriginal children has been removed from home by child welfare agencies. Numerous children are removed because they suffer neglect associated with substance abuse. Many of those substance abusing parents are residential school survivors.

Indigenous people often draw connections between the residential school system and present child welfare policies that remove aboriginal children from their homes and communities. First Nations seek jurisdiction over aboriginal child welfare. By linking the past with the present, a transitional justice framework may be used to illuminate the racism and cultural bias that continues to taint the relationship between the Canadian government and aboriginal families. Child welfare may be one specific area in which transitional justice can be deployed to shine a critical light on the present through the lens of the past.

## Sovereignty and Legal Pluralism

The issue of sovereignty importantly distinguishes attempts to use transitional justice measures in post-authoritarian and post-conflict societies from their use to address historic injustices against indigenous peoples in non-transitional societies. Transitional justice measures are designed in part to reinscribe a common national identity, legitimate the government and re-establish the moral authority of state sovereignty.

Yet, one of the historic injustices that lie at the heart of indigenous identity is loss of sovereignty. Indigenous peoples are defined in part by the fact that their sovereignty was not recognized by colonial powers that appropriated territory and sovereignty under the doctrine of *terra nullius*.

The use of a transitional justice framework, therefore, stands in tension with the conceptual and legal connection the indigenous rights movement has drawn between the historical loss of sovereignty and the contemporary political presence of aboriginal peoples, which practically limits their capacity to make claims to self-government and territorial autonomy. At the same time, many other indigenous demands rely on a presumption of state sovereignty, and rest on a history of exclusion from many of the social, economic and political benefits of citizenship.

The Canadian constitutional conception of “reconciliation”—which balances “the pre-existence of aboriginal societies [including their legal systems and their laws] with the assertion of Crown sovereignty” (Supreme Court of Canada, *R v Van der Peet*, 1996)—may be a valuable resource for transitional justice in the absence of regime transition. A truth commission may be explicitly tasked with incorporating indigenous conceptions of truth and reconciliation along with indigenous structures and procedures for achieving truth and reconciliation. Such a precedent could have juridical and jurisdictional implications that extend beyond the moment of transitional justice and strengthen indigenous law.

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### About the Author

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A transitional justice framework may also open space for aboriginals to draw on international laws, conventions and declarations that specifically address the rights of indigenous peoples. Although Canada voted against the UN Declaration on the Rights of Indigenous Peoples, the UN General Assembly passed the document, which may still be drawn down into Canadian jurisprudence. Truth and reconciliation commission officials should be proactive in clarifying the status of the Declaration in Canada and in creating opportunities to use and develop the principles of the Declaration in the work of the commission.

## Conclusion

When transitional justice measures are used in relation to indigenous peoples in cases lacking regime transition, their success must be measured by their capacity to transform the playing field. It is not enough for them to perform the standard functions of legitimation and national reconciliation for which they have been designed in post-authoritarian and post-conflict situations. In Canada, the transitional justice framework should be deployed to highlight the degree to which the residential school system was merely one prong of a much more comprehensive policy of aboriginal dispossession, exclusion and forced assimilation, with a continuing impact on aboriginal well-being, culture, physical and psychological health, wealth and citizenship rights. The scope of Canadian government obligation toward its indigenous population extends far beyond the legacy of the residential school system.

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The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit [www.ictj.org](http://www.ictj.org).

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