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Transitional Justice Accountability and Memorialisation: The Yemeni Children Affair and the Indian Residential Schools

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This article outlines the building blocks of transitional justice in democracies. Grounded in the premises of Historical Institutionalism, the article analyses the institutions and processes established and their effect on the outcomes. It offers a comparative analysis of two cases of transitional justice processes in democracies. These are the investigations of the disappearance of Yemeni children in Israel and the Indian Residential Schools Settlement in Canada. There are important similarities and differences between the two cases. In both settler societies the transgressions were part of aggressive assimilation policies directed at children in an attempt to wipe out the particular cultural influences of the children's family and community. In both cases, children were isolated from the influences of their ethnic group in order to be resocialised into the dominant culture. The dire consequences of both these were suppressed, denied and forgotten in official narratives. The different outcomes of these processes are explained by the differences in the intent to redress, the types of institution and the processes implemented.

Keywords: transitional justice, cultural trauma, renarrativisation, reconciliation

1. Introduction

Traumatic memories of the slave, the colonised and the oppressed are often undervalued. Their silencing and exclusion from official collective memory prove to be ineffective in eliminating traumatic memories, or in keeping them dormant.[1] Cultural trauma is 'a dramatic loss of identity and meaning, a tear in the social fabric, affecting a group of people who have achieved some degree of cohesion'.[2] The impact of trauma lingers on, for generations sometimes, impairing the group's identity in fundamental, irrevocable ways.[3] It is constructed and reproduced through various representations as collective memories, or by less conscious means such as identification and mimeticism.[4] In order to restore its collective mental health, a trauma-stricken group must retrieve the repressed memories and deal with them. Hence, as a way to reconstitute the collective, transitional justice intersects history, memory and collective identity; it is borne out of society's particular legacies of fear and injustice.[5]

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[1] On the impact of social trauma see Didier Fassin and Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* (Princeton University Press 2009).

[2] Ron Eyerman, 'The Past in the Present: Culture and the Transmission of Memory' (2004) 47 *Acta Sociologica* 160, 160.

[3] Jeffrey C Alexander, 'Towards a Theory of Cultural Trauma' in Jeffrey C Alexander and others (eds), *Cultural Trauma and Collective Identity* (University of California Press 2004) 1.

[4] Dominick LaCapra, *History in Transit: Experience, Identity, Critical Theory* (Cornell University Press 2004).

[5] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000).

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In recent years, non-transitional democracies have launched transitional justice processes in order to deal with troubled pasts. Transitional justice processes in democracies can be examined from a historical institutionalism perspective.[6] Such analyses aim to identify the short- and long-term goals, the institutions established, the processes undertaken and evaluation of the outcomes. This article focuses on the extent to which the transitional justice measures employed can indeed fulfil the promise of transformational change in the power relations among groups. Presumably, transitional justice measures in democracies address some of the outcomes of past wrongs without offering a comprehensive solution to structural inequalities.

This article provides a comparative account of two cases of transitional justice in democracies: the public inquiries into the Missing Yemeni Children Affair in Israel and the Indian Residential Schools Settlement (IRSS) in Canada. The cases share some important similarities. In both settler societies the atrocities were parts of aggressive assimilation policies. Both cases involved a specific intent by the state to destroy the particular cultural influences of the child's family and community and to assimilate children of these particular groups into the dominant culture. The cases differ on at least four important domains: the type of democracy, the intent to redress, the transitional justice measures employed, and subsequently the outcome.

I argue that transitional justice in democracies dithers between the desirable and the politically viable. It operates within the pragmatic rather than the visionary realm. The politics of transitional justice affect the initial decision to embark on a process, the structural aspects such as the particular choice of institutions and the procedures they undertake, the conditions and the outcome. Whereas transitional democracies delegitimise the predecessor non-democratic regime, the scope of transitional justice in democracies is limited. Such processes may challenge, or even delegitimise, specific past abusive practices and discourses, allowing states to remain within their comfort zone and limit the scope of the injustice. Therefore, transitional justice processes are restorative rather than transformative.[7]

The article proceeds as follows. The next section (Section 2) outlines the building blocks of transitional justice processes in democracies. The following section engages in an analysis of the Yemeni Children case and is divided into three sub-sections: the first unfolds the background to the case and the antecedents of the decision to introduce transitional justice measures; the second analyses the process of transitional justice as implemented in this case; the final sub-section reviews the outcome of the process. Section 4 then applies the structure of the previous section to the Indian Residential Schools Settlement. The final section discusses the role of institutional settings in transitional justice processes and offers some general insights into transitional justice in democracies.

[6] Sven Steinmo, 'What is Historical Institutionalism' in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (Cambridge University Press 2008) 150.

[7] Restorative justice principles intersect with victims' rights in relation to a range of classic transitional justice policies concerning truth, memorialisation and historical justice, as well as cases of reparative justice and restitution.

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2. THE BUILDING BLOCKS OF TRANSITIONAL JUSTICE IN DEMOCRACIES

Historical institutionalism addresses macro contexts, in which it theorises about the joint effect of institutions and processes.[8] This section offers an empirical elaboration of transitional justice as a process. A process typically centres on some essential building blocks. Transitional justice processes have been characterised as forward- and backward-looking, long- and short-term. Their pragmatic, goal-oriented mission is all too often conveyed in abstract and rather utopic expressions.[9] The pragmatic course of action is provided by the variety of processes and mechanisms that societies employ as means for dealing with a legacy of gross violations of human rights.[10] Its visionary aspects are much aspired long-term goals such as reconciliation, healing for the victims and peace.

The building blocks of transitional justice are the short-term objectives of truth, accountability, renarrativisation and memorialisation. These provide necessary but insufficient conditions for achieving the long-term goal of reconciliation.

Truth is fundamental to the process. It constitutes a necessary condition both for achieving democratic accountability and for the renarrativisation and memorialisation of wrongs. Uncovering the facts of the wrong is vital. Truth must be established as formally as possible and be widely recognised, accepted, rigorous and objective. It must join all the relevant facts about the violation into an undisputable narrative. In particular, transitional justice processes must inquire into facts that are subject to popular misgivings, disagreement or disbelief. They must also expose all antecedents to the atrocities. Thus, such processes need to rely on an unrelenting elaboration of the historical circumstances that led to the atrocities.[11]

Accountability is a multidimensional concept that has become a catch-all term.[12] Three dimensions of democratic accountability are particularly pertinent in the context of transitional justice. These are accountability for fairness, accountability for the use of power and accountability for performance.[13]

Accountability for fairness holds governments accountable for a variety of well-established norms, such as fairness and equity. Rules, procedures and standards codify expectations for the conduct of government. They provide checks and balances in a manner that regulates the distribution of power. Moreover, government is expected to be held collectively accountable for its performance – namely, for what a specific policy and its decisions have actually accomplished.[14]

[8] ibid 150.
[9] Teitel (n 5) 225.
[10] United Nations Secretary General, Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, UN Doc S/2004/616(2004), 4–5.
[11] Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425, 1433.
[12] William T Gormley Jr, 'Accountability Battles in State Administration' in Carl E van Horn (ed), *The State of the States* (4th edn, CQ Press 2006) 101; Robert D Behn, *Rethinking Democratic Accountability* (Brookings Institution Press 2001) 1.
[13] ibid 9–10.
[14] ibid 10.

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Transitional justice tools, such as investigative commissions, trials and truth commissions, establish both guilt and responsibility. Karl Jaspers described four types of guilt – criminal, political, moral and metaphysical – that correspond to four loci of jurisdiction and responsibility.[15] Political guilt involves the acts of both the politicians and the citizenry, who are all responsible. Arbitrary power is mitigated by political forethought, and the acknowledgement of norms that are applied as natural and international law. In defining metaphysical guilt, Jaspers referred to the solidarity among human beings that makes each member collectively responsible for every wrong and every injustice in the world, especially for crimes committed in the presence or knowledge of the individual.[16] In such cases, individuals can be held accountable for failing to prevent a violation.

Truth and accountability furnish both the motive and justification for embarking on transitional justice. Such a process must begin with the dissemination of truth and be followed by renarrativisation. Recognition is often followed by the naming and shaming of the responsible parties, which provide a form of punishment. Public awareness of the injustice subsequently leads to the condemnation of the perpetrators.[17]

Renarrativisation and memorialisation are essential, as dark pasts cannot simply be ignored.[18] Dark pasts become hopeful if they manage to solicit individual and collective consciousness to engage in renarrativisation.[19] Yet transitional justice is often criticised by defenders of the status quo for dwelling on the past rather than on the future.[20] Moreover, further concerns elaborate on the risk of developing a psychological make-up of a victim and the use of victimhood as a tool of power.[21]

Reconciliation is not merely a long-term aspired goal; it is also a process.[22] As a process, it leads the way towards the final goal, preventing the use of the past as the cause of renewed conflict. Reconciliation is grounded in the present, yet it is composed of backward- and forward-looking dimensions. Its backward-looking qualities contribute to the healing of the victims through reparation. Renarrativisation provides the acceptance of a common vision and understanding of the past. In its forward-looking capabilities, reconciliation enables both victims

[15] Karl Jaspers, *The Question of German Guilt* (Greenwood Press 1978) 55–75.
[16] ibid 26.
[17] Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn, Oxford University Press 2001) 151.
[18] Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 2004) 674; Hannah Arendt, *Men in Dark Times* (Harcourt, Brace & World 1968).
[19] Johann Baptist Metz, 'The Future in the Memory of Suffering' in Johann Baptist Metz (ed), *New Questions on God* (Herder and Herder 1972) 9, 9–10.
[20] Charles S Maier, 'Overcoming the Past? Narrative and Negotiation, Remembering and Reparation: Issues at the Interface of History and the Law' in John C Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman and Littlefield 2003) 295, 295–304.
[21] See discussions in John C Torpey, *Making Whole What Has Been Smashed: On Reparation Politics* (Harvard University Press 2006); Ruth Amir, *Who is Afraid of Historical Redress? The Israeli Victim-Perpetrator Dichotomy* (Academic Studies Press 2012) 39.
[22] David Bloomfield, 'Reconciliation: An Introduction' in David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance (IDEA) 2003) 10, 10.

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and perpetrators to resume life at both the individual and societal levels. It also contributes to the establishment of a political dialogue between equals and the sharing of power.[23]

Reconciliation not only circumscribes the goal of legitimating state power, but also the aspiration for political community based on consent and shared norms.[24] This notion converges with the view that violations against groups constitute offences against the law of nations, for they undermine the very basis of harmony in social relations between particular collectivities.[25] The United Nations General Assembly (UNGA) reiterated this idea in its first session. The denial of the right of existence shakes the conscience of mankind, and brings about great losses to humanity through the loss of cultural and other contributions represented by these human groups. Such acts violate moral law and the spirit and aims of the UN.[26] In Ruti Teitel's words, '[r]eparatory projects vindicate rights generated by past wrongs to victims as well as to the broader society'.[27] In this, she maintains, transitions 'reconstruct the parameters of the changing political order in a liberalising direction'.[28]

3. THE YEMENI CHILDREN AFFAIR

3.1 BACKGROUND

General Israeli historiography and the Zionist master narrative tend to exclude the Yemeni immigrants from the major immigration waves, treating their immigration as a distinct phenomenon.[29] Hence, the Yemeni immigration between 1881 and 1914 was named after the biblical verse 'I will climb up into the palm tree …'[30] This omission is particularly blatant when one considers the admiration for the parallel immigration waves from Europe – first, and particularly, Second *Aliyah*, the Israeli equivalent of the Mayflower.[31] Moreover, the official Zionist narrative

[23] Luc Huyse, 'The Process of Reconciliation' in Bloomfield, Barnes and Huyse, ibid 19, 19.
[24] Bronweyn Ann Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30(1) *Human Rights Quarterly* 95, 105.
[25] Raphael Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences against the Law of Nations', Additional Explication to the Special Report presented to the 5th Conference for the Unification of Penal Law, Madrid (Spain), 14–20 October 1933, http://www.preventgenocide.org/lemkin/madrid1933-english.htm.
[26] UNGA Res 1(1946), 11 December 1946, UN Doc A/RES/96(I) (1946).
[27] Teitel (n 5) 7.
[28] ibid 7.
[29] Shafir and Peled noted that the most revealing case of Orientalist attitudes reflected towards immigrants from Asia, Africa and the Middle East was that of Yemeni Jews: see Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge University Press 2002) 75–76.
[30] Song of Songs 7:9. The Hebrew name *Tamar* (palm) together with the prefix 'into' is an anagram for the Jewish year 5642 (which started on 24 September 1881 and ended on 13 September 1882).
[31] Most of Israel's Founding Parents immigrated during Second *Aliyah* between 1904 and 1914. Israeli official historiography classified this migration as the most ideologically motivated of all immigration waves. Contra, see Gur Elroi, *Immigrants: The Jewish Immigration to Eretz Israel during the Early 20th Century* (Shlomit Masholam (ed), Yad Yitzhak Ben Zvi 2004) 11 (in Hebrew); Elroi's criticism of this argument is not extended to the exclusion of Yemeni Jews from Second (and also First) *Aliyah*. The Yemenis are completely ignored in his book cited above. While the book focuses on the mass immigration of European Jews, its subtitle suggests

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is also oblivious of the fact that during the period from 1943 to 1945, when immigration to Palestine was almost halted, the only mass immigration to Palestine was that of Yemeni Jews.[32]

The mass migration of Yemenis to Israel started out as the Zionist movement insisted on building Israel by Jewish labourers.[33] Yemeni Jews were brought to Israel because they were characterised as 'natural workers'; in other words, accustomed to the difficult conditions, thankful, and satisfied with little.[34] Arthur Ruppin of the World Zionist Organization, and a founder of the Palestine office of the Zionist organisation, sought to mobilise: 'Yemenite Jews are used to a hot climate and have a lower standard of living.'[35] Ruppin viewed the Yemenis as the most faltering social group in Jerusalem. His impression was that they were perhaps the only Jews engaged in drudgery.[36] At the time, Jewish farm owners employed experienced Arab workers and were not keen to employ the inexperienced Zionist pioneers who demanded higher wages. While, for Ruppin, the Yemenis could be paid less than the wages paid to Arabs, he argued against the exploitation of the agricultural workers who had emigrated from Russia.[37]

Hence, Yemeni-Jewish men, under 35 years of age, in near perfect health, were brought to Palestine as migrant workers towards the end of the nineteenth century.[38] This pull-immigration was to serve the economic interests of the Jewish Settlement in Palestine. Unlike other pioneers,

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a more general focus, from which Yemeni Jews are omitted. This, unfortunately, is quite representative. The immigration of the Yemenis is treated separately from both the European and North African immigration waves.

[32] Dov Levitan, 'The Immigration of Yemeni Jews to Israel: The Realization of a Dream or a Social Dilemma: The Case of the Missing Yemeni Children' in Eliezer Don-Yihya (ed), *Between Tradition and Renewal: Studies in Judaism, Zionism and the State of Israel* (Bar Ilan University Press 2005) 379–80 (in Hebrew); Dov Levitan, 'Immigration of Yemeni Jews and their Absorption in Palestine during WWII' (1994) 4 *Thema* 207, 207–26 (in Hebrew). Levitan defines mass immigration as the organised immigration of thousands of Jews during a short period and their absorption in temporary housing facilities. After 1945, immigration certificates were allocated to Jewish refugees fleeing from Europe. Between August 1943 and June 1945, approximately 5,000 Yemeni Jews arrived in Palestine. Thus, the Yemeni immigration was almost halted since June 1945 (only 160 certificates were allocated to Yemenis) and resumed in mid-December 1948. See also Haim Zadok, *From the Strait: Missives, Documents and Letters* (Afikim 1989) (in Hebrew).

[33] Shoshana Madmoni-Gerber, *Israeli Media and the Framing of Internal Conflict: The Yemenite Babies Affair* (Palgrave Macmillan 2009) 26; Yosef Meir, *The Zionism Movement and the Yemenite Jews* (Afikim 1983) (in Hebrew).

[34] Baruch Kimmerling, *Immigrants, Settlers, Natives: The Israeli State and Society between Cultural Pluralism and Cultural Wars* (Am Oved 2004) 101 (in Hebrew); Nitza Droyan, *No Magic Carpet: Yemeni Immigrants in Eretz Israel 1881–1914* (Yad Yitzhak Ben Zvi 1982) 134 (in Hebrew): Kimmerling noted that a Yemeni worker earned about 20 per cent of the wage of a Russian worker in Palestine. See Gershon Shafir, 'Zionism and Colonialism' in Michael N Barnett (ed), *Israel in Comparative Perspective: Challenging the Conventional Wisdom* (SUNY Press 1996) 227, 227–42; Shafir and Peled (n 29) 76: Shafir noted that the immigration of the Yemenis was a case of ethnic plantation colonialism. The ethnic plantation colony was based on European control of the land and local labour. Israel diverges from the common model of colonialism in that in spite of the planters' preferences for local labour, it also sought massive Europe immigration. The Zionist settlers implemented the homogeneous type of colonisation that diverged from the typical colonial model. According to Shafir, these differences 'have not eliminated its fundamental similarity with other pure settlement colonies'.

[35] Arthur Ruppin and Alex Bein, *Arthur Ruppin: Memoirs, Diaries, Letters* (Weidenfeld and Nicolson 1971) 109.

[36] Arthur Ruppin, *My Life* (Am Oved 1947) 27 (in Hebrew).

[37] Yaakov Thon, director of Hachsharat Ha'Yishuv, Israel Land Development Company and Ruppin's deputy at the Palestine office of the Zionist organisation, shared this view. Thon claimed that it was doubtful whether Ashkenazi Jews were qualified to work in menial labour. See Meir (n 33) 43; Madmoni-Gerber (n 33) 26.

[38] Nissim Benjamin Gamlieli, *Yemen and Camp Geula* (Nissim Benjamin Gamlieli and Sons 1966) 142–43 (in Hebrew).

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Yemenis were employed by associations of settlements and not directly by the farmers. Their wages were lower than those of the Arab workers.[39] Exploited and often physically abused, they complained of the treatment by the Jewish Settlement, who did not consider them 'brothers that came to Zion rejoicing, but rather as bond slaves'.[40] Yemeni workers were excluded from their collective settlements, and were housed in separate quarters on the outskirts of the agricultural settlements.[41]

Non-selective immigration was facilitated in the latter half of 1948 with the establishment of the State of Israel. The effects of the migrants' extended stay in immigrant camps in Aden were clearly evident in their poor health.[42]

The immigrants were totally dependent on the state. The camps were total institutions. The inmates had no control over their life. Babies were taken to infants' homes after birth; the inmates were not employed and were entirely dependent on the absorbers, for food and all other needs. Life at the camps resembled life at Camp Geula. The Jewish Agency denied the Yemeni children religious education. When the Yemenis protested, the camps became closed compounds. Barbed-wire fences and guards isolated the inmates from the outside world, rendering them de facto prisoners. The migrants were treated with paternalism and faced an unrelenting assimilation policy.[43]

At the heart of this policy of assimilation was the secular education system controlled by *Mapai* and a secular public space. Parents had not been consulted and had no control over the schooling of their children. The immigrants were denied religious education and religious freedom.[44] The forced trimming of the sidelocks of Yemeni children was part of the aggressive measures taken to secularise and assimilate them.[45]

Upon arrival in Israel, babies and toddlers were separated from their parents.[46] The Executive of the Jewish Agency had issued a directive to the managers of the camps, which applied predominantly to Yemeni immigrants.[47] This was borne out of the construction of the Yemenis

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[39] Droyan (n 34) 102.

[40] Yehuda Nini, *Yemen and Zion* (The Zionist Library by the World Zionist Organization 1982) 229 (in Hebrew).

[41] Shafir and Peled (n 29) 75–76.

[42] Gamlieli (n 38).

[43] Zvi Zameret, *The Melting Pot in Israel: The Commission of Inquiry Concerning Education in the Immigrant Camps during the Early Years of the State* (SUNY Press 2002) 68.

[44] On life in the transit camps in Israel see Moshe Shonfeld, *Genocide in the Holy Land* (Neturei Karta of the USA 1980) 304, 503.

[45] Beyond their significance in Judaism as part of the Biblical prohibition on Jewish males against clipping the hair at the temples: 'Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard' (Lev 19:27). Yemeni Jews refer to their sidelocks as *simanim*, which literally means 'signs'. Historically, this was the main feature that differentiated them from Muslims in Yemen.

[46] Yehuda Cohen and Yaakov Kedmi, 'Report: State Commission of Inquiry in the Matter of the Disappearance of Children of Yemeni Immigrants between 1948–1954', November 2001 (The Government Printer 2001) 38–39 (in Hebrew). Hundreds of infants were removed from their families – forcefully, if the parents objected – and were placed in infants' homes. In this the management of the immigrants' camps assumed full responsibility over these infants.

[47] While about one third of the cases of missing children examined by the three Commissions (see below) belonged to other ethnicities, the disappearance of the children was almost exclusively a Yemeni ordeal. See Boaz Sangero, 'Where There Is No Suspicion There Is No Real Investigation: The Report of the Committee of

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as primitive and uncivilised, who underwent a radical transformation through immigration to Israel. The practice of separating infants from their families was justified by alleged parental incapacity and the inadequate sanitary conditions at the immigrants' camps.[48] Prime Minister David Ben-Gurion's letter to the Army Chief of Staff, Yigael Yadin, conveys[49] the prevailing view about the Yemenis that were allegedly

> … far from us [by] two thousand years, if not more. He is devoid of the fundamental and primary tenets of civilisation (as distinguished from culture). The treatment [by Yemeni man] of the wife and children is that of a primitive person … The Yemeni father does not take care of his children and family in the manner that we do, and he is not used to feeding his children to the point of satiation before he feeds himself.

Giora Josephthal, Head of Absorption Department at the Jewish Agency, had given instructions to forcefully separate sick children from their families. He argued[50] that

> [b]ecause in some cases Yemeni mothers refused to give their children to hospitals or infants' homes, although the children were to be in danger if untreated in a medical institution, it is necessary in such cases to take the children by force. … [M]ost of the Yemeni mothers are indifferent to the destiny of their children. They are themselves sick and frail, and they have almost no technical opportunity to check where their babies were sent and what happened to them.

Between 1948 and 1954 at least 1,500 newborn babies and infants disappeared from hospitals or childcare facilities in the immigrant transit camps and in towns.[51] Among them were around 250 children of diverse ethnicities who went missing from hospitals.[52] The mystery surrounding the disappearance of the children, which has not been resolved to date, produced rumours and speculations about the seriousness of the phenomenon and the children's whereabouts.[53]

Inquiry into the Disappearance of the Children of Jewish Yemenite Immigrants to Israel in 1948–1954' (2002) 21 *Theory and Criticism* 47, 68–69 (in Hebrew); Cohen and Kedmi, ibid 38, 51. Only Yemeni children were forcefully placed in infants' homes; babies from other ethnic groups disappeared from hospitals.

[48] Temporary housing was provided by the state and its affiliated bodies. Thus, the conditions at the camp were under its responsibility. Moreover, the immigrants arrived from similar camps in Aden, where they lived for years under the same regime operated by Jewish organisations.

[49] David Ben-Gurion, 'A Letter from David Ben-Gurion to Yigael Yadin' in Yemima Rosenthal and Eli Shealtiel (eds), *Commemorative Series of the Presidents of Israel and its Prime Ministers* (The State Archives 1997) 169 (in Hebrew). David Ben-Gurion wrote to IDF Chief of Staff, Yigael Yadin, about the efforts made by the Israeli Navy to take care of Yemeni immigrants at a temporary housing facility.

[50] Haim Zadok, *The Load of Yemen 1946–1951: Five Countless Myriads* (A'Ale Batamar 1985) 132 (in Hebrew).

[51] The numbers are estimated in Cohen and Kedmi (n 46) 22. The report notes that the number of cases in the reports (1,033 in Israel and 20 in Hashed, investigated by all three Commissions) does not reflect the actual number of missing children because there were no reported cases. See also Sangero (n 47) 47–48.

[52] Amir (n 21) 99; Cohen and Kedmi (n 46).

[53] The figures were between 1,500 and 5,000, according to Sangero (n 47) 62–64. Some Yemeni sources quote up to 10,000 children. Some accounts suggest that the children were trafficked in Israel and abroad. Testimonies suggested that children were sold to families abroad for $5,000, or given up for adoption to childless Ashkenazi families. There are uncorroborated allegations that the children were transferred to Christian missions or were subject to clandestine medical experiments. See, for example, Y Harris, *On the Claws of Eagles: The*

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In most cases, parents were not notified personally of the death of their child. Many testimonies revealed that deaths were announced at random, along with other public announcements. In many cases, parents learned of their child's death when they came to visit the child. Most parents neither saw the body of their allegedly dead child, nor were they allowed to conduct a funeral and mourn the deceased child. Many remained uninformed about the fate of their child or his or her burial place.

The Yemeni Children affair went on hiatus for nearly two decades, as is often the case with individual or collective trauma.[54] During the mid-1960s, official letters and notifications addressed to the missing children – such as election notifications, military induction orders, and population registry notices stating that the child had left the country – aroused the families' suspicions that the disappearance of their children was the result of foul play. The siblings of the missing children now took the matter into their hands. Their socialisation into Israeli society had made them less trusting of the establishment. Unlike their parents, they were not obedient disciples and they demanded answers. Ironically, while this clearly marks their integration into Israeli society and a departure from their parents' helplessness, this latency is symptomatic of both individual and collective trauma.

On 1 April 1966, the story made front-page headlines in *Ma'ariv*.[55] Journalist Yosef Zuriel unveiled the stories of four couples whose children went missing in the same circumstances. The story referenced a total of twelve such cases. Since the number of the missing children was unknown, Yemeni activists summoned a gathering and established the Public Commission for Discovering the Missing Children of Yemeni Immigrants (the Public Commission). This Commission gathered information from families using a standard questionnaire, and distributed pamphlets calling for families to testify and demand an investigation. It also launched a public campaign in the daily press and in Parliament.[56]

On 19 July 1966, Knesset member Baruch Uziel issued a motion for the agenda in which he brought up the disappearance of the children and demanded an investigation.[57] Justice Minister, Jacob Shapiro, agreed with Uziel that the matter should be investigated, yet he seemed determined to prevent the deliberation of this issue in the Knesset Assembly. Moreover, Shapiro opposed the idea of establishing a parliamentary investigative commission. He suggested instead

Whole Truth on the Magic Carpet Affair (Torat Avot 1988) (in Hebrew); Joseph B Schechtman, *On the Wings of Eagles* (T Yoseloff 1961) 433–35; Shalom Cohen, 'A Baby for $5,000', *HaOlam Haze*, 11 January 1967 (in Hebrew).

[54] Fassin and Rechtman (n 1) 16.

[55] Yosef Zuriel. 'Twelve Mothers in Search of their Children', *Ma'ariv*, 1 April 1966, 8 (in Hebrew); Baruch Meiri, 'A Conference Held by Parents of Missing Children from "Magic Carpet"', *Ma'ariv*, 22 August 1966, 8 (in Hebrew).

[56] Meiri, ibid 8; Madmoni-Gerber (n 33) 70–77; Joseph Harif, 'The Mystery of Yemeni Children – In Cabinet', *Ma'ariv*, 14 October 1966, 10 (in Hebrew).

[57] Uziel was Representative of the Herut-Liberal bloc, an opposition party led by Menachem Begin. Uziel was member of the Parliamentary Committees of education and public services, and of a special committee that examined the structure of the Israeli education system. In the fifth Knesset, he had chaired a sub-committee on the education of immigrant youth.

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bringing the matter before the Public Services Parliamentary Committee of which Uziel was a member.[58]

This Parliamentary Committee was apprehensive because it lacked sufficient resources to conduct an investigation in parallel with its regular duties. Shapiro therefore recommended that the Israeli police conduct an investigation. The police investigators were to report the findings to the Public Services Committee from time to time. The latter was to report to the Knesset.[59]

Shapiro's proposal implied that the government was keen to curb public debate and limit its scope. The vague time frame in which the police were to report to the Parliamentary Committee implied that the government was attempting to cover up the affair and pacify the public. Moreover, the Committee was considered to be not that important among other parliamentary committees. This can clearly be inferred from its membership, which was mostly women, Oriental and ultra-orthodox Jews, joined by two Ashkenazi male members of the Parliamentary Opposition. Of the ten women members of the Sixth Knesset, seven were members of the Committee. In Israeli political- militaristic culture, Ashkenazi males stood a better chance of being appointed to the more prestigious parliamentary committees of foreign affairs, security or finance. On 14 October 1966, following public pressure, the issue was finally placed on the government's agenda by Minister of Welfare, Joseph Burg, and Minister of Religions, Zerach Warhaftig, both representatives of the National-Religious Party.[60] Minister of the Interior, Haim Moshe Shapiro, representative of the same party, finally decided to form an inter-ministerial investigative commission.[61]

3.2 PROCESS: THE TRANSITIONAL JUSTICE MEASURES EMPLOYED

Investigative commissions provide a quasi-legal mechanism for factual inquiry into matters of vital public importance.[62] The 1968 Israeli Commissions of Inquiry Law constituted three types of such commission, two of which were employed in this case. The formation of a commission is suggestive of the government's responsiveness. Investigative bodies vary in the government's extent of discretionary authority over their scope, composition and methods of inquiry.[63] The typically protracted investigations conducted by commissions can contain public pressure, push the issue out of the public agenda and bypass operative measures of accountability.

[58] Knesset Members Parliamentary Activity, Baruch Uziel, Israeli Knesset, http://www.knesset.gov.il/mk/heb/mk.asp?mk_individual_id_t=551.
[59] Joseph Bahaloul and Reuben Minkowski, 'Report – Commission of Inquiry of the Finding Yemeni Children' (The Government Printer 1968) 4.
[60] The 13th Government, Israeli Knesset, Government of Israel, http://www.knesset.gov.il/govt/heb/GovtByNumber.asp?govt=13.
[61] Harif (n 56).
[62] Law on Inquiry Commissions, 1968 (Israel), s 1.
[63] For example, for a government Commission of Inquiry, in accordance with the Law of Government, the composition, authorisation and charter are determined by the government. In contradistinction, once a government decides to form a state Commission of Inquiry, the judiciary takes charge of the process.

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Three Commissions of Inquiry investigated the whereabouts of the Yemeni children. The Bahaloul-Minkovski inter-ministerial Commission investigated claims concerning the disappearance of babies from immigrant camps between 1949 and 1954.[64] This Commission was formed in 1966, following the Minister of Interior's proposal of 13 October 1966.[65]

A government Commission of Inquiry chaired by retired Justice Shalgi was appointed in 1988 to investigate cases and factual materials that had not been examined by its predecessor.[66] The mandates of both Commissions were narrow. The inquiry was limited to the whereabouts of each of the children. Neither Commission summoned the families for testimony; rather, they delegated the collection of missing person reports to the Public Commission. Hence, the mystery surrounding the disappearance of the children was not resolved.

During the early 1990s, Israelis seemed to recognise the growing ethno-cultural diversity in Israel, and were ready to review the official narrative and revise it.[67] Israeli public discourse was concerned with the immigration experiences of Israelis of various ethno-cultural groups. Among these experiences, those of Oriental Jews triggered much criticism.

The long-overdue Cohen Commission, a state Commission of Inquiry, was formed on 8 January 1995.[68] The opening section of the report states that the Commission sought two objectives. First, it was to study the scope of the phenomenon, the circumstances in which it occurred and to find those responsible.[69] Second, it was to inquire into what had happened to each of the missing infants and to notify the families of the whereabouts of their children.[70] For the first time, the affair was investigated as a systemic and systematic phenomenon, rather than simply as a series of discrete unconnected cases. The families and the public at large were to testify and provide information. Whereas some of the hearings were public, the protocols of all three Commissions still remain sealed and inaccessible.[71]

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[64] Bahaloul and Minkowski (n 59).

[65] This can be considered to be an inter-ministerial commission of inquiry under the Commissions of Inquiry Law.

[66] Moshe Shalgi, 'Report of the Commission of Inquiry of the Disappearance of Yemeni Children (The Government Printer 1994) (in Hebrew).

[67] Ruth Amir, 'Citizenship, Religion and Transnational Identities' in Rachel Brickner (ed), *Migration, Globalization and the State* (Palgrave 2013) 127, 140–41

[68] The Cohen State Commission of Inquiry is known as the Cohen-Kedmi Commission. Justice Cohen resigned in February 1999 and was replaced by Justice Kedmi. A trigger for the establishment of the Commission was the Uzi Meshulam affair. Uzi Meshulam, a former school teacher, claimed that 10,000 Yemeni babies had been kidnapped and sold in the United States in order to participate in medical experiments, similar to those conducted in Auschwitz by Mengele. A conflict between Meshulam and a local sewage contractor in the town of Yehud heated up and required police intervention. Meshulam suspected that the contractor was acting on behalf of the Israeli Security Agency and that the house under construction was to be used for surveillance. Meshulam argued that he was being persecuted because of his preoccupation with the Yemeni Babies Affair and demanded that a state commission of inquiry be formed to investigate the case of the missing Yemeni children. Meshulam and his followers entrenched themselves at his house in Yehud, turning it into a bunker fully equipped with ammunition and reinforced with barrels, bricks and sandbags. For six weeks snipers and special police units surrounded the compound. On 10 May 1994, following negotiations, Meshulam was lured out of the compound to meet with the chief of police. Special police units seized this opportunity to break into the compound, killing one of his followers, and took eleven people into custody. Meshulam was arrested, tried and sentenced to imprisonment. See Amir (n 21) 112.

[69] Cohen and Kedmi (n 46).

[70] ibid 26.

[71] In January 2013 the proceedings of the Cohen-Kedmi open hearings became available.

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The Commission had narrowed the scope of the investigation by limiting the years under investigation, refusing to hear cases of disappearances that took place back in Hashed in Yemen, refusing to hear cases of kidnapping from other Mizrahi ethnic groups, and refusing to investigate the taking of communal cultural artefacts such as holy books and jewellery during the migration journey to Israel.[72] It was only after Yemeni activists exerted considerable pressure that the Commission agreed to include testimonies from other Mizrahi parents, as well as some cases from the immigrant camp of Hashed.[73]

The Cohen-Kedmi Commission submitted its report in 2001. Like its predecessors, the Commission relied exclusively on the official documentation provided to it by the entities under investigation. The Commission described these documents as sketchy, deficient, or altogether missing.[74] Some of the investigated entities destroyed their relevant archival materials while the investigation was under way. In the event of conflicting documentation and oral testimonies, the Commission relied on the official documentation.

The report met the Yemenis' grievances with unsubstantiated counterclaims regarding the parents' negligent conduct in not maintaining contact with the babies. It used legal strategies to disprove the allegations of state-organised kidnapping. The main finding was that the children were lost to their parents and that the vast majority were dead. While the Commission further ruled out the possibility of state-organised foul play, it failed to inquire into whether some private interests were engaged in illegal adoptions.[75]

3.3 Outcomes

The Yemeni Children Affair is an illuminating case of Israeli society dealing with its troubled past. The past is constructed as part of an ethno-cultural hierarchy that reflects both historical and current power relations in Israeli society. The Yemeni campaign was apparently driven by the need to inquire into the fate of the babies but, at the same time, it was an attempt to challenge the hegemonic order by breaking the silence surrounding the case.

An analysis of the reports of the three Commissions of Inquiry suggests that the investigation was no more than a ritual.[76] While the state opted for an investigation, it seems that it had no sincere intention to uncover the truth. The reports of all three Commissions were geared towards convincing the public in general and the Yemenis in particular to deny the allegations that the children had been abducted. All three Commissions set out to vindicate the establishment and the various officials, and to remove the issue from the public agenda.[77]

[72] Levitan (n 32) 377–403; Madmoni-Gerber (n 33) 36.
[73] Shoshi Zaid, *The Child is Gone: The Yemeni Children Affair* (Gefen 2001) 101 (in Hebrew). Madmoni-Gerber (n 33) 136.
[74] Cohen and Kedmi (n 46).
[75] See the allegations regarding the child-rearing practices of the parents in Zaid (n 73).
[76] Sangero (n 47) 75.
[77] ibid; Ehud Ein Gil, 'Questions to Members of the Commission', *Ha'aretz*, 7 December 2001, 60 (in Hebrew).

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The truth was never revealed by any of the three Commissions of Inquiry. It still seems that, although more than 60 years had passed, Israel is still reluctant to confront this dark chapter. Many of the records and protocols of the three investigative Commissions, particularly those conducted behind closed doors, are not accessible to researchers or the public. The truth about the whereabouts of the children is still buried, denied and suppressed.

Of the three, the Cohen-Kedmi Commission represented both the most promise and the most disappointment. On the one hand, as a state commission of inquiry it was a priori more independent and enjoyed more powers than the other two Commissions. The legal jargon of the lengthy report is factual and reads like a verdict. On the other hand, the Commission failed to use its legal power to conduct an active inquiry. Rather, like a court of law, it reviewed the evidence brought before it. The Commission did not inquire into the destruction of archives and documents while it conducted its investigation, nor did it use its power to subpoena witnesses.[78] All three reports failed to employ the epistemology of suspicion expected from an investigative body.[79] While all three Commissions noted the absence of order and the missing, incomplete and faulty documentation, they nevertheless relied on it exclusively. The oral testimonies of the parents were discounted even where the child's sex, age, or indeed his or her mere existence were disputed. These juridical, factual, verdict-like reports left no room for recognition, empathy or an official apology, not to mention reconstruction of the relationships.

The reports of all three Commissions adopted a mild tone with regard to accountability. Words such as 'guilt', 'negligence', or even 'vicarious responsibility', are not to be found in any of the reports in relation to a particular person or an entity. The most forceful words used were 'administrative error' or 'helplessness'. The only office holders found to be somewhat responsible were the Jewish Agency Executive, the managers of the camps and the managers of the infants' homes. They were held responsible for the loss of contact between the babies and their families. However, aside from the Jewish Agency Executive, the other entities ceased to exist long before even the first report was published.

The investigation limited the scope of the injustice, privatised it, and stripped it of any ethnic context. All three Commissions found that the care of the Yemenis was in good faith and blamed the ill-health of the immigrants on the conditions at the camps.[80]

The official narrative that provides the background to all three reports was amiss and lacked historical authenticity.[81] It merely reproduced the Orientalist prejudices regarding the Yemenis and it is tainted with paternalism and disrespect.[82] The official narrative of the Yemeni immigration to Palestine/Israel served to establish the myth of the redemption of the Yemenis through their migration to Israel and of the benefits of the melting pot ideology. The tragedy of the

[78] Sangero (n 47) 54–55.
[79] ibid 48.
[80] Cohen and Kedmi (n 46); Amir (n 21) 118–19.
[81] ibid 119.
[82] Throughout the reports of all three Commissions one can detect the Orientalist views about the Yemenis in the blaming of the victims' child-rearing practices, their naiveté, their naming convention and hygiene. Their testimonies on issues such as their child's sex, age or condition were often rejected as false: see ibid; Zaid (n 73) 45–47; Madmoni-Gerber (n 33) 131–34, 137; Sangero (n 47) 57–58.

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children is but one aspect of the wrongful treatment of the Yemenis, both in Yemen and Israel, in relation to their migration.

In the aftermath of the inquiry, no official apology was granted, no individual or party was blamed and found accountable, and no symbolic or material memorialisation was demanded or offered. The process did not culminate in the restructuring of the relationship between the state and the aggrieved group, or even in a reconstructed narrative of the Yemeni Children Affair.

4. THE INDIAN RESIDENTIAL SCHOOLS SETTLEMENT

4.1 BACKGROUND

Abuses in Indian residential schools have resulted in numerous lawsuits by Aboriginal litigants against four Christian denominations and the Government of Canada. A suggestion has been made that many of these litigants may suffer from a unique form of post-traumatic stress disorder, termed 'residential school syndrome'.[83] Another concept that is used to refer to the effect of residential schools on Aboriginal communities is 'historical trauma',[84] which is conceptualised as a generalised inter-generational condition dating back to the days of colonisation.[85]

The lives of Aboriginal Peoples in Canada have been deeply scarred by the colonial and post-colonial history of exclusion, dispossession and forced assimilation, and it is thought that many suffer from 'historical trauma'.[86] Indigenous peoples have experienced loss in nearly every aspect of their lives: the loss of sovereignty, land, community, culture, language, and limited access to resources and life opportunities. Although the living standards of the Aboriginal Peoples have improved in the past 50 years, they do not come close to those of non-Aboriginal people. Aboriginal people have lower life expectancy; illness is more prevalent among them, as are human issues such as family violence and substance abuse. Fewer Aboriginal children graduate from high school or acquire higher education at colleges and universities. Employment rates are lower; more Aboriginals spend time in prison.[87]

The Royal Proclamation of 1763 had defined the relationship between Aboriginal and non-Aboriginal people in North America. Issued in the name of the king, the Proclamation established the rules that were to govern British dealings with Aboriginal people – especially with regard to aboriginal title to land.[88] The British North America Act of 1867 granted the federal Parliament legislative authority over Indians, and land reserved for the Indians.[89] In 1876, the

[83] Charles R Brasfield, 'Residential School Syndrome' (2001) 43(2) *BC Medical Journal* 78; Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Minister of Public Work and Government Service 2000).
[84] Aaron Denham, 'Rethinking Historical Trauma' (2008) 45(3) *Transcultural Psychiatry* 391, 391–92.
[85] Law Commission of Canada (n 83) 209; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Vol 1, Looking Forward, Looking Back* (Canada Communication Group 1991) 479, 579.
[86] Denham (n 84).
[87] Royal Commission on Aboriginal Peoples (n 85) 9.
[88] ibid 12; Richard H Bartlett, 'The Indian Act of Canada' (1977) 27 *Buffalo Law Review* 581, 581.
[89] Constitution Act 1867 (UK), ss 30 and 31; RSC 1985, App 2, No 11.

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first consolidated Indian Act reflected the government's preoccupation with land management, First Nations membership and local government, and the ultimate goal of assimilation of Canada's Aboriginal population.[90] The Indian Act, which has been subject to numerous amendments since its enactment, remains the principal tool for the exercise of power over 'status Indians' and governs many aspects of their lives.[91]

The often conflicting goals of 'civilisation', assimilation and the protection of Indian peoples that have been pursued throughout the history of federal Indian legislation have their origin in (primarily British) colonialism. Throughout the colonial and post-Confederation periods, Canadian governments interchangeably employed two contradictory policies. On the one hand, it was argued that isolating Indians on reserves would gradually prepare them for integration into Canadian society. Alternatively, some maintained that isolation would grant them protection until they become extinct. On the other hand, the policy of immediate assimilation was intended to remove the special legal status of Aboriginal people and incorporate them into the dominant group. From among these two conflicting policies, the isolationist policy had the upper hand. Ironically, however, segregation resulted in preserving Indian cultures and national identities.[92] The general policy of the federal government was to elevate Aboriginal people from savagery to a self-reliant 'civilised' state in order to 'get rid of the Indian problem. … until there is no single Indian in Canada that has not been absorbed into the body politic'.[93]

For roughly one hundred years, from 1867 until the 1980s, the government of Canada in collaboration with various churches operated a system of residential schools. The residential school system targeted the most vulnerable and least powerful members of society. Lawrence Vankoughnet, Deputy Superintendent-General of the Department of Indian Affairs, wrote in a letter to the Prime Minister in 1887:[94]

> Give me the children and you may have the parents … [I]n working out that most difficult problem – the intellectual emancipation of the Indian, and its natural sequel, his elevation to a status equal to that of his white brother. This can only be done through education.

Around 150,000 Aboriginal children were removed from their immediate families and communities, sometimes forcibly, and were placed in 130 residential schools.[95] These schools were designed as total institutions. A total institution is a world in itself, where those in charge hold all formal power. Life in a total institution is governed in almost every aspect of daily

[90] Bartlett (n 88) 581–82.
[91] Indian Act, RSC 1985, c I-5.
[92] Wendy Moss and Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws* (Library of Parliament Research Branch 1991) 27.
[93] The words of Deputy Superintendent-General of the Department of Indian Affairs, Duncan Campbell Scott, quoted in Law Commission of Canada (n 83) 58.
[94] ibid 59.
[95] 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, 259; John Milloy, *Indian Act Colonialism: A Century of Dishonour, 1869–1969* (National Centre for First Nations Governance 2008). See Ch 4, in particular 51–76.

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life; inmates have little say about the rules and the manner in which they are administered, particularly when such institutions are governed at times more by arbitrary and unpredictable orders than by established rules. There was virtually no-one to question the actions of staff or to challenge the way in which authority was misused and abused.[96]

The residential school system was but one tool of the policy of aggressive assimilation of Aboriginal children.[97] The official objectives of this policy were to destroy aboriginal language and culture. Children as young as six years old were separated from their families for the duration of the school year or longer. They were forbidden to speak their languages and were taught to reject their heritage, their families and, by extension, themselves.[98] Most were subjected to physical deprivation; many suffered also from neglect, physical harm and sexual abuse. Some schools had mortality rates of 35 to 60 per cent as a result of malnutrition, abuse and exposure to tuberculosis.[99]

Over the years, Canada attempted to restructure and revise its relationships with the Aboriginal Peoples. The numerous amendments to the Indian Act provide a useful gauge for examining Canada's positions concerning its indigenous population. The post-Second World War era can be described as a turning point from which gradual changes in the Act have revoked some of its most blatant provisions that had been added over the years.[100] The House of Commons Special Committee on Reconstruction and Re-establishment was to inquire into the nature of Canadian society after the war. This was the first occasion on which the conditions of Indian reserves and Indian policies came under public scrutiny.[101] Between 1946 and 1948 a joint committee of the two Houses of Parliament came up with significant proposals and recommendations. Unfortunately, most of these recommendations were rejected by the federal government. The 1951 amendments to the Act rescinded some of the more oppressive provisions, such as the 1884 ban on Potlatch and section 141 of the Indian Act.[102] Following these amendments, however, the Indian Act merely resumed its initial content.[103]

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[96] Law Commission of Canada (n 83) 5.

[97] John S Milloy, *A National Crime: The Canadian Government and the Residential School System 1789 to 1986* (University of Manitoba Press 1999) 8.

[98] Law Commission (n 83) 17 n 12; Royal Commission on Aboriginal Peoples (n 85) 172.

[99] Bill Curry and Karen Howlett, 'Natives Died in Droves as Ottawa Ignored Warnings: Tuberculosis Took the Lives of Students for at least 40 Years', *Globe and Mail,* 24 April 2007; Megan Sproule-Jones, 'Crusading for the Forgotten: Dr Peter Bryce, Public Health, and Prairie Native Residential Schools' (1996) 13 *Canadian Bulletin of Medical History* 199, 204.

[100] John F Leslie, 'The Indian Act: An Historical Perspective' (2002) 25(2) *Canadian Parliamentary Review* 23.

[101] ibid.

[102] The Potlatch was one of the most important ceremonies for First Nations in Pacific Canada (and the US). This ceremony is a gift-giving festival in which a family holds a feast for its guests. Alongside its ceremonial role, Potlatch played a crucial role in the distribution of wealth in the community. Later, other practices such as the sun dance were also banned. The purposes behind these bans were to destroy Aboriginal practices and ceremonies but mostly to shift the Aboriginal Peoples from an economic system of redistribution to one of private property ownership. Section 141 of the Indian Act outlawed the hiring of lawyers and legal counsel by Indians. This ban was a reaction against the attempts by Aboriginal Peoples to organise and fight for their rights through the legal system. Eventually, any gathering of Aboriginal Peoples became strictly prohibited.

[103] Royal Commission on Aboriginal Peoples (n 85) 310–11.

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Prime Minister Trudeau's White Paper of 1969 proposed to abolish the Indian Act and dismantle the Department of Indian Affairs. This policy proposal was rejected by Aboriginal Peoples across Canada on the grounds that assimilation into Canadian society would not bring about equality. Following the failure of this proposal, Canada revoked its assimilation policy and recognised the position of Aboriginal people in favour of a policy geared toward establishing constitutional protection and granting them recognition.[104]

International law also proved to be a powerful trigger. Section 67 of the Canadian Human Rights Act of 1977 exempted the Indian Act from Canada's human rights law. This provision was to bar First Nations people from filing an official complaint with regard to the violation of human rights by the Indian Act.[105] Moreover, the views of the UN Human Rights Committee in the matter of *Sandra Lovelace v Canada* in 1982 stated that 'the facts of the case established that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, [and] disclose a breach by Canada of article 27 of the Covenant'.[106] In 1985 the Indian Act was amended accordingly and Bill C-31 was passed, reinstating Indian status to those who had lost it.[107]

During the 1980s Canadians were increasingly concerned with the safety of women and children, and with child abuse.[108] In 1986, with the closing of the last school, the system of residential schools became the subject of public scrutiny. The Citizen's Forum on Canada's Future, which emerged following the failure of the Meech Lake Accord, supported the recognition of Quebec's distinctiveness, Aboriginal self-government and the settlement of Aboriginal land claims. Non-Aboriginal Canadians found that the experiences of Aborigines and the dreadful consequences on Aboriginal communities fell within the parameters of their own social concerns.[109] The failure of the Charlottetown Accord in the 1992 referendums added to the frustration of the Aboriginal Peoples in Canada arising from the unresolved structural issues.[110]

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[104] Milloy (n 97) 3.

[105] This section was abolished by Bill C-21 in June 2008 by the House of Commons.

[106] *Sandra Lovelace v Canada*, Communication No R.6/24, UN Doc Supp No 40 (A/36/40), 166 (1981).

[107] See RSC 1985, c. I-5 (the amended Indian Act). Bill C-31 to Amend the Indian Act is still considered to be unconstitutional, as those who were reinstated according to the amended Indian Act can only pass their status to one generation. The ruling of the Appellate Court for British Columbia of April 2009, in the matter of *Sharon McIvor v Canada*, stated that this provision was inconsistent with Canada's Charter of Rights and Freedoms. The Court ruled that restricting inheritance of status to the children of women reinstated by Bill C-31 violates equality rights guaranteed in section 15 of the Charter of Rights and Freedoms: http://laws-lois.justice.gc.ca/PDF/I-5.pdf. See *McIvor v Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153 (CanLII).

[108] Law Commission (n 83) 1.

[109] ibid 10.

[110] The Charlottetown Accord was an attempt to resolve some long-standing disputes in Canadian politics surrounding the division of powers between federal and provincial jurisdiction. Its central component, the Canada Clause, granted recognition to the rights of the Aboriginal Peoples and their right to self-government, and was to be an interpretive section of the Constitution.

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4.2 PROCESS: THE TRANSITIONAL JUSTICE MEASURES EMPLOYED

In 1989 and 1990, prosecutions against former residential school staff began in British Columbia and the Yukon. Additional police investigations were followed by more claims.[111] In 1990, Chief Phil Fontaine, then leader of the Association of Manitoba Chiefs, called for the churches involved to acknowledge the physical, emotional and sexual abuse endured in the schools. A year later, the Government of Canada established the Royal Commission on Aboriginal Peoples (RCAP) to investigate the social, economic and political conditions of the Aboriginal Peoples of Canada.[112]

Formally, the institutions of state commissions of inquiry in Israel and Canadian royal commissions of inquiry are quite similar. Both are quasi-judicial, formal, ad hoc institutions of public inquiry. Both deal with matters of importance and controversy, are headed by retired senior judges, and have similar powers. At the Canadian federal level, royal commissions are appointed by Order in Council under Part I of the Inquiries Act. A royal commission can conduct investigations by subpoenaing witnesses, taking evidence under oath, requisitioning documents and hiring expert staff. As is the case with Israeli commissions of inquiry, the reports of royal commissions, however, are not binding.[113]

The RCAP was to develop recommendations for the improvement of these conditions, and the overall relationship between indigenous peoples and the Crown. Composed of four Aboriginals and three non-Aboriginals, the Commission was given a broad mandate that was translated into a large and complex research agenda. Consultations were held with Aboriginal groups on the development of the research plan.[114]

The Commission held 178 days of public hearings, visited 96 communities, consulted dozens of experts, commissioned scores of research studies, and reviewed numerous past inquiries and reports. Its central conclusion was that the main policy that had been pursued for more than 150 years, first by colonial then by Canadian governments, had been wrong. The RCAP Commissioners state clearly that there can be no peace or harmony unless there is justice[115]

> Our central conclusion can be summarized simply: *The main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong.*
>
> Successive governments have tried – sometimes intentionally, sometimes in ignorance – to absorb Aboriginal people into Canadian society, thus eliminating them as distinct peoples. … This is assimilation. It is a denial of the principles of peace, harmony and justice for which this country stands – and it has failed.

The main conclusion of the report that was issued in 1996 was the need for a complete restructuring of the relationship between Aboriginal and non-Aboriginal people in Canada. Some of the

[111] Royal Commission on Aboriginal Peoples (n 85) 360.
[112] ibid.
[113] Avigdor Klagsbald, *State Investigative Commissions* (Nevo 2001) 47 footnote 96 (in Hebrew).
[114] Report of the Royal Commission on Aboriginal Peoples (n 85) 12.
[115] ibid 11–16 (emphasis in original source); Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society' in Arthur (n 95) 217, 218, http://www.collectionscanada.gc.ca/webarchives/20071124125216/http://www.ainc-inac.gc.ca/ch/rcap/sg/sg1_e.html.

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broader recommendations included the proposal for a new Royal Proclamation – namely, a commitment for a new set of ethical principles that would be applied to Aboriginal cultures, values, history and their inherent right to self-determination.[116]

In 1997 Justice Minister Anne McLellan requested the Law Commission of Canada to prepare a report on the means for addressing the harm caused by the physical and sexual abuse of children in institutions funded, sponsored or operated by the government. These included the residential schools, schools for the deaf and blind, training schools and long-term mental institutions.[117]

In 1998 the government established a programme entitled Gathering Strength – Canada's Aboriginal Action Plan.[118] However, the plan has remained largely unimplemented. The state established a $350 million fund for community-based healing for the abuse victims of the residential schools. The government proposed to launch an alternative dispute resolution (ADR) scheme to replace protracted litigation. In January 1998 Jane Stewart, Minister of Indian and Northern Affairs, issued a statement of reconciliation.[119] These measures, however, did not put an end to the escalating legal cases filed against the churches and the federal government.

By March 2004, all parties were dissatisfied with the measures. The Assembly of First Nations argued that the measures were insufficient, biased and too slow. Lawsuits against the government and the churches continued to pile up. In May 2005 the government signed the Political Agreement that undertook to negotiate a settlement package. This package was to include reparations for all former students of Indian residential schools, a Truth and Reconciliation Commission (TRC), community-based healing and commemoration. An ADR process was to address the serious abuse suffered.

In August 2005 the Association of First Nations launched a class action suit against the federal government on behalf of survivors, deceased Aboriginals and the families of the victims.[120] The claimants sought general, special and punitive damages, and various declarations by the government. They also sought compensation for the loss of culture and language and social damage, which were not part of the Political Agreement.

The government, First Ministers of the Provinces, territorial leaders, and the leaders of five national Aboriginal organisations had all participated in a roundtable process that culminated in the Kelowna Accord in November 2005.[121] The Accord provided a comprehensive plan to

[116] Royal Commission on Aboriginal Peoples (n 85).
[117] Law Commission of Canada (n 83) 2.
[118] Minister of Indian and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan, A Progress Report* (Minister of Public Works and Government Services Canada 2000), http://publications.gc.ca/collections/Collection/R32-192-2000E.pdf.
[119] John DeMont and Bruce Wallace, 'Ottawa Apologizes to Natives', *The Canadian Encyclopedia*, 19 January 1998, http://www.thecanadianencyclopedia.com/articles/macleans/ottawa-apologizes-to-natives.
[120] *Larry Philip Fontaine and Others v Attorney General of Canada*, Ontario Court File No 05-CV-294716 CP (16 August 2011), http://turtletalk.files.wordpress.com/2011/08/8-31-11-fontaine-v-canada-attorney-general1.pdf. Chief Phil Fontaine, Head of the Assembly of First Nations, is an Indian residential school survivor. He was the proposed representative of the Survivor and Aboriginal sub-classes.
[121] Lisa L Patterson, 'Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations 2004–2005', 4 May 2006, http://www.parl.gc.ca/Content/LOP/researchpublications/prb0604-e.htm.

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close the gaps between Aboriginal and non-Aboriginal Canadians in education, employment and living conditions.

The Residential Schools Settlement Agreement between the churches, the federal government, the Assembly of First Nations and other Aboriginal organisations was reached in May 2006.[122] The agreement consisted of five transitional justice tools: monetary reparations, an independent assessment process, a TRC, commemoration and a healing fund. In June 2008 Conservative Prime Minister Stephen Harper offered an official state apology to former students of the Indian residential schools.

4.3 OUTCOMES

Both the RCAP and the Kelowna Accord provided transformational visions of the relationships between Aboriginal and non-Aboriginal people in Canada and an Aboriginal perspective on Canadian history. Like other indigenous minorities, the Aboriginal Peoples of Canada are subject to both misrecognition and socio-economic misdistribution.[123] Both documents provided a comprehensive framework of bivalent justice.[124] Regrettably, neither has been implemented.

The TRC's interim report stated that it 'will reveal the complete story of Canada's residential school system, and lead the way to respect through reconciliation … for the child taken, for the parent left behind'.[125] The TRC concluded in its interim report that residential schools constituted an assault on Aboriginal children, families and culture, and on the self-governing and self-sustaining Aboriginal nations. While the impacts of the residential school system were immediate, they are still ongoing. It seems that transitional justice tools employed in this case have been determined to reveal the truth. The conclusions of the TRC's interim report maintained that 'Canadians have been denied a full and proper education as to the nature of Aboriginal societies, and the history of the relationship between Aboriginal and non-Aboriginal peoples'.[126]

While the focus of the RCAP and the Kelowna Accord has been comprehensive, the political echelon singled out the particular wrong of the Indian residential schools as the focus of transitional justice. Hence, the transitional justice institutions implemented in this case, such as the apology, the TRC and the Compensation and Healing Fund, were limited to the particular legacy of the Indian residential schools.

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[122] The Indian Residential Schools Settlement Agreement (IRSSA) was approved by the courts and came into effect on 19 September 2007, http://www.residentialschoolsettlement.ca.

[123] According to Fraser, some collectivities, such as the exploited working class in capitalist economies, fall victim to injustices arising exclusively from capitalism: Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge 1997) 11.

[124] Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (translated by Joel Golb, Jams Ingram and Christian Wilke, Verso 2003); Nancy Fraser, 'Recognition without Ethics?' (2001) 18(2) *Theory, Culture and Society* 21.

[125] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Interim Report* (2012) 25; ibid 2.

[126] ibid 25.

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The celebrated apology delivered by Canadian Prime Minister, Stephen Harper, on 11 June 2008 acknowledged the wrong.[127] The apology by Jane Stewart, then Minister of Indian Affairs, a decade earlier admitted the physical and sexual abuse that took place in the residential schools. At the time, however, the apology was deemed to be narrow and partial. Although Harper assumed personal responsibility in his statement of apology, the apologies issued by the government and the churches were skilfully crafted to ensure that they could not be used in court as admissions or acknowledgements of liability.[128] While the government and the churches acknowledged and apologised for the atrocities of the Indian residential schools, they fought the plaintiffs in court, denying any responsibility or liability by blaming one another.

Despite Canada's intent to reveal the truth about the treatment of the Aboriginal Peoples and the acknowledgement of responsibility, Canada (along with other settler states such as the US, Australia and New Zealand) failed to support the United Nations Declaration on the Rights of Indigenous Peoples until 30 July 2012.[129] Canada's justifications for failing to endorse the Declaration were its concerns over various provisions.

The major concern about the IRSSA is its narrow scope.[130] Other concerns pertain to its specific provisions. While the Settlement pertained to three groups – First Nations, Métis and Inuit – First Nations were dominant in the negotiations. The IRSSA Settlement was less advantageous for Métis and Inuit than it was for First Nations. [131] For example, Métis children experienced dual racism, from both non-Aboriginals and Aboriginals. The ambiguity of the policies with regard to schooling for Métis children resulted in the exclusion of many of them from the Settlement. Also, the residential schools experience was most traumatic for Inuit children as a result of the distance between the schools and their community, and their lack of previous contact with Europeans.[132] Many Inuit victims were excluded from the Settlement because most of the schools were considered to be day schools while the children were housed in dormitories close by. Most Inuit have no access to services and programmes that are part of the Settlement.[133]

[127] Prime Minister of Canada, Stephen Harper, 'Prime Minister Harper Offers Full Apology on Behalf of Canadians for the Indian Residential School System', 11 June 2008, http://www.pm.gc.ca/eng/media.asp?id=2149.
[128] Jennifer J Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice' (2002) 52 *University of Toronto Law Journal* 253, 272.
[129] United Nations Declaration on the Rights of Indigenous Peoples, Annexed to UNGA Res 61/295 (13 September 2007) A/RES/61/295.
[130] Jung (n 115) 217, 218.
[131] Tricia E Logan, 'Lost Generations: The Silent Métis of the Residential School System: Revised Interim Report' in Larry N Chartrand, Tricia E Logan and Judy D Daniels (eds), *Metis History and Experience and Residential Schools in Canada* (Aboriginal Healing Foundation 2006) 21–23.
[132] David King, *A Brief Report of the Federal Government of Canada's Residential School System for Inuit* (Aboriginal Healing Foundation 2006) 11–13.
[133] *Sivumuapallianiq, National Inuit Residential Schools Healing Strategy: Journey Forward* (Pauktuutit Inuit Women of Canada 2007) 8–9; John Amagoalik, 'Reconciliation or Conciliation? An Inuit Perspective' in Marlene Brant Castellano, Linda Archibald and Mike Degagne (eds), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation 2008) 91; see also Truth and Reconciliation Commission (n 125).

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Justice Murray Sinclair's testimony before the Standing Committee of Aboriginal Peoples on 28 September 2010 captures the gap between the normatively desirable and the politically viable. Justice Sinclair said:[134]

> We need to think about reconciliation as a long-term objective. I do not think we will find it easily because we need to recognize that there is a great deal of pain that is still out there and a great deal of frustration on both sides. A large segment of the Aboriginal population does not want to talk about re-establishing a positive relationship with Canada, and many Canadians do not accept that they need to be engaged in this issue.

5. Conclusions

Like a pendulum, transitional justice vacillates between the visionary and the pragmatic. The balance struck between the normatively desirable and the politically viable clearly reflects and highlights the politics embedded in processes of transitional justice.

Both cases display the long-term impacts of the doctrine of assimilation that was grounded in dehumanising ideas about particular ethno-cultural groups. Truth was indeed a crucial element in the processes and a precursor for the consequences of transitional justice. Whereas Canada had invalidated and officially renounced them,[135] similar mellowed notions are still prevalent in Israel with respect to other ethno-cultural groups, particularly visible in Jewish minorities.[136] As the reports of the three Commissions of Inquiry suggest, Israel officially still finds justifications for the policies of aggressive assimilation. These justifications are grounded in the dehumanising and incorrect Orientalist views of Mizrahi Jews in general and the Yemenis in particular. In Israel, the mystery surrounding the whereabouts of the missing children still remains silenced and denied.

Investigation of some aspects of both tragedies is still needed. In Canada these are the less familiar and poorly researched ordeals of the disappearance of runaway students of residential schools, suicides, the disappearance of young women, the adoptions of Aboriginal children and the forced sterilisations. In Israel, the full scale of the injustices has yet to be unfolded. Some of the least known disappearances of Yemeni children from Hashed, the alleged existence

[134] Murry Sinclair, 'Proceedings of the Standing Senate Committee on Aboriginal Peoples Evidence' in the Standing Committee on Aboriginal Peoples (tr), Parliament of Canada, Vol 10, 28 September 2010, http://www.parl.gc.ca/Content/SEN/Committee/403/abor/10ev-e.htm?Language=E&Parl=40&Ses=3&comm_id=1.

[135] Moshe Lissak, *The Large-Scale Immigration of the 1950s: The Failure of the Melting Pot* (Bialik Institute 1999) 73–74 (in Hebrew).

[136] The Israeli 'melting pot' ideology was abandoned with regard to immigrants from 'Western' countries (including the former Soviet Union) although it is still exercised in the absorption of Ethiopian immigrants. This ideology was associated with 'total immersion' assimilation policies such as sending adolescents to boarding schools in order to isolate them from their families and culture, and the changing of names into Hebrew names: Esther Herzog, 'The Role of Diseases in Constructing Bureaucratic Patronage over Ethiopian Immigrants in Israel' (2010) *Anthropology of the Middle East* 71, 72–74; Amir (n 67) 132–35.

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of a network that engaged in illegal adoption and the disappearance of young brides still remain a mystery.

The cases varied greatly in terms of the guilt and accountability established. All three forms of accountability materialised in Canada – namely, accountability for fairness, for the use of power and for performance. Canada admitted that the policies were unjust and unacceptable; it acknowledged the abuse of power and the need for power-sharing, and granted full recognition to the horrific consequences of its policies towards the indigenous peoples. The apology and the transitional justice measures used were granted on the basis of acknowledging the truth (although not the whole truth) and renouncing the incorrect views and practices of the past.

In Israel, the three Commissions in general and the Cohen-Kedmi Commission in particular attempted to disprove that the ordeal was particularly Yemeni since only two thirds of the missing babies were Yemeni.[137] The denial of the alleged ethnic basis of the injustice, the blaming of the victims and the turmoil surrounding the mass immigration to Israel following the formation of the state were used to justify the policies, cope with guilt and deny accountability. None of the Israeli investigative commissions issued any recommendations or culminated in any operative measures.[138] Whereas the process in Canada was collaborative and resulted in renarrativisation, the inadequate outcome in Israel was the result of the unilateral imposition of the official narrative by the Commission.

The RCAP and the resulting transitional justice tools should be viewed in the wider context of several other processes surrounding Canada's national minorities that opted for comprehensive restructuring. These were the accords at Meech Lake and Charlottetown, the *Restoring Dignity* report by the Law Commission of Canada and the Kelowna Accord. A clear transformational vision of the relationships between Aboriginals and non-Aboriginals, and an Aboriginal perspective on Canadian history, have been the centrepiece of these processes, although none was in fact implemented. In contradistinction, the investigations of the Yemeni children affair in Israel suffered from the lack of any vision for the future of Israeli society. It seems that the investigations were a priori designed to protect the status quo and ward off challenges to the official narrative.

Institutional settings seem to confer volatility upon processes of historical redress. The embracing of the official narrative in Israel is related to the brittleness of Israeli democracy. In contrast, in Canada's well-established democracy, the RCAP and the Kelowna Accord could afford to be critical of the state. The Aboriginal majority in the Royal Commission's membership is also a sign for substantive democracy and democratic culture. The stand-off in the implementation of the RCAP and the Kelowna Accord conflicted with the political system's interest in maintaining the status quo. One may also suggest that in 2006 Harper's Conservative government framed the grievances as a human rights issue. By privatising the injustice, the demands for collective rights, the right to self-determination, and social and economic rights weakened.[139]

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[137] Cohen and Kedmi (n 46) 317–18.
[138] According to Commissions of Inquiry Law, art 19A, investigative commissions are not required to issue recommendations in their report, but may certainly do so.
[139] Jung (n 115) 219.

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The politics of transitional justice take place within broader political developments in international history.[140] The legitimation of transitional justice emanates largely from international norms. Compliance with these norms often entails significant changes in the constitutional order. Both settler societies continue to be haunted by their troubled pasts and the need to restructure the relationships between the aggrieved groups and the state. Canada's Aboriginal Peoples continue to agonise over the repercussions of their oppression. Yemenis in Israel are deeply scarred by their ordeal. A major consideration in both countries was the simultaneous and competing demands for transitional justice made by other groups.[141]

Transitional justice generally and mistakenly assumes a linear, progressive path that comes into being with the launching of transitional justice processes and institutions and ends with reconciliation.[142] In both cases examined here, transitional justice failed to bring about any momentous change. The road to reconciliation still seems winding and long. Thus, albeit their considerable variation, the two cases display the tilting of the pendulum towards pragmatism rather than the vision of transitional justice.

[140] Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 94.
[141] In Canada, the campaigns for transitional justice by Ukrainians, Chinese, Japanese and Italian Canadians; in Israel several simultaneous campaigns by Ethiopians, victims of *tinea capitis* irradiations, the Villagers of Iqrit and Bir'im, and Holocaust survivors.
[142] Leebaw (n 24).

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