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To what extent do the formal reconciliation processes in South Africa and Australia Compare?

To

My parents. For your unwavering love and encouragement.

John and Evelyn (Sydney), and Peter, Susan and Anika (Adelaide). For providing me with a safe and supportive environment in a time of crisis. Without your support this thesis would never have come to fruition.

Finally, to my mentor, supervisor and friend, Prof Sheila Meintjes.

Abstract

The purpose of the research has been to compare the reconciliation processes in South Africa and Australia.

The research involves specific periods of human rights abuses in both countries. Consideration is given to the role of state policies and institutions which excluded indigenous people from participating in society. Equality, human rights, and socio-economic disadvantage are defining elements of the debate between the governments and the indigenous communities.

It is impossible to talk meaningfully about reconciliation - and the transformation in relationships between indigenous and non-indigenous people - without reference to human rights. Both the South African and Australian processes were defined in terms of human rights. However, while there was a commitment on paper to addressing past experiences in the two official 'truth telling' mechanism introduced in both countries, the outcome of the processes did not, either in South Africa or in Australia, lead to any significant change in the unequal basis of the relationship between indigenous and non-indigenous people. The ways in which the processes unfolded were meant to offer more than a platform for memories to be recounted or for history to be rewritten on the basis of new evidence, they were meant to offer some kind of recompense that would lead to renewal and change. But neither the process nor the outcome properly addressed the deep disempowerment of indigenous people, and in many ways the process was disillusioning.

In studying the reconciliation processes in these two societies, an underlying question presents itself: does truth really achieve reconciliation?

Table of Contents

CHAPTER 1: INTRODUCTION 10

- Aims and Rationale 10
- Methodology 19

  The Process 28
- Strengths and Limitations of the Thesis 29
- Obstacles to Overcome 31

CHAPTER 2: FUNDAMENTAL CONCEPTS DEFINED 32

- Truth Commissions 32
- Reconciliation 39
- Terminology 43

CHAPTER 3: LEGACIES OF RACIAL SEGREGATION IN BOTH SOCIETIES 45

- Colonial Conquest 45
- Protection and Segregation 48
- Assimilation - The Destruction of Indigenous Identity 53
- Liberal Constitutionalism and the Struggles for Recognition 54
- Land and its Implications 60
- Conclusions 64

CHAPTER 4: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, THE COUNCIL FOR ABORIGINAL RECONCILIATION 66

- Establishment, Construction and Aims 67
- Strengths and Limitations of the Processes 78
- Conclusions 91

CHAPTER 5: RECONCILIATION, RIGHTS AND RECOGNITION 101

- Reconciliation: Obstacles to Overcome 101
- Australian and South African Government Responses to Reconciliation 115
- International Pressure 117
- Conclusions 119

CHAPTER 6: HUMAN RIGHTS VERSUS PRACTICAL RECONCILIATION 121

- Introduction 121
- Equality 122
- Indigenous Disadvantage and Indigenous-Specific Expenditure 128
- Human Rights versus Practical Reconciliation 134

CHAPTER 7: CONCLUSION 150

BIBLIOGRAPHY 158

Abbreviations

ANC	African National Congress
ANTaR	Australians for Native Title and Reconciliation
BEE	Black Economic Empowerment
CAR	Council for Aboriginal Reconciliation/the Council
CERD	Committee for the Elimination of Racial Discrimination/ the CERD Committee
CGC	Commonwealth Grants Commission
COAG	Council of Australian Governments
COSATU	Congress of South African Trade Unions
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	Covenant on Civil and Political Rights
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	Covenant on Economic, Social and Cultural Rights
NP	National Party
NSW	New South Wales
NTA	Native Title Act 1993 (Cth)
RDA	Racial Discrimination Act
RDP	Reconstruction and Development Programme
SACP	South African Communist Party
SADC	Southern African Development Community
TRC	Truth and Reconciliation Commission/the Commission/the Truth Commission
UN	United Nations

CHAPTER 1: INTRODUCTION

'The histories we trace are complex and pervasive. The actions of the past resonate in the present, and will continue to do so in the future' - Bringing Them Home (1997)

This dissertation compares the Australian and South African truth telling processes and asks whether they have led to reconciliation. The South African and Australian post-colonial reconciliation processes offer similarities, while the differences are stark. Thus, the thesis is a first attempt at comparing the two processes. The thesis covers the period until the end of the Howard regime (1996-2007). As a result, the most recent developments in Australia, where the post-Howard government, under Prime Minister Kevin Rudd, offered and aplogy to the indigenous people in February 2008, was not included in this study. In brief, it should be mentioned that although the Australian government offered an apology to the indigenous people who had suffered in the past, it fell short in not addressing the issues of compensation.

Aims and Rationale

The dissertation compares the processes and outcomes of the formal reconciliation mechanisms used in Australia and South Africa. South Africa and Australia share a common history of oppressing, discriminating against, and violating the human rights of their indigenous populations over a long

period of time. Dispossession, displacement, disappearances, genocide, brutality, oppressive legislation, the loss of identity, and a lack of collective memory characterise the history and shape the present circumstances of the indigenous people in both countries. The current situation of poverty and lack of access to opportunities stem from the colonial past and the settlement of white Europeans in these regions. After decades of struggle, the 1990s found both countries in a period of transition that required coming to terms with their respective pasts. Supported by a growing global human rights culture, South Africa and Australia both developed institutions for investigating past violations of human rights and sought to establish 'the truth' of official policy (and subsequently attempting to write a new national history that acknowledged these abuses). Both processes also claimed to embark on a path towards reconciliation. Although the ultimate goal was similar, the methods and processes developed by the two countries were completely different.

The central question is then: How do the formal reconciliation processes of South Africa and Australia compare? The thesis attempts to identify the larger issues which came into play in these countries and that have flowed from these formal reconciliation processes. This is usually expressed in terms of an acknowledgement of human rights abuse and their symbolic recognition in acceptance of responsibility for these abuses. This is counterposed to a second form of reconciliation, known as 'practical reconciliation' that recognises material claims such as land rights and perhaps more importantly, the right to vote, which was tied to various social rights. The thesis is an

exploratory study that will lay the ground for further comparative research that were both too complex and too broad to deal with in this study. While the following issues are mentioned, they are not subjected to a close or detailed analysis. These include a comparison of the ways in which indigenous people lost their land and how the land issue was both differently defined and manipulated by the colonial regimes. A comparison of the sites and forms of abuse suffered by victims in both societies over the *longue duree* and a more detailed study of the Australian 'Stolen Generations' was not possible either, but could form part of an extended study. The struggle in Australia for apology is given short shrift in this dissertation and awaits further study. The issues of justice, social justice, restorative justice and reparations are issues that resonate in both societies and would benefit from detailed comparative discussion and research. The different colonial native policies in South Africa and Australia would offer fascinating insights into how context shaped the colonial state's response to indigenous polities and how the social engineering that derived from discursive ideas of assimilation and self-determination led to very different social movements and outcomes in both countries. These questions link to such issues as citizenship, identity formation and access that defined the indigenous people as secondary and blinded the 'primary citizens' from 'knowing' what was happening to a whole population through a process of social conditioning. This thesis is concerned with a more limited issue, which is to uncover the ways in which 'reconciliation' was defined and struggled over in both countries.

Reconciliation had been a major issue in Australia from the 1960s, when a national referendum was held in 1967 to decide on whether to grant Aboriginal people the right to vote. This had created a new debate in Australia about the rights of Aboriginal people and their treatment in the past, and resulted in more than ninety percent of Australians voting to acknowledge Aboriginal and Torres Strait Islander people as citizens. This event is often referred to as the first stage of the reconciliation movement. The thesis addresses the development of the state's response to these demands. Under the more liberal Labour regime, under Whitlam in 1972, a more sympathetic approach emerged. This was followed by a Liberal government, that back-peddled somewhat on Aboriginal issues, which were put on the backburner. The issues were brought to the fore in the face of renewed activism in the early 1990s, coinciding with global 'winds of democratic change' that followed the fall of Soviet Russia. It was during this period of activism that new structures were created to address Aboriginal demands. But since the conservative Howard government came to power in 1996 and the mandate of the Council for Aboriginal Reconciliation ended in 2000, reconciliation in Australia has taken a back seat. The Howard government decided that under no circumstances would it take responsibility for past injustices against the aboriginal population, offer an apology, or implement any policies relating to reparations, land restitution, or a treaty. (Behrendt 2003: 2-16; ANTaR Media Releases 2000-2002; Reynolds 2000; Nettheim interview, 2003; Grattan 2000: 88-91; *Social Justice Report 2000, 2001, 2002*). In the words of Prime Minister Howard: 'I do not believe that current generations of Australians

should formally apologise and accept responsibility for the deeds of an earlier generation'.

The Aboriginal population, represented by various organisations, such as ANTaR, although divided on the details of reconciliation, insisted on including the above issues in any negotiations process. However, because the Australian government refused to participate on those terms, the reconciliation process, embodied in the organisation *Reconciliation Australia*, came to a standstill. All parties in the reconciliation debate - apart from the government - seemed to believe that adopting a human rights approach was essential (Behrendt 2003: 2-16; ANTaR Media Releases 2000-2002; Reynolds 2000; Nettheim 2003; Grattan 2000: 88-91; *Social Justice Report 2000, 2001, 2002*). In this perspective, the past should be dealt with by an acknowledgement of the atrocities committed against indigenous people, recognition of the status and role of indigenous people within Australian society, giving Aborigines and Torres Strait Islanders their outstanding human rights, and providing some form of reparations. It also meant assisting Aboriginal and Torres Strait Islanders in attaining an equal socio-economic position with all other Australians.

The Australian government held the position that 'formal rights' rather than substantive equality was the primary issue, and that it would thus be wrong to give any group rights or opportunities not provided to all other citizens - even if such an approach would assist in uplifting indigenous people (Behrendt 2003: 3, 9-16), (Grattan 2000: 88-91). The government insisted on only

focusing on ‘practical’ issues relating to reconciliation. Their notion of ‘practical reconciliation’ included providing a limited amount of money for housing, unemployment, health, and education, believing that anything beyond this narrow interpretation was not their responsibility. (Behrendt 2003: 3, 9-16)

South Africa, unlike Australia, chose to deal with reconciliation by redressing the issue of past human rights violations as part of formal negotiations for a transition to democracy and a democratic constitution. The context of the TRC was one in which a negotiated settlement had been made between the apartheid state and liberation movements that had been involved in a low-level civil war since 1960-61. The settlement involved the repatriation of exiles, including a liberation army, and the integration of these forces into a transitional government and a new national army. The issues of human rights abuse were thus very complicated, because both sides had seen themselves to be at war and the negotiations were the equivalent of a peace settlement. So there were two aspects to the process of reconciliation, the one was of an oppressed majority and the other of specific crimes in conditions of civil war. So the TRC was a complex mix of an amnesty process combined with an outpouring of the human rights abuses experienced by the systematic oppression of the apartheid system. Its three pronged structure of committees dealing with Human Rights Violations, Reparations and Amnesty presents a complicated institutional process that differed dramatically from the Australian CAR and other structures that dealt with Aboriginal claims. Thus in South Africa, there was an agreed commitment to truth telling and the

acknowledgement of past abuses in order to deal with an especially violent recent past embedded in a civil war. This was not the case in Australia, where Aborigines had experienced an equally sustained oppression, which violated human rights, but in different ways. South Africa was on the brink of an out and out war in 1992 that would have sparked widespread revolutionary violence and social dislocation. In Australia, there was never the danger of revolution. The exact form of the TRC process was not determined before the 1994 elections, but was debated afterwards. The project was initiated by the establishment of the *South African Truth and Reconciliation Commission* (*TRC*).

In both South Africa and Australia, the 1960s, a period of global economic upswing, saw intensified activism by indigenous people against their oppression. During this period, colonial powers also relinquished control over their dominions across the world, including Africa. In South Africa, liberation movements took up arms against the apartheid regime. A thirty year civil war unfolded.

Barbara Walter (2002), from the *University of California - San Diego*, explains that for a conflict to be defined as a civil war it had to: ' (1) occur within a generally recognized state; (2) produce at least one thousand deaths per year; (3) involve the national government as an active participant; and (4) experience effective resistance from both the rebels and the government' (Walter 2002).

In Australia the struggles of indigenous people was of a civil nature during the same period. Globally, the move towards democracy in the 1990s was preceded in the 1980s by struggles that prompted national elites in single-party countries to turn to 'human rights talk' as the hallmark of a new democratic order. The incorporation of international human rights laws into a national constitution was seen as coterminous with democracy, freedom, and the creation of a new social contract with citizens (Meredith 1999). South Africa and Australia developed their reconciliation processes in this context.

Reconciliation virtually disappeared as a national priority in both countries by the end of the 1990s, even though at the beginning it was a burning issue. During South Africa's first period of new democratic government from 1994 to 1999 and the Australian 'Decade of Reconciliation' from 1991 to 2001, reconciliation was at the top of their respective national agendas. Concepts like Black Economic Empowerment featured prominently in South Africa after 1999, and arguably replaced the notion of racial reconciliation.

Australia's democracy 'belonged' only to the new Australians, the settlers. It deliberately excluded indigenous people. South Africa developed a refined form of racial exclusivism, a democracy that existed for whites only. In South Africa, the popular struggles of the 1970s and 1980s mobilised hundreds of thousands of people against apartheid. The Australian indigenous population also made their presence felt as they became more politically active. However, the indigenous population of Australia is very small, and their overwhelmingly rural existence limited their impact. The relative population

size of indigenous people is an important variable in mobilising support for a reconciliation process. At the time this research was conducted, Australia had an indigenous population of less than five-hundred thousand out of a total population of twenty million. In South Africa, the black population comprised thirty-five million out of almost forty-five million people.

In dealing with the past, in the context of a new global human rights discourse, countries like South Africa and Australia were faced with how a nation might heal the pains of the past. How could an anti-democratic and violent segregationist political culture move towards true democracy and tolerance? How do young and emerging democracies deal with past violations of human rights? How do new democratic governments deal with leaders and individuals who were responsible for disappearances, deaths, psychological and physical torture, and other human rights violations? How does a society counter the effects of being raised in a system that indoctrinated and enshrined in them racist prejudice? These were the questions that faced South Africa's new government in 1994. Their solution was the Truth and Reconciliation Commission. It brought together truth telling and amnesty. This is discussed in the thesis.

The 1991 Report of the Royal Commission into Aboriginal Deaths in Custody marked the start of the 'Decade of Reconciliation' in Australia. This document led to the establishment of the Council for Aboriginal Reconciliation, the publication of the *Bringing Them Home* report, and the Native Title debate (illustrated by the *Mabo* and *Wik* cases). Australia, an 'ordinary' liberal

democracy, and not a transitional society like South Africa, faced a history of massive human rights violations and 'the everydayness or bureaucratisation of genocide'. It faced the question of how a nation would deal with its abusive past. How would Australia as a nation forge or restore its identity in the 1990s? The Human Rights and Equal Opportunity Commission was asked by the Attorney-General of Australia in 1995 to investigate the separation and effects of the removal of Aboriginal and Torres Strait Islander children from their families between 1910 and 1970. The 1997 report, *Bringing Them Home*, received wide-spread response by ordinary Australians but was rejected by the new liberal government under Prime Minister John Howard. Popular pro-aborigine marches resulted, culminating in an unofficial 'Sorry Day'.

Methodology

The research for this thesis adopted a stance that recognised systems of domination while at the same time conceptualising marginalised groups as social agents who have an impact on the systems in the way they conform or contest and/or negotiate power relations. The research takes reconciliation as a key analytical category, in a way that allows for consideration of the specificity of indigenous people's experiences. Reconciliation in divided societies presents a complex methodological problem. It is hardly a phenomenon that can be measured in any conventional objective sense. Attitudes may be subjected to statistical survey, but these would still reflect inconclusive evidence of a scientific nature. On the other hand, although most analyses have tended to dwell on individual case studies, analysis of

reconciliation processes requires a nuanced approach that examines the comparative aspects of societies that have attempted national reconciliation processes. Indigenous people as a social group are indeed a heterogeneous category, which at certain junctures might be subjected to systemic subordination that manifests itself in diverse and different ways. This explains why in this dissertation the analysis oscillates at times between a discussion of developments in each country in turn. Social change is also difficult to pin down, as this is an ongoing process, tied as much to the shifts that occur through history, regime change and the policy changes that they bring about as to shifts that occur through social engineering as in aboriginal oppression and 'stolen generation' or as in apartheid. An endeavour has thus been made in the dissertation to highlight both the positive and negative areas of change in both countries.

In comparing the two processes, I utilised both the comparative and discourse analysis research paradigms. In this instance, I found an analysis of the discourse relating to these two processes and their contexts to be an invaluable tool in the attempt at comparison.

Dr. Ruth A. Palmquist, Assistant Professor at The University of Texas at Austin - Graduate School of Library and Information Science, explains that Discourse Analysis will enable one to:

> …reveal the hidden motivations behind a text or behind the choice of a particular method of research to interpret that text. Expressed in

> today's more trendy vocabulary, Critical or Discourse Analysis is nothing more than a deconstructive reading and interpretation of a problem or text. Discourse Analysis will, thus, not provide absolute answers to a specific problem, but enable us to understand the conditions behind a specific "problem" and make us realize that the essence of that "problem", and its resolution, lie in its assumptions; the very assumptions that enable the existence of that "problem". By enabling us to make these assumptions explicit, Discourse Analysis aims at allowing us to view the "problem" from a higher stance and to gain a comprehensive view of the "problem" and ourselves in relation to that "problem". (Palmquist, R.A)

The wealth of exploration by reputable scholars of the history of these two countries and the two processes examined in this dissertation, made discourse analysis a valuable tool in comparing these two societies. Examining the various viewpoints surrounding the contexts and fundamental issues underlying these two processes, added an additional comparative dimension to the study.

The Comparative Method constitutes one of the main branches in the study of politics – comparing how different governments and societies manage various problems, with particular focus on the role and operation of political structure and institutional mechanisms in different contexts. When we think of the comparative method, we can go back as early as Aristotle, whose text, The Politics, written after he came to Athens in 367 BC, was one of the first to

explore comparative constitutions, and along with Plato's work, heralds the birth of politics as a discipline. Aristotle could perhaps be considered as the father of the comparative method. However, in this thesis I have chosen to draw on several contemporary authors.

Cynthia Ghorra-Gobin's (1998) defines the comparative approach as follows:

> The comparative approach responds to concerns of an epistemological character. It makes it possible to classify countries and phenomena on the basis of a number of variables so as to then provide oneself with the means to deduce constants, invariables free from any historicist consideration. Identifying laws on the basis of these human phenomena and societal activities (Ghorra-Gobin 1998).

In his review of comparative politics and the comparative method, Lijphart (1971) describes comparative politics as a subfield of political science, which is characterised by an empirical approach based on the comparative method. He explains that comparative methodology focusses on 'the how but does not specify the what of the analysis', and is thus not defined by the object of its study, but rather by the method it applies to study political phenomena. Lijphart (1971) explains that the comparative method is one of four fundamental scientific methods which can be used to test the validity of general empirical propositions, i.e. to establish empirical relationships among two or more variables while all other variables are held constant (Lijphart 1971: 682–683).

The study does not attempt to find operable generalisations, but rather attempts to understand complex historical forces and effects of domination in different historical circumstances of two post-colonial societies – South Africa and Australia. Furthermore, the study does not attempt any quantitative comparisons, but rather attempts to understand how societies in transition have dealt with their violence and violating pasts – and have attempted to record and possibly find mechanisms to reconcile people who were oppressed and excluded from civil and political rights by generations of racial oppressors.

Rose (1991) suggests that even though the comparative methodology makes use of comparable, or at least functionally equivalent units of analysis, this does not suggest that the units of comparison are identical, but rather that they are similar in terms of specified attributes. He also explains that the existence of no equivalence between the comparison of consequences does not prevent comparison (Rose 1991: 446-462).

Rose (1991) goes on to argue that science depends on its concepts, and that concepts thus come before theories. These concepts determine the questions that are asked as well as the resulting answers. Concepts are therefore more fundamental than the theories which are stated in terms of them (Rose 1991: 446-462).

Rose (1991) suggests that it is naive to assume that political scientists always start by formulating abstract theories from which hypotheses are then

logically deduced for formal testing. Doing so has dangers, and in practice, the linkage of countries, concepts and theories is a matching or search process (Rose 1991: 446-462).

This is how Rose (1991) illustrates the above:

> In comparative politics concepts are used in a manner not dissimilar to anatomy. The starting point is the development of a generic vocabulary for classifying the 'bare bones' of political systems. Concepts provide the categories into which information about particular countries can be sorted. The use of concepts does not deny the particularity of a national Gestalt. After all, an anatomist knows that although the bones of different persons can be classified under the same anatomical headings, it is not possible to treat each bundle of bones (each individual person) as identical (Rose 1991: 446-462).

Rose (1991), quoting Sartori's 'ladder of abstraction', suggests that concepts can be chosen from many rungs, depending on the purpose of the research. The explanation of observed differences between nations requires hypotheses and/or theories. Rose (1991) furthermore explains that, as long as concepts can be operationalized, they provide the critical link between empirical observations and discussions of political systems in the abstract. After lengthy examination of evidence of a particular country, comparative analysis can arrive inductively at a theoretical discussion. Rose (1991) provides the following examples. Firstly, 'case studies can be surveyed in order to elucidate an inventory of propositions supported by available

empirical evidence. Alternatively, a broad theoretical discussion can be presented, followed by an examination of evidence of one or more countries that may or may not support the refutable hypotheses offered' (Rose 1991: 446-462). For Rose (1991), the starting point is less significant than a conclusion that is generalizable (Rose 1991: 446-462).

This study is concerned with comparing the phenomenon of truth-telling in very different contexts of post-colonial history. The cases being studied include the Australian CAR, which was an attempt to deal with Australia's history of discrimination and oppression of its minority Aboriginal and first nation people and South Africa's TRC which addressed its history of segregation and apartheid.

> Comparative social scientists recognize that a good social scientific explanation is relevant to a variety of cases but at the same time they recognize that social phenomena are complex and that a general explanation is a partial explanation at best. Thus, generality and complexity often compete with each other, even in a single study. An appreciation of complexity sacrifices generality; an emphasis on generality encourages a neglect of complexity. It is difficult to have both. (Ragin and Zaret 1983)

In Charles Ragin's (1987) The Comparative Method, he explores case-oriented versus variable-oriented comparative strategies. Ragin (1987) considers case-oriented methods to be classic comparative methods that

examin historically defined cases and phenomena. Ragin (1987) suggests that one of the central goals of the comparative social science is to explain and interpret experiences of societies nations and cultures, and that the case-oriented strategy clearly emerges from this goal. The case-oriented strategy, however, is incapacitated by a large number of cases and is thus best suited for identifying invariant patterns common to small sets of cases. The main weakness identified by Ragin (1987) is this strategy's tendency toward particularizing (Ragin 1987).

For Ragin (1987), the variable-oriented approach is more concerned with assessing the correspondence between relationships across societies or nations and broad theoretically based images than it is with understanding outcomes. According to Ragin (1987), the tendency of the variable-oriented strategy toward abstract, and sometimes vacuous, generalizations, is its major weakness, and it is 'incapacitated by complex, conjunctural causal arguments requiring the estimation of the effects of a large number of interaction terms or the division of a sample into many separate sub-samples' (Ragin 1987). This strategy is 'best suited for assessing probabilistic relationships between features of social structures, conceived as variables, over the widest possible population of observations (Ragin 1987).

The case-oriented strategies aims at appreciating complexity rather than achieving generality. 'Invariant statements relevant to more narrowly defined categories of phenomena, for example, are preferred to probabilistic statements relevant to broadly defined categories' (Ragin and Zaret 1983). By

contrast, the variable-oriented strategies gives precedence to generality rather than complexity. 'Investigators who use this approach are more interested in testing propositions derived from general theories than they are in unraveling the historical conditions that produce different historical outcomes. The case-oriented approach uses theory to aid historical interpretation and to guide the identification of important causal factors; the variable-oriented strategy, by contrast, usually tests hypotheses derived from theory' (Ragin and Zaret 1983).

In this dissertation, we consider the two commissions – and those are the two institutions and processes that we are comparing. At the same time, we are comparing context (colonial history, policy towards indigenous people, post-colonial history, demography etc.). Thus, this is a combination of addressing the comparison via case studies of two post-colonial societies, and the way they have dealt with that post-colonial history. The so-called liberal trajectory of Australian politics that was particularly oppressive and exclusive towards indigenous society, and segregationist and apartheid South Africa (i.e from 1910).

The following variables have been identified and are explored in this dissertation: Colonial Conquest; Protection and Segregation; Assimilation - The Destruction of Indigenous Identity; Liberal Constitutionalism and the Struggles for Recognition; Land and its Implications; Establishment, Construction and Aims of the Processes; Strengths and Limitations of the

Processes; Government Responses to Reconciliation; International Pressure; Equality; Human Rights versus Practical Reconciliation.

The Process

The research is primarily based on the study of the reconciliation processes in South Africa and Australia. The idea was to explore the differences and similarities within these reconciliation processes.

The depth of the research varied in the two countries. This is in view of the fact that in-depth studies of the South African Truth and Reconciliation Commission were more readily available than its Australian counterpart. There has been a burgeoning literature of insider views of the South African TRC, such that it was not necessary nor possible because of time constraints to undertake interviews. Archbishop Desmond Tutu, the Chair of the TRC, his deputy Alex Boraine, and a Commissioner, Wendy Orr, have all written biographies that provide considerable evidence. Piers Pigou, an investigator in the Commission has also written about the internal dynamics in the TRC. The TRC report of five volumes provides an incomparable resource for researchers. In the case of the Australian Commission on Aboriginal Reconciliation, there was less written evidence, so that key informants were approached and gave interviews. Two research trips to Australia were used to gather key information on the Australian process, outcomes and context.

A number of different research methods were employed to adequately study and understand the reconciliation processes in these two countries. First, unstructured interviews with a variety of actors were used. The interview discussions included key informants such as officials of the commissions, significant scholars and representatives of key organisations who participated in these processes. Furthermore, open and unstructured discussions were used to gain information particularly on the context within which these processes took place, as well as the impact of these processes on the two countries in question.

Documentary and archival research was also carried out. Records were analysed, government publications and laws pertaining to the processes were studied to understand the scope of government powers. Newspapers, both local and international, were consulted. Newspapers also constitute an important social space in terms of signalling change and what is considered crucial and newsworthy at any point in time.

The timing of the visits to Australia were planned to coincide with significant events and publications of key reports on the impacts of these processes.

Strengths and Limitations of the Thesis

In considering the main question explored in this thesis, the aim is to define the field and consider the content and processes of the discourse of truth and reconciliation in the two countries, as well as to analyse the interaction

between the ‘victims’ and the state. An important question considered in the dissertation is how these truth seeking and reconciliation processes compare. The dissertation not only addresses the various issues of reconciliation, but also focuses on the viability of a human rights-based versus a ‘practical reconciliation’ process. It does not deal with aspects of reconciliation that include subjective or material objectives, the achievement of which might determine the success of the processes in each country. Instead, a distinction is required between a formal process of holding hearings or researching the experiences of oppression, which might bring important issues to the surface, and the concept of ‘reconciliation’, which refers to a coming to terms with past trauma and a choice to move forward collectively. The latter cannot be dealt with in this study.

The literature lacks a practical definition or articulation of the meaning of ‘reconciliation’. In fact, its meaning is largely dependent on context. The original notions of ‘truth’ and ‘reconciliation’ held at the beginning of the South African and Australian experiences differed substantially from how it was understood a decade later. It should be noted that the exposure or presentation of truth does not automatically lead to reconciliation.

The issues raised by a comparison of the South African and Australian truth and reconciliation processes invites a whole range of potential elaboration and discussion that simply cannot fit within the scope of a Master’s dissertation. As such, this study is limited to a preliminary investigation of the research and literature on the South African TRC and the Australian

reconciliation processes. Its originality lies in its comparative approach, something only a few scholars, such as Orford (2005), have attempted to employ.

Obstacles to Overcome

Much research has been undertaken on the reconciliation processes in Australia and South Africa. After completing an extensive search, as well as consulting with the Australian High Commission, I discovered that the research material on Australia available in South Africa was minimal, outdated, and mostly related to general history. Secondary sources about the Australian reconciliation process, as well as literature on the Aboriginal struggle, were almost non-existent in South Africa. Thus, in July and August 2003 and June 2004, I undertook research trips to Australia. My research trips to Australia gave me great insight into the social relations between the indigenous people and the rest of the population in that country. I had initially believed that Australia's economic development and ranking among the top first-world countries would have enabled a successful reconciliation process and the integration of the indigenous population with non-indigenous Australians. What I found in 2003, twelve years after the process began in Australia, was very different and not much had changed on my return in 2004. I have not attempted to pursue the story beyond this period. Thus it is important to acknowledge that changes have occurred since, particularly in early 2008. This post-script has not been integrated into this dissertation.

CHAPTER 2: FUNDAMENTAL CONCEPTS DEFINED

It is important to begin the discussion about the reconciliation processes in South Africa and Australia by defining some of the fundamental concepts upon which these processes are based. Defining the concepts of Truth Commissions and Reconciliation forms a platform on which to base the discussion on the establishment, construction and aims of the processes chosen in these two countries, which is dealt with in Chapter 4.

Truth Commissions

Humphrey (2002) and Orford (2005) are two scholars who have conducted extensive research in the field of truth commissions. As their explanations of these key concepts correlate strongly with the Australian and South African situations, I decided to draw extensively on their definitions of these terms.

Orford (2005) believes that most of the literature regarding truth commissions focus on the success of these commissions in achieving reconciliation, peace, justice or successful transitions to democracy. Truth commissions attempt to report on massive human rights violations in liberal democratic states as well as the bureaucratisation of genocide. Unsettling the sense that massive human rights violations are an exceptional problem confronting states in transition from authoritarianism or dictatorship to democracy and truth forms

the fundamental basis in establishing transitional justice institutions (Orford 2005: 2).

Humphrey (2002) notes that truth commissions have been adopted internationally to promote national renewal and foster inclusive societies in the wake of state repression and violence. The centrepiece of the truth commission process is individual testimonies of suffering. Truth commissions address the legacy of violence – trauma – as the basis for promoting national reconciliation rather than the pursuit of justice through the prosecution of its perpetrators (Humphrey 2002: 106).

Christie (2000) argues that truth commissions are a society's best hope for restoring meaning in individual lives, and can assist in determining how the effects of a traumatic past are linked to the present (Christie 2000). Trials or truth commissions are designed in part to help change the practices of authoritarianism to democracy, although these attempts are inevitably shaped by the past as well. Truth commissions also provide a frame of reference for future historians who wish to analyse the politics of states in transition. Wilson (2001) concurs with these arguments, noting that human rights commissions create a space where stories of suffering can emerge and be incorporated into the 'official' version of the past (Wilson 2001).

Orford (2005) explains that transitional justice literature treats the recording of truth as necessary for commencing the healing of individuals and of the community (Orford 2005: 2).

In analysing post-conflict societies, Humphrey (2002) suggests that the problems faced in reconstructing nationally fractured communities often dictate whether to pursue reconciliation. Usually, the state – or the new political regime – is not strong enough to pursue the path of justice, a point proven by the repeated need for international criminal tribunals to prosecute crimes against humanity or other atrocities (Humphrey 2002: 105).

Orford (2005) states that the goal of facilitating healing for individuals requires accepting their testimony as the truth.

> For example, the processes of the South African TRC were designed to enable victims to feel safe while they told their stories before sympathetic listeners and to assist in documenting atrocities and locating individual trauma in the larger political context. In the context of a history in which the state and its legal institutions were the purveyors of terror and human rights abuses, this requires a distancing of the TRC from the legacy of apartheid law. The Human Rights Committee of the TRC particularly avoided giving chilling reminders to victimised people of the hostility and insensitivity of the courts under apartheid (Orford 2005: 3, 4).

Humphrey (2002) argues that the notion of reconciliation is politically focused on the social recovery of victims within the larger purpose of reconstituting the national whole. In this process, he explains, 'the threshold of moral vision is adjusted by recognising victims in the testimony of their suffering' (Humphrey

2002: 106). Truth commissions seek to 'invert the state politics of pain by shifting the focus from terror to trauma' (Humphrey 2002: 106). With pain as their fulcrum, they seek to objectify and institutionalise truth claims through the testimony of victims. However, the political shift from terror to trauma results in an implied difference in the perspective of pain (Humphrey 2002: 106). In the former, pain is 'the medium through which society established its ownership over individuals', while in the latter, 'pain is the medium available to an individual through which a historical wrong done to a person can be represented, taking sometimes the form of describing individual symptoms and at other times the form of a memory inscribed on the body' (Humphrey 2002: 106).

In contrast to the evidence available to courts, truth commissions are able to draw on a broader range of evidentiary material and are able to widen the focus of their inquiries from the actions of particular individuals to the role of entire sectors of society (Orford 2005: 3).

The sources of 'truth' (evidence) are the stories of the suffering of the victims without the burden of legal proof or judgements. According to Humphrey (2002), individual testimonies also serve as alternative sources of 'memory' for events that had been expunged from official records. The power of these statements is not legal (at least only potentially and indirectly), but empathetic. The process is supposed to move people collectively, thereby diminishing the legacy of violence by sharing its effects. This sharing of the 'truth' of suffering

is an act of moral implication that is supposed to engender acknowledgement of collective responsibility (Humphrey 2002: 106).

In the courts, violence is re-enacted in precise detail through rules of evidence and procedure to establish the 'fact' of its occurrence for the purpose of judgement and punishment. In tribunals, 'truth' is established through the credibility of the performance of the victim in telling their story and the empathy witnesses feel. Testimonies to suffering before tribunals are not aimed at securing justice; instead, they utilise the victim as the foundation for moral and social reconstruction (Humphrey 2002: 107). In Australia and South Africa, the processes were both painful, deeply cathartic but also with a strong political and material aspect to them.

Humphrey (2002) argues that in tribunals the greatest burden falls on the survivor: they are enjoined to reveal the constituted collective memory; and they are morally pressured to reconcile and forgive, and to accept token compensation (if any). Finally, the victim's rights are further subordinated to the promise of the rule of law and notions that a more pervasive culture of human rights may be established (Humphrey 2002: 141).

The most commonly expressed criticism of the role played by war crimes tribunals and truth commissions is the extent to which they are capable of producing an agreed 'truth' or collective memory.

> While supporters of truth commissions see in this flexibility a strength, for others (and particularly those in political opposition to the new regime), the lack of traditional process detracts from the credibility of the truth produced as a result (Orford 2005: 5).

Truth commissions offer the means to respond to years of barbarism run rampant, or horrific human rights violations that occurred while countries were caught up in racial, ethnic, class, and ideological conflict over justice and power (Orford 2005: 6).

> Another strand of critical engagement with the work of transitional justice focuses on the performative effects of war crimes trials or truth commissions, and in particular on the ability to achieve the ends claimed for them – individual healing, collective reconciliation, the recording of history. In the context of South Africa, for example, some commentators have argued that the TRC increased racial tensions. Many commentators (including it should be noted the authors of many truth commission reports) point out that reconciliation depends as much upon ending the threat of further violence, addressing structural inequalities and providing reparation as it does upon the acknowledgement of the truth (Orford 2005: 7, 8).

> Others who are concerned with individual healing suggest that there is no reason to think that the experience of testifying before such a commission will necessarily have a therapeutic effect. A number of

> commentators noted that these inquiries are hardly a healing process for those actually responsible for seeking out the truth' (Orford 2005: 7, 8).

Although acknowledging the value of some of the work of truth commissions, Wilson (2001) suggests that these methods of investigation and documentation are too legalistic to adequately record and reflect upon past violations. Citing the South African TRC, he also believes that truth commissions do not function well if they are overloaded with a variety of tasks. According to Wilson (2001), the most damaging outcome of truth commissions is their inherent equating of human rights with reconciliation and amnesty, which he says de-legitimises them in relation to popular understandings of justice, and can lead to greater criminal activity in society. Finally, Wilson (2001) says that human rights talk has become the language of pragmatic political compromise rather than the language of principle and accountability. He argues that this is the main obstacle to popular acceptance of human rights as the new ideology of constitutional states (Wilson 2001: 228).

Political crimes are usually committed by highly skilled operatives trained to conceal their acts and destroy incriminating evidence; thus, these offences are notoriously difficult to prosecute and to establish guilt beyond reasonable doubt. For example, the Nuremburg trials after World War II were extremely time-consuming, expensive, and required large teams of skilled and highly competent investigators. Moreover, judicial enquiries into politically sensitive

matters rarely satisfy the need for truth and closure. As such, they should not necessarily be seen as superior alternatives to bodies such as the TRC.

Reconciliation

As mentioned in the previous chapter, the literature lacks a practical definition or articulation of the meaning of 'reconciliation'. Its meaning is thus largely dependent on context. Numerous definitions of reconciliation have, however, emerged from the South African and Australian reconciliation processes.

According to the Collins Dictionary, 'reconciliation' means to bring opponents into a friendly relationship, to come to a settlement, or to acquiesce to unpleasantness (Collins, 4th edition, 1999). In practice, the meaning of reconciliation varies according to the situation or national context. For analytical purposes, Lederach (1997) - a Mennonite conciliator who has been involved in peace processes in many countries - provides an interesting and appropriate definition of reconciliation. He illustrates the idea of relationship as 'the basis of the conflict and its long-term resolution' (Lederach 1997: 26). The idea of ongoing 'encounters' not a once-off event is at the core of the idea and the practice. It involves knowing and acknowledging, argues Lederach (1997), in order for a more interdependent and creative process of peace-building and interaction. For Lederach (1997), the space of reconciliation is critical – it must include and involve a four-pronged process which he sees as a framework – he has a graphic which shows reconciliation in the middle with four prongs representing the process of Truth (acknowledgement,

transparency, revelation and clarity), Mercy (acceptance, forgiveness, support, compassion, healing), Justice (equality, right relationships, making things right, restitution) and Peace (harmony, unity, well-being, security, respect). He goes on to discuss how the relationships involved in reconciliation are embedded in three specific contradictory 'paradoxes': 'a conflictual past and an interdependent future; a space for truth and mercy to meet where concerns for exposing what has happened *and* for letting go in favor of renewed relationships that are validated and embraced'. Finally, 'redressing the wrong is held together with the envisioning of a common connected future' (Lederach, 1997: 31). This is clearly a challenging model, because contradiction can lead to impasse – instead he proposes a process of embracing the paradoxes in order to move forward constructively. His book addresses the 'how to' of reconciliation – but it is an interesting contrast to conflict resolution – a process which he calls 'conflict transformation'.

The South African Truth and Reconciliation Commission determined that reconciliation was not about avoiding the reality of history or pretending that events of the past had not occurred. It acknowledged that reconciliation would likely be never-ending, costly, and often painful. In South Africa, establishing democracy and a human rights culture were essential elements of the reconciliation process, with the hope that such changes would foster a more decent, caring and just society (TRC Report 1998: 349).

The Australian notion of reconciliation focused on recognition, rights, and reform. Ideally, this requires an acknowledgment that indigenous people have

a historical and cultural relationship to the land that should define their rights as 'first peoples' within the larger society of Australia. Reconciliation was also supposed to be about reforming the existing system to address the disadvantages experienced by indigenous people and to change how those people are viewed in society (Grattan 2000: 68).

Fanie Du Toit (2003), an Afrikaner and South African political philosopher, contends that reconciliation is based on respect for a common humanity, and involves a form of restorative justice that does not seek revenge or impunity. Equally important is the necessity of perpetrators to accept responsibility for past abuses. This is not intended to wipe away the past, but rather to stress remembrance without debilitating pain, bitterness, revenge, fear, or guilt. In this respect, reconciliation seeks to learn from and redress past violations for the sake of a shared present and a peaceful future. While it does not require forgiveness, there must be a general willingness to peacefully co-exist and resolve continuing differences. Reconciliation also requires all citizens to accept a moral and political responsibility to nurture and protect a culture of human rights and democracy, as well as a commitment to resolve political and socio-economic conflicts in a non-violent manner. At best, reconciliation is a continual process that gradually addresses the issues and problems that cause divisiveness and generate conflict (Du Toit 2003: 26).

For the Australian government, reconciliation involved implementing practical measures to achieve improvements in the livelihoods of indigenous people (*Social Justice Report* 2000: 2). Grattan (2000) views reconciliation as a

process that takes place at different levels. At the personal level, ignorance, hostility, discrimination, or racism would damage reconciliation, while concern, solidarity, inclusiveness, and respect would lead to a positive result (Grattan 2000: 265). At the social level, reconciliation involves resolving continuing problems in health, housing, education, employment, welfare, and economic advantage that are experienced by indigenous people. In this respect, reconciliation is explicitly linked to whether the government and people of Australia are committed to addressing the concerns of Aboriginal people. Ultimately, it is about acknowledging the shared responsibilities and obligations that a society has towards those who have been oppressed (Grattan 2000: 265).

The Australian Human Rights and Equal Opportunity Commission (HREOC) *Social Justice Report 2000* outlines a rights framework for reconciliation based on four inter-related principles. The first is '*No discrimination'* or guaranteed equal treatment and protection for all. The definition they provide goes as far as recognising the cultural distinctiveness of indigenous people and the adoption of special measures to redress historically derived disadvantage. The second is '*progressive realisation',* which refers to the commitment of sufficient resources through well-targeted programs to ensure adequate progress in the realisation of rights on a non-discriminatory basis. The third is '*effective participation'* to guarantee the participation of indigenous people in decisions that affect them, including in the design and delivery of programs. Finally, '*effective remedies'* provides mechanisms for redress where human rights are violated (*Social Justice Report* 2001: 193).

The South African context was of a newly formed democratic government trying to create an inclusive human rights environment where none had previously existed. In contrast, the Australian process was defined by a need to change governance methods through legislative measures that could shape the opportunities and outcomes of the disadvantaged (Grattan 2000: 265).

Humphrey (2002) notes that South Africa's TRC was primarily concerned with providing the victims of gross human rights violations with 'space' to tell their stories, incorporating their experiences into the history and public consciousness of the country. In this respect, reconciliation was both symbolic and political. In Australia, reconciliation was equated with recognition for Aboriginals and Torres Strait Islanders. Apart from finally acknowledging the history of oppression and violence in the country, reconciliation was supposed to provide recognition of indigenous people as the original citizens of the country (Grattan 2000: 266).

Terminology

When speaking of the formal or official reconciliation process, this dissertation refers to South Africa's Truth and Reconciliation Commission (TRC or the Commission), or Australia's Council for Aboriginal Reconciliation (CAR or the Council) and Reconciliation Australia.

For the purposes of this dissertation, the term ‘indigenous people’ refers to Australia’s Aboriginals and Torres Strait Islanders. In the literature, indigenous people are refered to as aborigines, aboriginals, aboriginal natives, natives, or black. South Africa’s black population is also refered to as Africans or natives. Coloured, Indian, black and white refer to categories that defined groups in South Africa under the Population Registration Act (1950). Australia’s white population is often referred to as Europeans, settlers or non-indigenous people in the literature.

Aboriginal people are also described as full-blood or half-blood (mixed race).

Terra nullius is defined as land belonging to no-one.

CHAPTER 3: LEGACIES OF RACIAL SEGREGATION IN AUSTRALIA AND SOUTH AFRICA

In South Africa and Australia, the reconciliation processes focussed on specific periods of human rights abuses in their countries. I will illustrate in this chapter, however, that there was a long pre-history. The terms of reference limited both processes to specific periods, neither of which dealt with the colonial past. It is thus important to take a steep back in this chapter to eplore some defining moments of exclusion for both indigenous societies. In South Africa it was probably the South African Union of 1910, and the Land Acts, with issues of labour segregation and the entrenchment of migrancy. In Australia, this was illustrated by the removal of Aboriginal children from their families, Native Title, the questions relating to treaty.

Variables explored in this chapter include: Colonial Conquest; Protection and Segregation; Assimilation - The Destruction of Indigenous Identity; Liberal Constitutionalism and the Struggles for Recognition; and, Land and its Implications.

Colonial Conquest

The oppression of indigenous people in Australia and South Africa occurred in different ways, at different times, and in different contexts. Although both nations were colonised by Britain and the indigenous people were dominated and oppressed by developing settler societies, fundamental differences exist

between the experiences of the two countries. In this section, I focus on some of the similarities as well as differences of colonial conquest between Australia and South Africa. These include issues such as forced integration into wage labour, maintenance of homestead and family life and subordination of the indigenous people.

European incursion into the way of life of indigenous people in Australia began upon settlement of this country in 1788. For Aboriginal Australians it became important to retain and protect their traditional way of life including their culture, values, institutions and land (Stokes 2002: 191,192). European settlement in Australia was characterised by violence, oppression and segregation as well as the annexation of traditional Aboriginal land. The frontier conflict in Australia also resonates with the South African experience, where commandoes in the earlier century were established to perform raids on San-Bushmen.

The abduction and capture of indigenous people in both these countries was primarily for the purpose of pressuring them into labour. This defeat and dispossession of indigenous communities would affirm the supremacy of the settlers and established a condition akin to slavery (Reynolds 1987: 68). Colonialism in both these countries depended on the use and abuse of labour resources of the indigenous communities. In South Africa, independent African producers were unable to sustain long term production as a result of 'settler competition, land losses and legislative and administrative controls designed by the colonial state to force them into wage labour' (Walker 1982: 174). In the Australian situation, the forceful removal of Aborigines into

pastoral stations, fringe camps, reserves and missions were designed for exactly this purpose (Reynolds 1987: 67). They were designed as a form of control over the traditional Aboriginal way of life, to control freedom of movement and to force indigenous people into labour. This restriction of movement was reflected in South African pass laws.

In South Africa, by the end of the 19th century, 'all formerly independent chiefdoms had been brought under colonial administration systems through direct conquest, annexation, or negotiated settlement' (Walker 1982: 174). In Australia there was never any form of peace treaty or formal negotiations regarding settlement (Reynolds 1992: 198). Passes and other mechanisms of labour control – service contracts, curfew regulations, residence controls, and travel permits – ensured that labour took the form of migrant labour. In South Africa the hut tax (1820s) was a central device for drawing the homestead into the nexus of the cash economy. The hut tax created a new and inflexible demand for cash in African societies, and while some homesteads were able to meet it through increased market production, an increasing number were obliged to turn to wage labour (Walker 1982: 174,175). This is in contrast to the Australian situation where indigenous people were formerly hunter gatherers. The new dispensation limited their freedom to live a traditional way of life particularly in relation to the land.

Protection and Segregation

Colonialism brought European settlement to South Africa in a slower and more complex process than in Australia. Racial segregation and state controlled processes were entrenched by the time of Union in South Africa in 1910. The gradual systemisation of segregation and racist social engineering achieved dominance in 1948 through settlement patterns and enforced racial domination, i.e. apartheid. Australian history was also characterised by entrenched racism, however, South Africa's systematic racial ordering of society and its consequent violation of human rights occurred on an entirely different scale.

In Australia this racial ordering comprised a set of 'total institutions', distinguished by the autocratic rule of officials or mission employees. For decades, the institutional regimes governing indigenous people in Australia were largely unaccountable and the State Protection Boards played an authoritarian and often brutal role in restricting Aboriginal society (Stokes 2002: 192, 193).

State policies and institutions in Australia excluded indigenous people from participating in Australia's liberal democracy. Through official protection and segregation policies Aborigines were denied citizenship rights and institutionally confined to state reserves (Stokes 2002: 193). To maintain order, state laws established new categories of offences only applicable to indigenous people. These included: 'drinking, leaving a reserve, entering one

when barred, intermarrying, refusing to work, being cheeky, writing salacious letters to a boy/girl-friend, committing adultery, playing cards'. When found guilty of such offences a range of penalties were imposed such as 'fines, forced manual labour, confinement, or expulsion from the community'. (Stokes 2002: 193, 194).

In South Africa, after the Union in 1910, a set of 'native policies' were put in place to establish control. Ultimately, this legislation entrenched a system which was dependent on single male migrant labour. Some of the important legal measures adopted included the *Native Labour Regulation Act* of 1911, the *Land Act* of 1913, which set the parameters of the South African reserves and sounded the death knell for independent African peasant producers. The *Urban Areas Act* of 1923 introduced a uniform system of urban pass controls and a segregated urban housing policy. Finally, the *Native Administration Act* of 1927 made it clear that the all-white government intended to base its native policy on a reconstructed 'traditionalism', with the purpose of shoring up homestead production and adapting tribalism into a 'bulwark against radical movements'. In addition, existing tribal chiefs were 'co-opted as lowly functionaries of the state, customary law was recognised in civil cases between Africans, and tribal marriage was sanctioned. By 1930, the migrant labour system had become the dominant force in the social and economic life of the rural periphery of southern Africa'. (Walker 1990: 176).

According to William Beinart (2001), South Africa rejected an all-embracing form of nationalism, and instead enshrined racial distinctions at the heart of its legislative program and political projects. In 1948, a 'reunited' National Party

(NP) sought a tight set of racial policies (Beinart 2001: 143). The *Mixed Marriages Act* (1949) and the *Immorality Act* (1950) prohibited marriage and extramarital sex across racial boundaries (Beinart 2001: 147). In 1950, the *Population Registration Act* (1950) provided for compulsory racial classification on a national register (Beinart 2001: 148). The *Group Areas Act* (1950) and *Prevention of Illegal Squatting Act* (1951) defined living areas by racial zones (Beinart 2001: 153). The government also greatly impeded radical worker organisation through the *Suppression of Communism Act* (1950) (Beinart 2001: 155). The *Urban Areas Act* of 1952 was one of a number of regulations passed concerning African movements and urban rights (Beinart 2001: 158). The *Prohibition of Improper Political Interference Act* (1967) outlawed most political activity across racial lines (Beinart 2001: 151). As a result, opposition movements inside and outside the country focussed on issues such as passes, influx control, and forced removals, as well as provided an interface between black and white women (Beinart 2001: 189).

For Beinart (2001), the NP's apartheid edifice, which drew on segregationist precedents, rested on several pillars: a starker definition of race, exclusive white participation and control of central political institutions (and repression of those who challenged this), separate institutions or territories for blacks, racial segregation in towns and the countryside, control of African movement to cities, tighter division in the labour market, and the segregation of amenities and facilities of all kinds, from universities to park benches (Beinart 2001: 148).

In the Australian situation, Aborigines were placed in two major categories, 'the so-called "full-bloods" or tribal Aborigines, and those of mixed race' (Stokes 2002: 193). Two different policies were applied, based on the putative condition or capacities of these two categories of indigenous people, namely either segregation or assimilation. For tribal Aborigines, segregation was intended to protect them during the 'time it took the race to die out' (Stokes 2002: 193). 'For both the "full-blood" Aborigines and those of mixed race, the policy was one of hastening the inevitable demise of race and culture. On such grounds, some would argue, these programs were attempts to bring about the ultimate exclusion of indigenous people, namely, their genocide' (Stokes 2002: 193).

The international legal definition of the crime of genocide is found in Articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide. Article II describes two elements of the crime of genocide:

1) the *mental element,* meaning the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such', and

2) the *physical element* which includes five acts described in sections a, b, c, d and e. A crime must include *both elements* to be called 'genocide'.

Article III described five punishable forms of the crime of genocide: genocide; conspiracy, incitement, attempt and complicity.

Reynolds (1987) explains the concept of genocide in the Australian context as follows:

> Did significant numbers of settlers seek the total destruction of Aboriginal Australia? It is clear that from at least the 1820s many colonists expected the Aborigines to "die out" or "pass away". The belief grew stronger as the century progressed and was still widely held in the 1940s. Australians often talked of extinction and extermination, but their reaction to the prospect varied widely. Sharpened conflict called forth increased demands for extermination. They became common, for perhaps the first time, between 1828 and 1830. Even when the fighting ceased and anxiety ebbed there were settlers who believed that colonisation was incomplete while any blacks were alive. (Reynolds 1987: 53-57)

Under these circumstances, citizenship for Aboriginal and Torres Strait Islanders was primarily a minimal legal and administrative category that enabled state governments to implement policies that were almost universally authoritarian, discriminatory and oppressive. Aborigines were forbidden to speak their native languages, and their previous cultural practices were prohibited. The state aimed to reduce indigenous 'sovereignty' over important areas of life, constrain the autonomy of those living within it (Stokes 2002: 194). Few political options were available to Aborigines under this regime, apart from escape, withdrawal or resistance (Stokes 2002: 195). When combined with government neglect of basic service provision, these factors contributed to a self-perpetuating cycle of poverty and despair that limited the capacity to engage effectively in liberal democratic political struggles (Stokes 2002: 195,196).

The Aborigines were the subjects of policy, of a particular kind of 'integration' based on paternalism, protectionism, and later assimilation. To embrace this new lifestyle, they were still subject to unequal treatment, evidenced by low income, special laws of removal from their lands, citizenship cards (the equivalent of South African passes), and even eradication campaigns.

The second destructive policy identified by Bourke et al (2002) was the forcible removal of indigenous children from their families from 1910 to 1970. This measure was part of a social engineering experiment designed to 'breed out' the Aboriginal race, and subsequently became the preferred solution to the 'half-cast problem' in Australia (*Social Justice Report* 2000).

Assimilation - The Destruction of Indigenous Identity

From 1937 to 1972, assimilation was the primary Aboriginal policy for the various Australian governments and political parties of the period. In a comparable period, South Africa espoused segregation, and after 1948, the idea of separate development, or apartheid, as it came to be known.

The central goal of this policy of assimilation in Australia is clearly demonstrated by a statement made at a ministerial meeting in 1961: 'The policy of assimilation means in the view of all Australian governments that all aborigines and part-aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community' (Native Welfare Conference, 1961).

Those of mixed race were thought minimally capable of participating in white society and many of them were subjected to a policy of forced assimilation. The main strategy was to remove such children from indigenous families and place them in state institutions and white families so that they could learn to participate in the larger white society and economy. Over time, however, it was also thought and hoped that all trace of 'colour' would be bred out (Stokes 2002: 193).

Bourke et al (2002) suggest that the impact of genocide, invasion, institutionalisation, and the forced assimilation of the indigenous population only began to be generally recognised in the non-Aboriginal community in the 1960s. As mentioned earlier, this was a period of global economic upswing, and saw intensified activism by indigenous people against their oppression. During this period, colonial powers also relinquished control over their dominions across the world.

Liberal Constitutionalism and the Struggles for Recognition

The formation of the Commonwealth of Australia in 1901 constituted the creation of a new federal, political domain, comprising formal constitution, liberal democratic institutions, values and practices. Building upon colonial democratic precedents, this national *domain of liberal democracy*, as Stokes (2002) puts it, put a premium on political equality among citizens. Ideally, it consisted of instruments for (a) protecting the legal and political rights of individuals, such as the common law, the constitution, and legal statute, and (b) selecting governments that have authority over citizens, which is then

exercised through the instruments of the state. In Australia, the federal system also ensured that sovereignty was divided between the Commonwealth and the states (Stokes 2002: 187). Through Section 51 (xxvi), the original constitution prohibited the Commonwealth from making special laws for 'aboriginal natives' and effectively left power over indigenous people with the states. In addition, the states, through their 'residual powers', were awarded constitutional jurisdiction over land. This fact and the condition of divided sovereignty had a significant influence upon the evolution of relations between indigenous people and the state, largely to the detriment of the former (Stokes 2002: 187).

Following colonial precedents, early in the history of the Australian Commonwealth, only certain kinds of people, usually 'whites', were deemed to have the capacities for democratic citizenship. As a consequence of later political struggles, however, this liberal democratic political domain gradually expanded the types of people who could be officially designated as citizens (Chinese, Aborigines). Such a process may be categorised as one of *liberal inclusion*, in which previously excluded groups are given entry into liberal democratic institutions, and then begin to participate in them. This process of inclusion involved not only the granting of votes, but often also legal rights and other institutional and material resources (Stokes 2002: 188).

For indigenous people, the logic of inclusion tends to produce particular political and social outcomes. The general citizenship regime for Aborigines and Torres Strait Islanders remains a liberal democratic one that is little

different from that of the rest of the society. This process of liberal inclusion required the political assimilation of indigenous people into the prevailing values and practices of Australian citizenship. Indeed, one tendency, associated with the interests of the liberal democratic state, was to incorporate the newly included groups and remould them into compliant civic actors. The political disposition here, Stokes (2002) argues, was still to reshape the indigenous domain and make it conform better to established forms of political and administrative rationality. Regimes of consultation and indigenous self-management were characteristic of this political logic (Stokes 2002: 189). In South Africa the discourse was much more distinctively segregationist.

Aboriginal people lack the population numbers necessary to influence political parties, or the financial resources to educate the wider community about their concerns through television, radio, or the print media. And yet there has been intense public interest at certain times – 'windows of opportunity' when aboriginal rights, statuses and entitlements have been vociferously debated throughout Australian society. This was the case in 1967 with a lull in the 1970s and 1980s but a resurgence in the 1990s with the *Mabo* court case and the *Bringing Them Home* report.

The federal government's involvement in Aboriginal affairs began on 2 November 1967 – as a result of the 1967 referendum. The referendum, about the right of Aborigines to the vote was the occasion for the first public debate about full citizenship for Aborigines in the land of their birth. This sparked widespread activism of Aboriginals and led to the famous 'Tent Embassy'

(1972) in front of the parliament buildings in Canberra. The discourse shifted amongst Aborigines to a demand for self-determination. The question of entitlement of Aborigines became the focus of debate. The lack of an original treaty and the loss of Native Title was at the heart of the issue. Aborigines looked to the Federal Government to resolve matters.

Empowered with responsibility for Aboriginal affairs, the national government in Canberra was now expected to force the repeal of the racist legislation of the individual states and address the conditions of general deprivation in Aboriginal community. However, problems arose because the federal government did not immediately assume the necessary practical responsibility for Aboriginal health and welfare. As the state governments began repealing their *Aboriginal Protection Acts* in 1968, a political vacuum was created that severely exacerbated the living conditions and social/health status of Aboriginals throughout the country. This, in turn, led to political upheaval in indigenous communities, most significantly in the urban centres of southeast Australia (As depicted in *Ningla-Ana*, 90min. B&W, dir. A. Cavadini, 1973).

The first year of the Whitlam Labour government (1972) was a time of dramatic change, with the cabinet making 'well over a thousand decisions, at an average rate of twenty a week'. (Manne 1999: 188) In early 1973, the Whitlam government became the first federal government to assume formal responsibility for Aboriginal people. This necessitated the formation of a new agency to administer the significant funds allocated to Aboriginal Affairs.

Gough Whitlam, leader of the Federal Opposition at the time of the 1967 referendum, had strongly canvassed in favour of constitutional change

reference. Whitlam said that the passage of the referendum meant there was no longer an alibi for a failure to improve the conditions of the Aboriginals. Whitlam stated that the Commonwealth's inability to enact special legislation for Aboriginals because their interests were the jurisdiction of the individual states had inhibited progress. In his view, the referendum would remove the appearance of discrimination and enable the federal government to improve the condition of Aboriginals in terms of health, housing, employment, and community facilities.

The Australian religious establishment also strongly advocated constitutional change, with the heads of all of the major denominations publicly pledging their support. The Anglican Primate viewed the proposed changes as a way of helping build self-confidence, self-reliance, and self-respect among Aborigines. The Whitlam government seemed to be committed to the process but it was short-lived to be replaced in 1975 by a more conservative Liberal government led by Fraser.

The liberal democratic course, promoted by internal opposition forces in South Africa, found expression in 1994 in a social democratic constitution. The Constitution embodied both a human rights and a socio-economic rights framework in order to deal with the contradictory legacy of apartheid. When the democratically elected government came to power in South Africa, it inherited both the most developed economy in Africa on the one hand and major socio-economic problems on the other. The most serious of these were high rates of unemployment; abject poverty among a growing proportion of the population; sharp inequalities in the distribution of income, property and

opportunities; and high levels of crime and violence (Terreblanche 2002: 25). It also inherited the legacy of the systemic consequences of the deprivation of land and economic opportunities for the vast majority of people. None of these socio-economic problems were incidental or temporary in nature. All of them were closely interlinked, and deeply rooted in South Africa's extended colonial history (Terreblanche 2002: 26). However, the manner in which the TRC terms of reference were defined, in fact limited the extent to which it would be able to address these systemic questions. Ironically a human rights approach, which addressed the abuses of the past, could not deal with the pressing issues of poverty that arose from apartheid. Individualising the apartheid experience limited the way the state could respond to the apartheid past, in particular the land question.

The democratic transition between 1992 and 1994 and the subsequent measures to deal with South Africa's past were hailed worldwide as a political miracle. From a political and human rights point of view, South Africa put in place constitutional measures to ensure the protection and promotion of democracy. It also attempted to deal with the abuses of the past in ways similar to many post-conflict societies, by setting up the TRC (Terreblanche 2002: 27). However the TRC would never be able to meet the needs and interests of black people because of the limiting factor related to its terms of reference.

Land and its Implications

In the Australian struggle, the optimism of the 1970s, generated by federal intervention after the 1967 Referendum gave way to disillusionment for the Indigenous population. In the 1980s, Aboriginal affairs were pushed off the national agenda by recession. In 1983, Labour came back to power and held it until 1996. However, its approach to Aboriginal affairs was characterised by 'pragmatic drift'. The land issue had become a bipartisan Aboriginal policy issue once the 1976 *Land Rights Act* had been passed under a conservative Liberal government. The *Land Rights Act* had attempted to recognise Aboriginal land claims, but had satisfied nobody. Aboriginal people reappeared on the national agenda during the Bicentenary in 1988, challenging the idea of a unitary citizenship and Australian nationhood, by focusing on their exclusions and particularly their land claims. This led to renewed activism, which in 1992 found expression in the High Court of Australia. For over a year the media vibrated to the word '*Mabo*', a land claims case that would change the moral stance of the nation. The *Mabo* case would also change the interpretation of the land rights of Aboriginal people. This would not be uncontested by subsequent governments, but was hailed as a victory for Aboriginal land claims. The Keating Labour government (1991-1996) with renewed vision shaped the High Court's decision into law. The judgement also produced the greatest newspaper controversy and the longest Senate debate in the history of Australia as Australians came to terms with the fiction of 'terra nullius' and the fact of native title (Broome 2001: 6, 7).

There were a number of landmark developments in the area of indigenous affairs during this period. In 1992, the High Court's decision in the *Mabo* case focused on the land rights issue rejected the assertion that Australia was *terra nullius* (land belonging to no-one), and found that Australian common law recognised the land rights of indigenous people stemming from their continued occupation and usage (*Social Justice Report* 2000). The High Court noted that British sovereignty over the country had not extinguished the beneficial title to the land of the indigenous inhabitants, which they held under their own laws and customs. The passage of *Racial Discrimination Act* in October 1975 was pivotal in protecting the native title rights established in the *Mabo* case. Reynolds (1992) notes that the High Court's decisive rejection of the concept of *terra nullius* consequently ruled it an inappropriate foundation for the Australian legal system. Justice Brennan stated that the 'fiction by which the rights and interests of the indigenous people in the land were treated as non existent' was justified by a policy that 'has no place in the contemporary law of this country' (Reynolds 1992). Moreover:

> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands (Reynolds 1992).

Justice Brennan contended that the acceptance of *terra nullius* in Australia resulted from the confusion of sovereignty and property, and claimed that 'only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty' (Reynolds 1992).

Reynolds (1992) suggests that for many Australians, both black and white, the *Mabo* decision represented an opportunity to achieve greater national resolution of the troubling question of Aboriginal land rights. It also heralded an opportunity to improve relations between the two communities on such a divisive issue, while still ensuring indigenous people could genuinely repossess their inheritance.

Noel Pearson (sited in Cowlishaw and Morris 1997), an Aboriginal activist lawyer, and former Executive Director of the Cape York Land Council, coined the concept of the 'politics of victims in 1997 and asserted that unless the dominating state accepts the victims on their own terms, any complicity or interaction constitutes an unacceptable relinquishment of the victims' power:

> For a long time, the only political currency which Aboriginal people could use was their refusal to be involved. Now that the non-Aboriginal legal system has offered something in the way of rights, however narrow, to refuse to engage in the game and to fail to appreciate the rules and its limitations – even if our purpose be to disrupt the game – no longer seems smart. The challenge is to negotiate the expansion of those rights without

losing ground and without surrendering the chance of future progress in a struggle which has seen incremental advances but whose resolution is still long in arriving (Cowlishaw, Morris 1997).

The year following *Mabo* saw the next important native title case to be heard before the High Court: *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors*. The Wik people of north Queensland commenced proceedings in the Federal Court of Australia in June 1993 against the State of Queensland, the Commonwealth of Australia, Comalco Aluminium Limited, and Aluminium Pechiney Holdings Pty Ltd, claiming native title and other possessory rights over an area of land and sea. The Thayorre peoples later joined in the suit as they made their own claim to part of the land claimed by the Wik peoples. Justice Drummond found that pastoral leases over the land granted exclusive possession to the lessees and therefore extinguished native title. The Wik and Thayorre peoples appealed to the Full Federal Court, and the suit was subsequently moved to the Australian High Court. The substance of the appeal was based on whether the grant of a pastoral lease necessarily extinguished native title rights; the answer was based on the question of whether the pastoral leases granted exclusive possession of the land to the pastoralists (Bourke et al 2002: 70).

As the pastoral leases were created by statutes, Bourke et al (2002) suggest that the interpretation of the relevant legislation was pivotal in determining the nature of the rights and obligations flowing from the grant of each lease. It was also necessary to identify native title rights in the case through reference

to indigenous traditions, customs, and practices. Where there was any inconsistency, the rights of the pastoralists prevailed over native title rights. The effect of inconsistency - whether the native title rights were extinguished or suppressed - was not determined by the Court. The decision was delivered on 23 December 1996 (Bourke et al 2002: 70).

Indigenous people and their supporters held numerous land rights marches in the 1970s and 1980s, with many positive results. Noel Pearson (sited in Cowlishaw, Morris 1997) suggests that increased political agitation by indigenous people in 1970s, combined with negative findings in land rights cases, gave rise to a political imperative to address the issue of native title. If Aboriginals possessed no inherent right to land by law, then a moral onus was on parliament to create such rights. Pearson notes that the Woodward Commission, established by the Whitlam Labour government (1972-1975), eventually led to the enactment of the *Aboriginal Land Rights (NT) Act of 1976*. The initiative had been taken by South Australia, and eventually similar, although increasingly inadequate, legislative land title measures were introduced in New South Wales, Victoria, and Queensland (Cowlishaw, Morris 1997).

Conclusions

The histories of South Africa and Australia, although very different, had established *secondary citizen* status on all non-white people. Both South Africa and Australia had deprived indigenous people of their land, had redefined their role as wage labourers tied to migrancy. Aboriginal activism in

Australia had in fact altered the formal status of Aboriginal people through the provision of the vote. However, the structural deprivation associated with land alienation remained a critical factor in the claims made by Aboriginal people. The Federal State, although compelled by the *Mabo* and *Wik* court cases to address these, continually prevaricated and failed to institute land reform. In the South African case, the *Land Act* of 1913 had essentially deprived African people from acquiring land outside reserves. The democratic state after 1994 also excluded the land issue from being the subject of the TRC. Human rights abuse was defined in individual terms and thus excluded addressing substantive structural issues such as the land.

CHAPTER 4: THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION AND THE COUNCIL FOR ABORIGINAL RECONCILIATION

'*Not everything that is faced can be changed, but nothing can be changed until it is faced*' – James Baldwin (2001)

In the previous two chapters, a foundation was formed on which to base the discussion and examination of the South African and Australian reconciliation processes. It was important to first define the concepts of truth commissions and reconciliation, as well as to explore elements of the colonial past which created the oppressive environments in these two countries. Only once the above issues have been incorporated in the study, can one move forward to explore the processes chosen to address the past. The following section critically examines and compares the establishment and conduct of the processes in Australia and South Africa. An examination of the strengths and limitations of these processes allows us to determine the contributions they made towards truth and reconciliation in both countries.

Establishment, Construction and Aims

The democratic transition in South Africa between 1992 and 1994 established constitutional measures to ensure the protection and promotion of democracy, and created the Truth and Reconciliation Commission (TRC). The full remit of the TRC was finalised by the *Promotion of National Unity and Reconciliation Act, Number 34 of 1995* (also referred to as the TRC Act). The TRC began operating in December 1995 with the broad aim of 'promoting national unity and reconciliation in a spirit of understanding that would transcend the conflicts and divisions of the past' (TRC Report 1998: 55). The TRC was given four major tasks: analysing and describing the causes, nature and extent of gross violations of human rights that occurred between 1 March 1960 and 10 May 1994; making recommendations on measures to prevent future violations of human rights; restoring human and civil dignity of victims through testimony and recommendations concerning reparations for victims; and granting amnesty to persons who made full disclosure of relevant facts relating to acts associated with a political objective (TRC Report 1998: 57). Direct social and economic change has been considered a component of reconciliation rather than a necessary product of it. The TRC pursued socio-economic transformation and reconstruction only indirectly (Hamber and Kibble 1999).

In Australia, the report of the Royal Commission into Aboriginal Deaths in Custody, provided a complex and devastating picture of the effects of

dispossession, colonisation, and institutional racism on the indigenous people of Australia. The report condemned the paternalistic assimilationist policies of the past and suggested that it was necessary to give up the long-held, if well intentioned, assumption that others knew what was best for Aborigines. The Royal Commission recommended that Aboriginals should instead be recognised for what they are: a people with their own culture, history, and values (Social Justice Report 2000).

Considering the recommendations of the above mentioned report, the Australian government enacted the *Council for Aboriginal Reconciliation Act 1991*, with the hope that the legislation would usher in a decade of reform and social justice. A complementary goal described in the legislation's preamble was that Australia should seek a national commitment to progressively address Aboriginal and Torres Strait Islander issues and aspirations in the decade leading to the centenary of Federation (1991–2001). This commitment related to addressing land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, and economic development matters (Council for Aboriginal Reconciliation 2000). The Council for Aboriginal Reconciliation (CAR) was established in June 1991 with bipartisan support and with the stated objective of 'the transformation of Aboriginal and non-Aboriginal relations in Australia' (Council for Aboriginal Reconciliation 2000). While its formation was acknowledged as a necessary first step, it was recognised at the time that reconciliation would likely take longer than the mandated life of the Council (which would end on 1 January 2001) (Council for Aboriginal Reconciliation 2000).

Boraine (2000), a former opposition member of Parliament and opponent of apartheid and Deputy Chairperson of the TRC, suggests that central to the TRC process was bringing into balance the political realities of the transition to democracy and the African philosophy of unity and reconciliation, rather than revenge and punishment. The negotiated settlement in South Africa meant that some form of amnesty would be inevitable. Simply put, there were limited options available to the incoming government, and their choices were influenced by this political reality (Boraine 2000). The African National Congress (ANC) also lacked sufficient power at the negotiating table to ensure that any perpetrators would be prosecuted, but had enough influence to demand truth in exchange for amnesty (Hamber and Kibble 1999). The TRC process was thus devised with two purposes in mind: to meet the political demands of the time and to introduce a process that made acknowledgement and accountability possible. Thus the issue was not 'a straight trade-off between amnesty and criminal or civil trials. What was at stake, rather, was a choice between more or less full disclosure; the option of hearing as many cases as possible against the possibility of a small number of trials revealing, at best, information only directly relevant to specific charges' (TRC Report 1998: 122). In this respect, it focused attention on the victims and survivors rather than the perpetrators (Boraine 2000). Thus, although the Commission did not offer retributive justice, placing the amnesty process within a broader framework was likely to contribute to formal justice in the long term. Instead of trading justice for truth, amnesty might eventually prove a more profitable option than the stark choice between truth and trials.

At least for societies in transition, truth must be viewed as an important element in restoring the rule of the law.

Posel and Simpson (2003) argue that the TRC 'took shape within the politics of negotiated compromise between the outgoing exponents of white minority rule and the incoming champions of constitutional democracy' (Posel and Simpson 2003: 2,3). They suggest that the

> …official confrontation with the past was seen not only as a means of setting a distorted and contested historical record straight, but also to foster individual and national reconciliation, through the catharsis of confession and forgiveness undergone by the perpetrators of human rights abuses and their victims, and an ensuing national consensus about the need to preserve a culture of human rights in the future. The production of a shared national history and of public memories in respect of landmark historical events and struggles was understood to be an integral part of the new nation-building project. Going further still, unveiling the truth was envisaged as a constitutionally defensible alternative to criminal prosecution, by enabling the granting of amnesty to perpetrators who made full disclosure (Posel and Simpson 2003: 2,3).

Posel and Simpson (2003) turn to Archbishop Tutu's Foreword to the report, to underscore the vastness of this undertaking. It is 'a road map to those who wish to travel into our past. It is not and cannot be the whole story; but it provides a perspective on the truth about a past that is more extensive and

more complex than any one commission could, in two and a half years, have hope to capture' (Posel and Simpson 2003: 147,148).

The South African TRC was intended *inter alia* to restore the humanity and dignity of the victim, but in a way that neither excluded nor replaced justice. In this respect, the TRC advocated restorative justice to greater extent at a national level than at an individual level (Hamber and Kibble 1999). The TRC's objectives of centralisation, state building, and reducing legal pluralism were only partially fulfilled (James and Van De Vijver 2000; Wilson 2001).

Posel and Simpson (2003) explain that:

> the pursuit of relevant "facts" was intended to be rigorous and substantial, drawing on appropriate expertise and experience, in the interests of "scientifically" objective and robust findings. The Commission's Research Department was given powers of search, seizure and subpoena, and was significantly larger and better resourced than most other truth commissions. In prospect was a serious engagement with South Africa's recent past, in which an analysis of the "antecedents and causes" of violence, "motives" of perpetrators, and chains of command and responsibility could become the object of systematic research (Posel and Simpson 2003: 4,5).

The TRC had three committees to deal with the separate areas of human rights violations, amnesty, and reparations and rehabilitation. According to section 14 of the Act, the Human Rights Violations Committee 'was mandated, amongst other things, to enquire into systematic patters of abuse, to attempt to identify motives and perspectives, to establish the identity of individual and

institutional perpetrators, to find whether violations were the result of deliberate planning on the part of the state or liberations movements and to designate accountability, political or otherwise, for gross human rights violations' (TRC Report 1998: 276). 'The primary function of the Amnesty Committee was to consider applications for amnesty that were made in accordance with the provisions of the Act'; and to grant amnesty only for offences 'associated with a political objective committed between 1 March 1960 and 6 December 1993' (TRC Report 1998: 267). The Reparations and Rehabilitations Committee was the only TRC committee not to hold public hearings. According to the TRC Act, it was tasked with considering

> matters referred to it by the Commission; gathering evidence relating to the identity, fate and whereabouts of victims and the nature and extent of the harm suffered by them; putting forward recommendations 'on appropriate measures for reparation and rehabilitation and measures to be taken to restore dignity of victims; to make recommendations on urgent interim measures on reparations; and finally, to make recommendations on the creation of institutions conducive to a stable and fair society, and on the measures to be taken in order to prevent the commission of human rights violations (TRC Report 1998: 285).

The TRC Report (1998) suggested that disclosures made during the amnesty process, together with information that emerged at the hearings of the Human Rights Violation Committee, in victim statements, and during investigations, would contribute significantly to the Commission's understanding of the broad pattern of events during the thirty-four-year mandate period. They would also

assisted the Commission in its analysis of key perpetrator groupings and institutional responsibility, and in making findings on the root causes of gross violations of human rights committed in the past. These insights would provide the foundation for making recommendations aimed at both helping prevent future human rights violations and complementing the necessarily narrower focus of formal trials. A functioning and effective justice system was, of course, crucially important in this regard in terms of reinforcing the rule of law and vindicating victims. However, even a justice system functioning at its optimum level could not provide all the answers required (TRC Report 1998).

The TRC was the first body to deal with conditional amnesty as a practical compromise between blanket amnesty and judicial prosecution and tried to incorporate lessons from past truth commissions (Hamber and Kibble 1999). Hamber (1995) argues that in South Africa there was an attempt to ensure that perpetrators gave something in exchange for amnesty: amnesty was conditional - it had to be applied for - and it was not granted unquestioningly (Hamber 1995).

In the South African reconciliation process, an exclusive focus on punishment was rejected in favour of restorative justice. The Commission sought to restore not only victims, but also perpetrators and the community at large. They sought to stress the context in which offences took place, and pointed to the need for the beneficiaries of the apartheid system to acknowledge their responsibility and accept their complicity. The TRC focussed on reconciliation for the whole community, encompassing structures and institutions as well as individuals (Boraine 2000). On an individual level, the TRC made it possible to

reintegrate the perpetrators into their communities at the behest of the survivors, providing the latter felt the perpetrator had taken responsibility for their actions and made some form of restitution (Hamber and Kibble 1999).

Boraine (2000) believed that unless economic justice was the first item on the agenda - i.e., unless health, homes, water, electricity and, most importantly, jobs became part of the quest for reconciliation - South Africa would remain a deeply divided society.

During the CAR's term, attention focused on the potential creation of a reconciliation 'document or documents', as well as on the future of the reconciliation process after the Council ceased to exist. At the time, it was generally acknowledged that reconciliation would not be achieved by the fixed end date (Nettheim et al 2002). The CAR held its second national convention, Corroboree 2000, in Sydney on 27 May 2000. The centrepiece was the hand over to the federal and state governments of two documents prepared by the Council after wide-ranging consultations: the Australian Declaration Towards Reconciliation and the Roadmap for Reconciliation (Nettheim et al 2002). On May 28th, an enormous march (known as the Bridge walk) in support of reconciliation occurred across the Sydney Harbour Bridge, as well as in other Australian towns and cities. According to Nettheim et al (2002), these public demonstrations served as notice that 'the people's movement' in support of reconciliation was a force to be reckoned with (Nettheim et al 2002).

The Council for Aboriginal Reconciliation devoted the last months of its term to preparing its final report, Reconciliation: Australia's Challenge, which was

presented in Parliament on 7 December 2000. The report provided an overview of historical necessity of reconciliation and summarised the progress of the reconciliation process over the previous decade. Finally, six recommendations outlined a feasible and accountable reconciliation process, which included the establishment of national committees and monitoring and evaluation mechanisms and requesting assurances that the process would involve negotiation with indigenous people. Having thus fulfilled its mandate, the Council for Aboriginal Reconciliation ceased to exist on 31 December 2000, ending the first ten-year phase of the reconciliation process.

Grattan (2000) refers to Senator Aden Ridgeway, the Australian Democrats spokesperson on indigenous affairs and a former member of the CAR, who argued that Australians needed to go beyond a superficial social analysis of their history. It became clear that national identity was often shaped by the traumatic forces of violence and conflict (Grattan 2000). Unlike South Africa, official Australian historiography does not acknowledge the existence of widespread conflict and violence in the last century. Instead, utilising an 'ideology of insulation' it is argued that Australia developed differently from the rest of the world, secure in its isolation from global trends and disturbance. According to Ridgeway, this has enabled official Australian historical accounts to avoid investigating the true nature of the relationship between the European settlers and Aboriginals and Torres Strait Islanders. In contrast, the indigenous perspective characterises the settler era as a most 'bloody and violent period' marked by war, slavery, conflict, and civil unrest. The existence of a commonality among people who were denied recognition,

disempowered, and prevented from practising and maintaining a distinct cultural personality is understandable (Grattan 2000).

Behrendt (2003) argues that redefining the relationship between indigenous and non-indigenous Australians requires an assessment of the impact of historical injustice:

> It is only when we understand how the ideologies of colonialism have permeated today's institutions that we can begin to break the grip of the historical legacy. Once that grip is broken, Australians will be free to explore alternatives to colonisation and assimilation (Behrendt 2003).

While the recognition of past injustices would provide symbolic atonement for the misdeeds of colonisation, Behrendt (2003) concludes that there must also be a concerted campaign to transform Australian institutions that entrench negative ideologies and exclude indigenous people. Moreover, opportunities and policies must be created that empower indigenous people and allow them to transcend the socio-economic circumstances in which they were born (Behrendt 2003).

According to the Social Justice Report 2000, the perspective of the Australian government's debate contended that it would be neither relevant nor fair to link events of the past to disadvantage and discrimination in the present. These refusals to accept the long-term impact of past practices on the current status of indigenous people, in turn, supported the argument that present day

Australians should not be held responsible or accept blame for historical events or acts. It was also used as support for the notion that indigenous people use history to avoid accepting personal responsibility for their status or taking control of their own lives. The Social Justice Report 2000 noted that this perspective failed to recognise the broader systemic nature of indigenous disadvantage and, instead, seeks to absolve the Australian government from responsibility (*Social Justice Report 2000*).

Prime Minister Howard's (1996-2007) claim that the wrongs committed against indigenous people were historic and therefore not the responsibility of present day Australians compounds the continual failure of Australian legal and political institutions to recognise native title as a legitimate property right (Behrendt 2003). Behrendt (2003) argues that the rhetoric used to generate antagonism towards native title interests after the *Wik* case is also a factor in understanding the response to the Human Rights and Equal Opportunity Commission's (HREOC) report, Bringing Them Home (1997), which describes the activities and legacy of the Aborigines Protection Board. The report contains a detailed investigation of the experiences of people removed from their families by the Aboriginal welfare regimes in each state and territory. The report highlights a connection between the removal of indigenous children from their parents – the so-called 'Stolen Generation' - to ensuing problems of suicide, mental illness, substance abuse, family breakdown, and the cyclical poverty of indigenous communities (Behrendt 2003). Howard asserted that Australians should feel neither guilt nor responsibility for past actions and policies. The government stated: first, 'there was never a

“generation” of stolen children’; and second, ‘emotional reaction to heart-wrenching stories is understandable, but it is important to evaluate by contemporary standards decisions that were taken in the past’ (Behrendt 2003).

Nettheim (2003) noted that the CAR helped found local reconciliation groups around Australia, and assisted in the establishment of state and territory reconciliation committees. Professor Nettheim, an Indigenous Law and Human Rights expert, argued that the zenith of the process was the Australian Reconciliation Convention held in Melbourne in 1997, which brought together people actively engaged in the reconciliation movement around the country (Interview: Nettheim 2003).

Neill (2002) suggested that despite the formal adoption of self-determination three decades ago, attempts to significantly improve the living standards of indigenous people have largely failed. Neill (2002) points out that public debate has so far refused to acknowledge the causes of this failure: observing taboos has become more important than exposing multi-faceted or unpalatable realities (Neill 2002).

Strengths and Limitations of the Processes

Considering its positive effects, Hamber and Kibble (1999) believe that the TRC fostered the restorative processes, allowing victims to meet and confront perpetrators. In a few instances, perpetrators actually attempted to make

direct amends to the victims or survivors. In this respect, reconciliation sometimes occurred spontaneously as the truth unfolded. Survivors seized opportunities presented by the TRC, using it as part of their personal healing process and to seek answers to their questions from the perpetrators. In addition, the TRC helped establish and support a range of local initiatives that ensured greater participation of the survivors in the Commission's process by taking into account their concerns (Hamber and Kibble 1999). Hamber (1995) notes that South Africa was the only country to allow some public and civil society debate over the terms and scope of the truth commission. This debate led to its proceedings being held in public rather than in camera, as was first proposed by the parties in the negotiations process and initially by the new government. However, while the South African TRC emphasised a public process, it also had powers to hold hearings in camera and to provide formal protection to witnesses (Hamber 1995).

Boraine (2000) and Lötter (1997) argue that the TRC successfully employed a limited form of amnesty - defined by clear criteria and an acknowledgement that amnesty was not guaranteed - an emphasis on truth-telling by victims, and a reparations policy in an attempt to reach a consensus on what really happened during the apartheid period. The South African model not only included specific reference to and concern for victims, but it also upheld the notion of truth telling by the perpetrators and the victims in a common commitment to restorative justice. Publicly acknowledging the suffering of victims of past abuse reverses the inhuman treatment of people through political violence. Ideally, the state’s public acknowledgement of their

participation in human rights violations bestows equal dignity and worth (Boraine 2000; Lötter 1997).

Posel and Simpson (2003) assert that, in several respects, the TRC remains a remarkable achievement.

> One of its important successes has been in closing many individual "dossiers" on the past, revealing what happened to sons, fathers, brothers, sisters, mothers and daughters who had "disappeared", tracing their killers, identifying the circumstances that led up to these ghastly deeds; also, vindicating individual allegations about torture perpetrated in the liberation movements and previously denied. And, in many instances, these disclosures have been accompanied by the sort of catharsis and individual or interpersonal reconciliation that the TRC strove to achieve. There were others for whom this process was less rewarding, people whose stories have not been fully heard, who feel frustrated by the haste which accompanied the TRC's hearings and the inattention to the complexity of local histories of political conflict and violence. Clearly, the task of unravelling these individual and local truths remains unfinished. But if one effect of the TRC has been to animate popular interest in understanding the past, this must count as a success, despite the limits of its own rendition (Posel and Simpson 2003: 166).

Despite its problems, the TRC did have certain strengths: first, it had more financial and personal resources than any truth commission to date; second, the TRC held the power to grant amnesty and reject blanket impunity; third, it

had the scope to interpret its own rules within the given mandate; and finally, the TRC permitted survivors and the general public to influence its work and methods of operation (Hamber and Kibble 1999).

Although the TRC proclaimed a restorative approach at the national level, its operation at the individual level was less clearly defined. Survivors did not necessarily have more say in the process or what happened to perpetrators than they would have had through the judicial process. In fact, it could be argued that they actually had less input since the granting of amnesty meant that perpetrators were not sentenced. Furthermore, restorative justice implied direct restitution from the perpetrator to the community or individual; without such restitution, amnesty broke the link between violation and obligation. The TRC process placed most of the onus for reparation on the state; the survivors played no part in determining the perpetrators' contributions and the perpetrators were not obliged to make direct restitution (Hamber and Kibble 1999). This highlights one of the central tensions in the TRC project: the tension that exists between the individual and the collective. Hamber and Kibble (1999) note that reconciliation was both an individual relationship and a part of a nation-building project. Transformation, however, required real socio-economic change and institutional reform. Not only did the survivors of apartheid see little change in their material circumstances, but they also saw their torturers still in office, their jobs preserved by so-called 'sunset clauses' and amnesty clauses agreed to during the negotiations. Therein lay the contradictions between reconciliation and justice (Hamber and Kibble 1999). Hamber and Kibble (1999) also question the capacity of the TRC to promote reconciliation at all levels: at the individual level and for the collective, and

among different races/population groups, elites, and the military (Hamber and Kibble 1999).

Posel and Simpson (2003) believe that 'the promise was richer than the practice. The TRC's capacity to verify the evidence and information placed before it was severely impaired. This significantly compromised the quality of the empirical data necessary to sustain the sorts of positivist outcomes anticipated in the TRC's legislative and political mandate' (Posel and Simpson 2003: 5).

Mahmood Mamdani, at the time based at the Centre for African Studies at the University of Cape Town, criticised the TRC for defining victims too narrowly. In his opinion, South Africa's reliance on Latin America's experience with dealing with reconciliation led to an over emphasis on the notion of perpetrators and victims, thereby ignoring the unique structural issues related to victimisation in South Africa. According to Mamdani, the result was an insufficient focus on those who benefited from apartheid, but may not have been direct perpetrators of human rights violations; this included the majority of the white population, who benefited materially from apartheid and was complicit in the abuses by its silence. This made the TRC a-contextual in its approach, even if its origin was particularly contextual (Hamber and Kibble 1999).

Justice Langa of the Constitutional Court of South Africa argued that at the collective or social level, reconciliation in South Africa did not mean forgetfulness. Moreover, on an individual level, there could be no reconciliation if the torturer took forgiveness for granted. He added that

reconciliation was a long-term process rather than a ‘one-off’ event (Hamber and Kibble 1999).

Hamber and Kibble (1999) argue that truth is integral to reconciliation at the collective and individual level. Thus, in order for reconciliation to take place, a clear record was required so individuals and the country could deal openly with the past. In this respect, if it was understood how violations occurred, mechanisms could be established to prevent them from recurring. However, truth was too often equated with reconciliation. Nevertheless, truth was necessary for laying the foundations of the reconciliation process, a process that appeared to work best at the individual level when spearheaded by civil society (Hamber and Kibble 1999).

While the TRC seemed to be passing judgment on the practices of the apartheid regime, it was actually incapable of that type of judgment; the Commission could not come to terms with the underlying structures and processes of apartheid because they were outside its terms of reference. According to Wilson (2001), the TRC was not particularly effective at creating a new culture of human rights or greater respect for the rule of law. As long as human rights institutions function as a substitute for criminal prosecutions, they will be resisted by some victims and denounced as a ‘sell-out’ by informal justice institutions (Wilson 2001).

Legal scholars and TRC researchers suggest that most of the legal and jurisprudence dilemmas presented by the TRC process were rooted in its ‘bi-polar roles’ as a ‘fact-finding’ and a quasi-judicial enterprise on the one hand

and as a psychologically sensitive mechanism for story telling and healing on the other. The legislation that defined the operational terms of the TRC was not an ideal document, leaving many issues poorly defined or excluded altogether (James and Van De Vijver 2000; Simpson 1998; Wilson 2001; Meiring 1999).

Hamber and Kibble (1999) argue that prosecutions should have been an integral final step in the overall TRC process, and that those alleged perpetrators who did not apply for amnesty should have been prosecuted. The failure to secure a conviction for Magnus Malan may have made some dismiss the legal route to truth; however, some convictions, such as that of Ferdi Barnard for the murder of anti-apartheid activist David Webster, demonstrate that the formal justice system could produce results (Hamber and Kibble 1999). Hamber and Kibble (1999) argue that it was vital for trials to be initiated against those who failed to apply for amnesty. This would have sent a clear message that the TRC was both a restorative and rigorous formal justice process aimed at re-establishing the rule of law. It could have also revealed new truths that were not forthcoming during the actual TRC process (Hamber and Kibble 1999).

One of the most serious criticisms of the TRC is over the apparent gap between the reparations and amnesty processes. However, such measures are necessary to overcome the perception of many victims that the perpetrators gained more than survivors from the process. Thus, lobbying for the speedy processing of reparations was critical (Hamber and Kibble 1999).

The Commission acknowledged some of its failings and operational constraints in its 1998 report. These included: failing to identify early enough a number of areas to which it should have devoted more time and energy; failing to call certain key actors before it; failing to provide an in-depth examination of civil society's complicity in the crimes and misdeeds of the past; failing to deal with specific geopolitical areas and the violations that occurred in those areas in sufficient detail; and failing to contest the constraints imposed on its investigative capacity (TRC Report 1998).

In Posel and Simpson (2003) argued that:

> The tasks set for the TRC were well beyond its capacities to carry out. The multiple mandates with which it was charged and the limited resources it had at its disposal forced it to rand in order of priority the different types of investigation it could undertake. The political imperatives of the time impelled it to place the pursuit of forensic truth and restorative truth at the top of its list. This left little time and capacity to probe the larger issues of context and motivation. However, the constraints and pressures that shaped the Commission's agenda were only partly responsible for the report's explanatory vacuity. The Commissioners and research teams must also bear some of the responsibility for its failure to uncover social truth. Such an exercise would have required much more finely grained local studies, drawing on larger slices of life history, than the snapshot victim statements that furnished much of the raw material of the report (Posel and Simpson 2003: 198).

For Posel and Simpson (2003), in the final analysis, on the evidence of its own discourse and mandate,

> The TRC could only render up a range of fractured, incomplete and selective truths. In its quest for forensic truth, the TRC set up a standard that is not even sustained within the criminal justice system, which seeks proof beyond a reasonable doubt. Indeed, in yielding to the propensity for criminal law to define a narrow universe of facts designed only to reach conclusions about individual liability, it cultivated a standard of proof that simply could not creatively engage the contradictions that complicate sociological or historical truth at the structural level. Yet, at the same time, the TRC sought to span these levels of individual, local and national truth recovery. The commissioning of the "truth" under the auspices of the TRC was framed by a mandate that was essentially impossible to fulfil. The process produced no integrated, comprehensive or internally consistent body of "truth". To some extent, the obstacles to such a goal could have been overcome with fuller planning and foresight, more effective research in certain, areas, closer organisational synchrony between the different institutions and functions of the Commission, more time and greater political will. Yet the tensions among different genres of evidence, argument and "truth" also inherent in the process and contributed to – rather than wholly detracted from – the scope and impact of the Commission. The idea of "truth" is variegated, and so it is appropriate to view the TRC as a set of

> disparate processes with distinct accomplishments as well as limitations. Ultimately, the politics of “truth” may render the unevenness and incompleteness of the TRC’s “truth-finding” as a strength rather than a weakness. If “the past is an argument”, then we should welcome the fact that the TRC did not settle the matter, close the debate, and put paid to lingering questions and controversies about South Africa’s troubled history (Posel and Simpson 2003: 11,12,13).

The TRC did not manage to develop a definitive chronicle of the apartheid era. In addition, the TRC admitted that it was unable to adequately explore and investigate the violence that occurred from 1990 to 1994. The Commission also acknowledged its serious error in not conducting a search and seizure operation of the defence archives (Hamber and Kibble 1999).

There are counter-arguments to these criticisms of the TRC's mandate. Hamber and Kibble (1999) point out that focusing on the structural oppression of apartheid might have made the TRC's work unmanageable. Alex Boraine, the Deputy Chairperson of the TRC, found that apartheid's beneficiaries hated the TRC, and that complaints and letters to the TRC did not support the contention that the beneficiaries were 'off the hook'. He said that responses written by members of the public in the Reconciliation Register did not demonstrate an expectation of forgiveness, but instead asked: 'What can I do to atone?' Alex Boraine's comments highlight the idea that the TRC process sensitised some 'beneficiaries' of apartheid (mostly white South Africans) to their complicity with the apartheid system. In fact, some of the signatories donated money to the TRC for the benefit of the victims. How representative

the Reconciliation Register was of general feeling in the white South African population is open to question (Hamber and Kibble 1999).

For Posel and Simpson (2003), 'the limits of the 'history' written by the TRC in turn inhibit its 'cathartic' and 'healing' qualities. With its powers of explanation stunted, the TRC cannot produce a consensus about *why* the terrible deeds of the past were committed. The increasingly familiar refrain among white South Africans that apartheid was merely a 'mistake' for which no one was responsible, that somehow the system propelled itself impersonally, may be one of the more ironic, unintended consequences of the TRC's rendition of the past' (Posel and Simpson 2003: 168). They argue that to the extent that the report does venture into historical explanation, its consequences may once again be deeply ironic. The report's only answer to the question of why the country was subjected to such a violent and abusive past is itself in need of explanation – the prevalence and intensity of racism. But in the absence of an explanation for racism itself, the report fails to suggest any plausible grounds for transcending the racism of the past. If racism was part of the warp and woof of South African society, how can it be undone? The fact that it is embedded in the social fabric is also a measure of its tenacity. If we do not understand the conditions under which racism was produced, reproduced and intensified in South Africa, taking account of its interconnections with other modes of power and inequality such as gender and class, how can we transcend it? (Posel and Simpson 2003: 168).

> Whatever the limits of its report, the TRC has created significant opportunities for an engagement with the past, which have not yet

been realised fully. Its large archive promises to be an important resource for academic and popular historians, provided it remains open and accessible. It seems that the TRC has stimulated an interest in and enthusiasm for truth-telling, in communities intent on unravelling the complexities of their past. And there is much more to be said about the mechanisms of leaders in the apartheid state and the homeland governments, and the liberation movements which opposed them. In the final analysis, it is a strength rather than a weakness of the TRC that it has initiated a process of truth-telling without seeing it through to completion (Posel and Simpson 2003: 168). If "the past is an argument", then it should not be limited to a single distillation under one official rubric. The responsibility falls to a range of different research communities and intellections to diversify the terms of debate and prevent its premature conclusion (Posel and Simpson 2003: 168). The stakes are high: As Ignatieff puts it, "national identity [should be] a site of conflict and argument, not a silent shrine for collective worship'' (quoted in Posel and Simpson 2003: 168,169).

For Van der Merwe, (quoted in Posel and Simpson (2003)) it was

clear that the promotion of national reconciliation does not automatically produce reconciliation at other levels in the society. Despite political and international transformation at the national level, and the creation of peaceful relations between erstwhile political opponents at the community level, the truth (or lack of it) remains a volatile social issue in the local arena. Reconciliation at community

> level will require extensive further intervention, dealing directly with truth, as well as other concerns, through more open-ended and sustained dialogue, investigation and reflection (Posel and Simpson 2003: 217).

In relation to the Australian situation, the first decade of reconciliation during the CAR witnessed a major shift in public and political attitudes, with reconciliation moving from a little understood concept to a key item on the national agenda. However, it noted that significantly divergent views existed on the meaning of reconciliation and how it could be achieved. The CAR report argued that reconciliation should be flexible enough adapt to local needs and circumstances within a nationally recognised framework. The Council firmly believed that its two reconciliation documents (the Declaration and the Roadmap) provided such a framework (Council for Aboriginal Reconciliation 2000). The Council also warned about the apparent persistence of ignorance, apathy, resistance, and opposition to reconciliation within some areas of the Australian community. They cited one poll indicating that almost half of Australians believed that Aboriginals and Torres Strait Islanders were not 'disadvantaged', despite the existence of overwhelming evidence to the contrary. According to the Council, continuing acute disadvantage, discrimination, and racism remained the single greatest challenge to achieving reconciliation (Council for Aboriginal Reconciliation 2000). In addition, the Council also found that not all Aboriginals and Torres Strait Islanders were convinced of the need for the reconciliation process. Research indicated that some indigenous people were unconvinced that

reconciliation could improve employment, education, and housing outcomes, or make any substantial difference to their daily life circumstances. Thus, despite some important advances, public awareness and education on all sides remained a key task of the reconciliation process (Council for Aboriginal Reconciliation 2000).

While the CAR report noted that the government's bipartisan decision to launch the formal reconciliation process was correct – and that all Australians could take heart from the progress to date - it would take far longer than a decade to address the legacy of 200 years of history (Council for Aboriginal Reconciliation 2000).

Conclusions

Did the TRC reveal the truth? The individualist approach to human rights violations limited the extent that 'the truth' could be fully revealed. It limited the possibilities of seeing the individual acts in a broader framework of the apartheid system as a whole. Hamber and Kibble (1999) argue that determining the effectiveness of the TRC at revealing the 'truth' can be approached on two levels: first, at the level of individual case work and investigation; and, second, at the level of the apartheid system and responsibility for violations (Hamber and Kibble 1999). Hamber and Kibble (1999) contend that the TRC failed to uncover as much as was hoped, particularly regarding individual cases. Granted, time and a shortage of resources operated against the TRC's Investigation Unit (IU) being able to

successfully investigate the thousands of cases put before it. Moreover, a substantial volume of documents and records had been destroyed by the old security apparatus (Hamber and Kibble 1999). Thus, in terms of seeking to establish the truth in individual cases, the TRC was set an impossible task. Many victims expected full disclosure and a complete investigation of their case, which was unrealistic. In this respect, the TRC may have failed to communicate its purpose effectively. Moreover, the Commission did not report back to the majority of survivors on the status of their cases (Hamber and Kibble 1999). Hamber and Kibble (1999) question whether truth really achieves reconciliation. In addition, the difficulties inherent in uncovering the truth highlight the notion that reconciliation may not be possible if the whole truth is not known (Hamber and Kibble 1999).

Did the TRC uncover a larger truth? Was the report a comprehensive and fair representation of the history of South Africa during the apartheid era? Hamber and Kibble (1999) note that the Truth and Reconciliation Commission's final report revealed a considerable amount of information about the workings of the apartheid state system. The previous government was found responsible for most of the atrocities: In other words, the state fostered an environment that led to and sanctioned human rights violations. However, the political parties, including the National Party, still have not taken full responsibility for these atrocities. While they have offered apologies for specific acts, there has never been a full acknowledgment of their complicity in developing the apartheid system or the impact of that system on individuals (Hamber and Kibble 1999). Alex Boraine, Former Vice-Chairperson of the TRC, notes that while ‘foot soldiers’ and even generals applied for amnesty for specific crimes,

thereby accepting blame for their actions, political leaders generally refused to take responsibility for systematic human rights violations (Hamber and Kibble 1999).

Boraine (2000) argues that the TRC not only broke the silence surrounding the apartheid era, but also initiated an on-going long-term reconciliation process. The TRC frankly and frequently acknowledged that reconciliation could not be achieved by a single commission operating over a limited period and with limited resources (Boraine 2000). Hamber and Kibble (1999) suggest that people are likely to feel that some collective form of justice had been achieved through the TRC because those responsible for past atrocities had to admit to and account for their actions. They argue that the TRC was more successful at the level of collective repudiative, rehabilitative, and restorative justice than at the individual level (Hamber and Kibble 1999).

Has the substitution of justice for truth succeeded in establishing collective and individual truth? What are the long-term implications - for peace, reconciliation, and the rule of law in South Africa - of using this strategy? (Hamber and Kibble 1999) How far did the TRC influence the transformation in South Africa?

Given that the Commission was born from compromise, negotiation, and the balance of forces at the time, Hamber and Kibble (1999) contend that it is unlikely the TRC could have driven transformation in the country, particularly in the economic and social spheres. The TRC bore the weight of transformation only in legal and moral areas; unfortunately, so little

transformation occurred elsewhere that the foundation for reconciliation and openness were in danger of being undermined. While defenders of the government could point to a number of land, housing, electricity, and infrastructural improvements, many believed that the government was focussed on pursing a neo-liberal program that had little chance of overcoming the inequalities and economic oppressions of the past or alleviating poverty (Hamber and Kibble 1999).

The TRC acknowledged that a key element of the transition was establishing a common history for *all* South Africans. Hamber and Kibble (1999)argue that the Commission ceased operation with much of its historical work incomplete, which had a definite impact on how it made recommendations and implemented reparations. There were thousands of unsolved cases, with many survivors still waiting for responses, and many South Africans were angry over what they perceived as a lack of justice in the TRC process and continued socio-economic inequities. Despite some valuable recommendations in the TRC's final report, a significant gap still existed in South Africa between policy and actual implementation, which could only add to general frustration with the transition (Hamber and Kibble 1999).

Recognising the importance of consultation and good-faith negotiations between all parties, as well as the need for informed public debate about the issues of reconciliation, the CAR report recommended the introduction of legislation to deal with the unresolved issues of reconciliation. The CAR reported contended that such legislation had the potential to facilitate much needed agreement and the settlement of outstanding matters between

Aboriginals and Torres Strait Islanders and other Australians (Council for Aboriginal Reconciliation 2000). However, as the first decade of reconciliation ended, the stark reality was that indigenous people remained the most disadvantaged and discriminated against group in Australian society. They experienced poorer health, shorter life expectancy, limited education and employment opportunities, and greater imprisonment compared to other Australians. Moreover, economic disadvantage restricted their life choices and served as a major obstacle to self-determination. The Council itself argued that many sharp divisions about the nature and purpose of reconciliation still had to be addressed (Council for Aboriginal Reconciliation 2000).

The CAR report suggested that Australia could never become a 'reconciled' nation while stark contrasts in social and economic outcomes existed between Aboriginals, Torres Strait Islanders, and other Australians. The Council stressed the existence of an important connection between the resolution of outstanding rights issues and the practical economic aspects of reconciliation. They argued that the lasting effects of dispossession, marginalisation, and the assimilationist policies played a key role in defining the current status of indigenous people in Australia. In this respect, the CAR report stated that the resolution of outstanding issues such as native title and the 'Stolen Generations' was a necessary pre-condition for Aboriginals and Torres Strait Islanders to achieve economic independence and overcome disadvantage (Council for Aboriginal Reconciliation 2000).

The CAR report also argued that despite concerted opposition in some quarters, reconciliation would ultimately require a formal and final resolution of issues that had remained unaddressed from the period when Australia was settled without the consent of its indigenous inhabitants. Simply put, legislation was considered necessary to establish a framework for negotiating the resolution of outstanding issues - perhaps through a treaty - and without such a measure true and lasting reconciliation was not a foregone conclusion (Council for Aboriginal Reconciliation 2000).

In Australia, the presentation of the final report of the Council for Aboriginal Reconciliation in 2000 marked the public emergence of a new group, Reconciliation Australia. Although a non-governmental organisation, Reconciliation Australia was the inheritor and successor to the CAR. In the ongoing reconciliation process, its stated role was 'to report on progress to the Australian community, circulate information, encourage partnerships, and provide forums for discussions' (Reconciliation Australia 2002: 3). Moreover, CAR tasked it with maintaining a national focus for the reconciliation process, report on its progress to the Australian community, circulate information and educational material, encourage partnerships, and provide forums for discussion (Social Justice Report 2001). Reconciliation Australia's initial strategic plan targeted social and economic equity for indigenous people. It also sought to strengthen the people's movement for reconciliation and thus build a framework for a shared future. Some of these action areas and commitments were shared with the Council of Australian Governments (COAG) (Social Justice Report 2001).

While Reconciliation Australia was generally considered as the successor to the Council for Aboriginal Reconciliation, there were significant differences between the organisations. First, as a not-for-profit private company, Reconciliation Australia's operation and objectives were not mandated or controlled by Parliament. Accordingly, its relationship with the government was based on goodwill rather than any formally legislated requirements. Second, Reconciliation Australia might have appeared to be the national coordinator of reconciliation, but it lacked the necessary funding. For example, the 'seed' funding provided by the government was only equivalent to six months of its operational costs, which had to be met through fundraising activities from the corporate sector and the community. Monetary constraints prevented Reconciliation Australia from having the influence and reach of the Council for Aboriginal Reconciliation. It simply could not pay for ongoing nationally significant public awareness activities and campaigns. These funding shortfalls, in turn, limited its ability to adequately monitor and evaluate the government's reconciliation efforts; lacking a government mandate and financial support, Reconciliation Australia could not hold the government accountable. Indeed, the Council for Aboriginal Reconciliation had never envisioned that Reconciliation Australia would have to operate as the principal monitoring body. The CAR believed that a centralised, coordinated approach to reconciliation was required at the national level to ensure that reconciliation continued to grow, a role that Reconciliation Australia was obviously ill equipped to play (Social Justice Report 2001).

Posel and Simpson (2003) argue that, in this context,

> it is simplistic to describe South Africa as a "post-conflict" society in the wake of the TRC. Instead, the real challenge lies in grappling with and monitoring continuity and change in the patterns of social conflict that continue to dominate the democratic South Africa, and the easy slide between political and criminal violence that has always complicated analysis of South African life, but which may have been shrouded rather than exposed by the TRC. In seeking to meet this challenge, this paper point to some of the (perhaps inevitable) limitations of the TRC as a *restorative justice* mechanism in the true sense of the term, because of its historical imperative and its explicit mandate to deal with the issues of violence and reconciliation exclusively by reference to political responsibility, narrowly defined (Posel and Simpson 2003: 245).

They furthermore suggest that

> proper evaluation of the efficacy of *transitional justice* mechanisms such as the TRC must therefore be situated within the specific context of transmuting patterns of violence. This perspective demands a shift in the debates on transitional justice, from an exclusively retrospective scrutiny of past injustices, important as this is, to a strategic and proactive engagement with the challenges that face justice institutions in newly emerging democracies, where patterns of violence and social conflict change, rather than simply being brought to an end by political settlements, and where the lines of social cleavage at the heart of such historical violence are redefined rather than simply staying the same.

> Such an approach demands an engagement both with the past and with the future, and insists not only on a scrutiny of justice in transition, but of violence in transition as well (Posel and Simpson 2003: 245,246).

For Posel and Simpson (2003), this

> analysis has profound implications for how we understand the roles and challenges of transitional justice interventions, including the South African TRC. In particular, it suggests the need for a less simplistic or theoretical understanding of the dangers of impunity in society, as opposed to one simply premised on the need for compliance with the principles of public international law (vital though this is). In the final analysis, it remains difficult to draw clear-cut conclusions about the TRC, although evidently it has not made quite the contribution to reconciliation claimed by its most ardent supporters and assumed by international audiences from a distance. Certainly, it would be a grave mistake to judge the whole TRC by the obvious shortcoming of its final report, which simply cannot hope (and does not pretend) to reflect the full complexity of thirty-five years of history. The great value of the TRC lay in the process rather than the published end product (Posel and Simpson 2003: 246).

They finally suggest that

> we should also guard against a “sanitised public transcript” which suggests that anger, vengeance, or violent conflict are absent from post-apartheid South Africa. There is a grave risk that out of the

testimonies and confessions of a few, a truth will be constructed that disguises the way in which black South Africans, who were systematically oppressed and exploited under apartheid, continue to be excluded and marginalised in the present. The sustained or growing levels of violent crime and antisocial violence, which appear to be new phenomena associated with the transition to democracy, are in fact rooted in the very same experiences of social marginalisation, political exclusion and economic exploitation that previously gave rise to the more “functional” violence of resistance politics. The fundamentals of social and economic justice were untouched by the TRC (Posel and Simpson 2003: 246).

CHAPTER 5: RECONCILIATION, RIGHTS AND RECOGNITION

'If the 1967 Referendum brought Aboriginal people into the census, the Mabo judgement brought them into the common law. Reconciliation may yet bring them into the nation' -Richard Broome (2001)

In this chapter we alaborate on Chapter 4, by considering the obstacles faced by the two reconciliation processes. We also tie in the next two variables identified which include the respective governments' responses to reconciliation, as well as briefly focussing on the degree of pressure placed on these countries by the international community.

Reconciliation: Obstacles to Overcome

Can a nation be reconciled and healed after violence, conflict, and oppression? The secret for Lederach is that the parties be brought together to build a new kind of relationship – through the space created by the reconciliation process. So the point is to recognize past grievances, pain, suffering and loss and, says Lederach (1997), 'explore future interdependence' (Lederach 1997: 34).

Grattan (2000) argues that a nation cannot be told how to reconcile; rather, it must flow from a natural acceptance of the need for truth and justice. The ideal outcome of reconciliation is the creation of a new social compact that promotes and balances rights and responsibilities against the needs of the

wider community, economy, and state. Alex Boraine, the former Vice-Chairperson of South Africa's TRC, argues that reconciliation is an intensive and essentially endless pursuit of healing. It must be nurtured and anchored at every level of society, whether political, social, or economic (Boraine 2000: 429).

According to the TRC Report, the vast majority of people involved in the South African process sincerely believed that reconciliation was possible. However, national reconciliation within the short lifespan and limited mandate and resources of the TRC was impossible to achieve. What the TRC did accomplish was to restore human dignity to many victims and aid them in coming to terms with the past (TRC Report 1998: 17).

Although the reconciliation process challenged entrenched attitudes in South Africa, Boraine (2000) concedes that South Africa remains trapped by racism, divisions, and stereotyping (Boraine 2000: 358). Yet, he notes that reconciliation began even before the formal TRC process was implemented, and it will continue as long as all parties share a basic acceptance of its principles. In contrast, Orr (2000), Hamber (1995), and Meredith (1999) argue that reconciliation was an unattainable goal from the outset, and that little had changed at the national level by end of the TRC mandate. They contend that a single initiative like the TRC could never overcome the deep wounds created by apartheid, but only lay the foundation for future reconciliation. The value of publicly revisiting apartheid era oppression was the creation of a new collective history for South Africa (Orr 2000, Hamber 1995, Meredith 1999).

Grattan (2000) argues that the reconciliation process in Australia provided the foundation for a new relationship based on understanding the value of different perspectives. This requires the successful integration of formerly oppressed people into the nation, allowing them to become stakeholders in making the decisions that affect their lives. This approach maintains that the delivery of justice requires a policy response from the government that is defined by positive engagement and the genuine desire to develop a process of constructive partnership that can improve the lives of indigenous people and alter negative attitudes (Grattan 2000).

Nursey-Bray (2003) notes, that the Australian and South African experiences are similar in that neither country established a definitive or universally accepted meaning of reconciliation. However, in Australia, differences in interpretation made it very difficult to move beyond the status quo: While neither side had a clear vision of what they wanted, both sides rejected the other's perspective. For Aboriginals, reconciliation meant recognition of their historic occupation and oppression in the country, but for many white Australians it represented an attempt to learn to live together (Interview: Nursey-Bray 2003).

According to Hamber and Van der Merwe (1998), the TRC also failed to provide a clear definition of reconciliation for South Africans. Indeed, the ultimate purpose and ideal form of reconciliation diverges greatly among different sectors of society. A non-racial notion of reconciliation that focused

on a human rights approach was the most consistent vision presented by the TRC. This approach emphasised the need for acknowledgement, repentance, and apology before the adoption of any legal or human rights strategy (Hamber and Van der Merwe 1998).

Dick (2003) suggests that South Africa's conception of reconciliation was more easily understood by the public than that in Australia. Indeed, many of the non-indigenous members of the Australian population denied there was even a problem requiring reconciliation. In turn, Aboriginals were suspicious of Australia's promotion of multi-culturalism because it seemed to propose the future obliteration of their distinctive identity (Interview: Dick 2003).

A general refusal to address the past characterises the dominant non-indigenous national identity of both Australia and South Africa. White Australians will not accept their historical role as colonial oppressors, while white South Africans struggle to confront their oppressive rule of the indigenous African population during apartheid.

Nursey-Bray (2003) argues that one of the central obstacles to reconciliation in Australia is the Aboriginals' persistent fear of assimilation, which is not surprising given their collective historical experiences. They feel that integration into the Australian mainstream could spell the disappearance of their culture. While Aboriginals seek full equality *within* the state, they also define themselves as a *separate entity*, which inherently raises questions about the legal jurisdiction of Australian institutions in their lives (Interview:

Nursey-Bray 2003). Fear about maintaining a separate cultural identity for Aboriginals stems partly from their small population. Nursey-Bray (2003) argues that because Africans are the majority in South Africa, there was never any question they were at risk of assimilation or losing their unique cultural identity (Interview: Nursey-Bray 2003).

This context generates other questions that must be addressed: When does a settler become a native? According to Nursey-Bray (2003), the TRC tried to address this question: in other words, to use reconciliation to legitimise the status of whites within South Africa. In this respect, land rights claims in Australia have a very specific purpose: to return part of the land that was taken under certain conditions. The apparently willful incomprehension and failure to confront this issue lies at the heart of Australian reconciliation problems (Interview: Nursey-Bray 2003).

Unlike in South Africa where a liberation 'civil war' was fought from 1961 onwards with the formation of Umkhonto we Sizwe, the military wing of the ANC, violent pressure against the government for the recognition of Aboriginal rights in Australia was intermittent. Why? Was it a question of numbers, a lack of resources, or a lack of unity? In the late 1980s and early 1990s, the Aboriginal rights movement became increasingly vocal and confrontational, which forced the government to engage in some type of reconciliation process. Interestingly, it was the rising militancy, evidenced by the 'Tent Embassy', that partially explains the government's willingness to address Aboriginal issues in

the late 1960s and 1970s. This militancy then dissipated for a number of reasons, only to re-emerge in late 1980s and early 1990s.

According to Dick (2003), South Africa had to confront its race problems because of the exclusionary, violent, and ultimately unsustainable nature of apartheid oppression. Simply put, the civil war and international sanctions forced the apartheid regime to negotiate. These extreme conditions simply did not exist in Australia. Aboriginals did not possess the population numbers sufficient to pressure the Australian government into negotiation or action, and this meant they could be ignored or marginalised over extended periods with few measurable consequences (Interview: Dick 2003).

The Howard years were characterised by a 'leadership vacuum' in Aboriginal policy and, as a result, white Australians are still very confused about the actual status of indigenous people in the country. A Newspoll survey from early 2000 indicated that fifty-two percent of Australians did not believe that Aboriginals were disadvantaged. However, 'disadvantage' is found by all measurements of living standards – life expectancy, children's health, educational attainment, poverty levels, unemployment – which characterises the indigenous community as a third-world nation living in the midst of one of the richest Western societies (Grattan 2000: 180).

The HREOC *Social Justice Report 2000* notes that the two most important issues to be addressed in Australia are the lack of recognition and respect for indigenous culture and values, and the persistent imbalance of power

between indigenous and non-indigenous people. Landlessness, poverty, and socio-economic disadvantage render many indigenous people incapable or unable to participate fully in Australian society. A significant imbalance in these areas is also found between white and black people in South Africa. Thus, despite the apparent success in the South African reconciliation process relative to Australia, there is very little difference in the practical living conditions for traditionally oppressed groups between the two countries.

The HREOC *Social Justice Report 2000* poses the following question: Will Australia seize the opportunity to challenge the fundamental contradiction that lies at the heart of their society? While modern day Australia prides itself on being a defender of human rights and a model democracy, it is a historical fact that it is a nation built on the exploitation and dispossession of Aboriginals and Torres Strait Islanders. According to the *Social Justice Report 2000*, the reconciliation process challenges Australia to structurally adapt in ways that welcome, respect, and encourage the participation of indigenous people in society. Integral to forging this new relationship is the recognition of past wrongs and a new respect for the human rights and dignity of all people.

Boraine (2000) argues that while truth facilitates reconciliation it does not necessarily guarantee it. Exposing difficult or unpalatable historical truth encourages victims and survivors to come to terms with past, and to reclaim their lives from the effects of uncertainty and loss of dignity (Boraine 2000: 376). The TRC report suggested that its work had uncovered enough of the truth about South Africa's past to begin building a consensus on the common

history of the country. While truth is often divisive, it is essential for true reconciliation to occur (TRC Report 1998). Du Toit (2003) suggests that reconciliation can be problematic if it is predicated on every person learning to forgive in order to participate. Rather, forgiveness should be considered a consequence of rather than a pre-requisite for the reconciliation process (Du Toit 2003: 301).

Du Toit (2003) offers an argument that allows us to look to the future in ways that no other commentators do. He argues that estrangement over past and current injustices continues to plague relations between groups in South Africa. He identifies a number of blockages to any kind of reconciliation or consensus from emerging between groups. Despite some modest progress made through the TRC, Du Toit (2003) contends that a lack of *historical common ground* still exists, and establishing such a consensus is an essential component of releasing trauma and learning to live together (Du Toit 2003: 134). He also posits a lack of a *geographical common ground* as a problem since the settlement period in South Africa. The legacy of the apartheid era residential segregation policies restrictions is that most communities are still defined along racial lines. Moreover, rising crime rates have renewed attempts by affluent South Africans to isolate themselves from the majority of the population (Du Toit 2003: 134).

Du Toit (2003) suggests a third lacunae - a lack of *cultural common ground,* usually expressed in the heated public debates over multi-culturalism and non-racialism, has also impeded reconciliation. Neither notion appears to

offer a solution for a society defined so completely by racial classification. Du Toit's (2003) view is that South Africans will have to develop new ways of dealing with racial and other differences and affiliations. Du Toit (2003) suggests that a great deal remains to be done to convince South Africans that cultural 'strangers' – in the form of fellow South Africans, immigrants, or international partners – can be seen as a resource and not a threat (Du Toit 2003: 134, 135).

For Du Toit (2003) the past and present 'estrangement' also remains an important obstacle to reconciliation. He says 'creating a dialogue, developing a safe middle ground, and fostering mutual appreciation of cultural and language differences are a modest starting point towards overcoming estrangement' (Du Toit 2003: 135). This is tied to socio-economic inequality which he suggests is an 'extremely serious obstacle to social reconciliation' (Du Toit 2003: 135). Over the three-hundred and fify-year history of settlement in South Africa, blacks were systematically exploited, oppressed, and impoverished, while the white community almost universally benefited. However, it must be recognised that this situation cannot be remedied immediately (Du Toit 2003: 135). In addition, *Systemic poverty* creates substantially different living and working environments in South Africa. Educational and cultural diversity restricts social discourse as shared topics and interests are typically limited. Unemployment generates enormous pressure for those without work, as well as on employed family members. Wealthy communities are able to access a substantial range of skills and resources, while the poor remain almost wholly dependent on the public

sector. There is seldom any genuine or protracted interaction or consultation between these vastly different worlds. The results of a racist past – manifested in conditions of extreme poverty in the present – complicate the quest for social reconciliation. Awareness and sensitivity are crucial elements of social reconciliation between rich and poor. Companies can foster diversity by paying careful attention to capacity building and skills development, as well as appropriate mentoring (Du Toit 2003: 135).

The final obstacle to reconciliation in Du Toit's (2003) view, is the HIV and AIDS epidemic. He argues that it is a social and economic disaster for southern Africa. Du Toit (2003) draws on projections that suggest that almost half of the workforce would be lost because of the AIDS pandemic. He suggests that efforts towards establishing a multi-faceted approach to fighting the illness, relying on scientific progress, social development, the alleviation of poverty, sex education, personal empowerment, strong leadership, and international awareness, is required (Du Toit 2003: 135).

For Du Toit (2003), race remains a core unresolved issue in reconciliation. Claims that race is no longer important – or that non-racialism permits ignorance of the issue – fosters a culture of denial and unaccountability. Conversely, national attempts to raise awareness about racism and address instances of racial discrimination and violence have sometimes generated ill feeling and racial polarisation. The challenge is generating constructive dialogue about race that balances these tensions (Du Toit 2003: 136).

Du Toit (2003) concludes that the final obstacle is to restore the 'human face' of a society as traumatised and divided as South Africa. He identifies violent crime as one of the major blockages to any progress. As he says:

> Violent crime postpones that restoration. In a society saturated with violence to the extent South Africa's is, people often accept that violence is fine as long as you get away with it. It undermines interpersonal trust and tolerance and invades public spaces with tension and aggression. This violent culture – fed and encouraged by violent crime – stands in diametrical opposition to a culture of *ubuntu* and human dignity, which is the end goal of a process of reconciliation. South Africans have to come to terms with – and effectively prevent - the violence in their communities. We cannot achieve reconciliation as long as violence flourishes. The logic of violence destroys the capacity for reconciliation (Du Toit 2003: 137).

Australia faces many of the same obstacles presented above (with the exception of the HIV and AIDS in pandemic proportions). As noted in the Chapter 1, Australians were also faced with almost a complete lack of historical, geographical, and cultural common ground between the indigenous and non-indigenous communities in the country. Present day indigenous communities are characterised by estrangement, socio-economic inequality, and systemic poverty. Racism and violent crime (within Aboriginal communities) also continue to be serious obstacles to the reconciliation process.

The Australian colonial state was built upon the cartographic notion that every race could be sorted properly into their own place with indigenous people segregated on missions and under the control of Protection Boards. Those who were of 'mixed descent' were to be 'merged' or 'assimilated' into the non-indigenous community. Yet this orderly system was always impossible, and this impossibility and the anxiety it produced in those who imagined themselves as white was at stake in the practices of separation documented in the report. Bureaucrats and missionaries were concerned to maintain racial purity – while in South Africa this function was performed by the Immorality Squad, in Australia it was performed by the Chief Protectors and child welfare agencies who removed children described as 'half-caste'. Intimate relations between Aboriginal and non-Aboriginal people were thus punished. Yet this only complicated the attempt to maintain strict racial boundaries. (Orford 2005: 10, 11).

'So while *Bringing them Home* seeks to make racism a thing of the past, its solution to these racist practices is in part to propose an ordering back into categories, ensuring that everyone has gone home' (Orford 2005: 12).

This was precisely the structure that the newly-elected conservative Australian government mobilised in its response to the Report. According to Prime Minister John Howard, whose government was elected in 1996 (and has been re-elected twice since then, most recently in 2004), the Commonwealth government owed no apology for these separation policies because 'Australians of this generation should not be required to accept guilt

and blame for past actions and policies over which they had no control' (Orford 2005: 13, 14). In the media, Howard insisted: 'I do not believe that current generations of Australians should formally apologise and accept responsibility for the deeds of an earlier generation' (Orford 2005: 13, 14). Yet the report explicitly sought to derive these obligations from international law binding the sovereign state of Australia. It notes that the international legal obligation to make reparation 'passes from the violating government to its successors until satisfaction has been made' (Orford 2005: 13, 14). Orford's (2005) analysis shows how Howard's persistent invocation of familial rather than legal language works overtly to refuse the notion that obligations or debts can be inherited from earlier generations. It also works implicitly to affirm that these ancestors of John Howard and of those he represents are not Aboriginal or Torres Strait Islander' (Orford 2005: 13, 14).

Bringing them Home exemplifies the complex commitments required of participants in this transitional justice process. Indigenous peoples are called by a national institution representing the universal good of human rights and formal equality to testify to their experiences at the hands of the colonial state. In exchange, these stories are translated into accounts of rights violations that give rise to obligations on the part of the nation-state to make reparations. An economy or closed system of circulation is constituted through the report where Indigenous peoples must allow themselves to be spoken in the language of human rights and equality for the nation. They must both be represented in this formalist account of the nation and its history, and yet also identify with the project of returning home in order to benefit from many of the

report's recommendations. In this way, the differentiated system is recreated. In much the same way, the doctrine of native title developed in Australia during the 1990s requires Indigenous peoples to demonstrate an ongoing relationship to culture and land if they are to have their property rights recognised by the Australian state. For the non-indigenous addressees of this report, it offers the promise of a new ground for the nation-state. It is not possible to imagine that the nation-state of Australia could continue on the basis of such a terrible history of dispossession, genocide, grief, loss and exploitation. Yet perhaps, as Orford (2005) opines 'if the peoples of the nation are reconciled, if debts are paid, if the past is remembered (and remembered 'in this form, writing'), if those who have been denied voice become speaking subjects, perhaps then the nation might be able to move forward into a future of hope and justice' (Orford 2005: 16).

Orford (2005) says, 'There is a promise and a danger in such a project. The promise is realised in the vision of the past that is made available by the report. The need to articulate the universal through the particular – here through the testimony of Indigenous witnesses – means that something new happens, something that disrupts this circulation of honest words and things' (Orford 2005: 16, 17). Orford (2005) shows that emerging through the testimony of both perpetrators and victims of the violence of colonialism 'a history of that which escapes the ordered world that colonial administrators and bureaucrats imagined they were bringing into being' (Orford 2005: 16, 17). The discourse embedded in the report spells out what Orford (2005) calls the 'desires' that structure relations in a colonial state, 'the desire to be free of the

power of the state to normalise and punish, the desire to be desired by the other, the desire to transgress boundaries or borders, the desire to erect or affirm boundaries, the desire to name and categorise, the desire for reconciliation of private self and public community, the desire to go home' (Orford 2005: 16, 17).

Australian and South African Government Responses to Reconciliation

In Australia, the HREOC *Social Justice Report 2002* argues that despite Prime Minister John Howard identifying reconciliation as a key priority during his second term, the government did not focus on the issue nor articulated any strategic plan. This 'blind spot' in the Australian government's vision of an all-inclusive civil society had far-reaching implications for indigenous people. Dr William Jonas, an Aboriginal and Torres Strait Islander Commissioner and author of the *Social Justice Report*, contended that the Australian government moved towards addressing issues that were marginal to indigenous people at the expense of sustained work on the distinct problems already identified (*Social Justice Report* 2002).

Dr Jonas noted that the government's response to the CAR documents, which were the result of a ten-year investigative process, was far more restrained and subdued than expected. The Council of Australian Governments (COAG) agreed to issue a communiqué on reconciliation adopting only one of the CAR's recommendations. Apart from this step, there was no formal or comprehensive response from the federal government to the reconciliation

documents presented at Corroboree 2000, or to the recommendations contained in the CAR's final report of December 2000 (*Social Justice Report* 2001: 196).

According to the *Social Justice Report 2001*, the government had numerous specific reservations about the concept of a negotiated and binding treaty:

> We must try to focus as much as possible on those areas where all of us agree, and there are many areas of agreement in relation to reconciliation. Those things where we agree are much greater, more important, stronger and more enduring than those areas where we disagree (*Social Justice Report* 2001: 197).

For Jonas, this indicated that the government was committed to pursuing only its notion of 'practical reconciliation'.

In South Africa, it was clear with the establishment of the new democratic order in 1994 that the government was initially committed to a reconciliation process. The establishment of the Truth and Reconciliation Commission was the first step and was combined with the enactment of legislation to address human rights issues and socio-economic inequalities in the country. However, reconciliation no longer seemed to feature in the government's plans after the report was released. Black Economic Empowerment (BEE) tended to replace the earlier vision of racial reconciliation in South Africa after Mbeki came to power in 1999.

International Pressure

Unlike Australia, South Africa faced intense international pressure to end apartheid and reform its system of governance. Du Toit (2003) argues that the threat of continued social and economic sanctions, particularly during the period of rapid global change following the collapse of the Soviet Union (1990), brought the apartheid regime to the negotiating table. The cumulative impact of the international anti-apartheid lobby, international sanctions, Resolution 556, and various other international instruments pressured South Africa to unravel its oppressive race-based system. These efforts – coupled with sustained internal resistance and armed struggle – led to the unbanning of liberation movements and the release of political prisoners on 2 February 1990, negotiations for a new constitution from 1992 to 1994, and democratic elections on 27 April 1994 (Du Toit 2003: 24, 25).

In contrast, Australia faced little international pressure to change its relationship to the indigenous population (Interview: Nursey-Bray 2003). International involvement was usually limited to expressions of concern from United Nations (UN) agencies and human rights committees about medical conditions in the bush and the treatment of Aboriginal prisoners. The UN has had very little influence on the conduct of the Australian government, particularly since Prime Minister Howard developed close bilateral relationship with the United States (Interview: Nursey-Bray 2003). The response of the Australian government to critical comments from human rights committees

and the UN has been to express disbelief at the evidence presented or challenge the credibility of the investigation process (Interview: Nursey-Bray 2003). This is in stark contrast to the behaviour and attitude of conservative Australian governments of the past, who were far more sensitive to international public opinion.

According the Nettheim (2003), the effective mobilisation of international pressure against a single country - such as in the case of South Africa under apartheid - is very rare. Australia never had to face this kind of pressure (Interview: Nettheim 2003).

Some of the reasons why similar sufferings in Australia were invisible to the international community include Australia's status as one of the wealthiest first-world countries, its close ties with other wealthy first world countries and the fact that its Aboriginal population is a small minority which does not have a strong united voice and has been unable to place the type of pressure on the government which was illustrated by the South African liberation movement.

During the South African liberation struggle many political parties, groups, newspapers and individuals were banned under the various restricting Acts. These groups and individuals often fled the country to continue their struggle abroad. This provided an international platform to create awareness about the attrocities and violations occuring in South Africa. The Australian situation could be considered to be a quiet struggle as the aboriginal people did not

have an international voice or the numbers needed to create pressure on the government.

Conclusions

In this chapter we identified a variety of obstacles that have impeded the success of the formal reconciliation processes, as well as the overall achievement of reconciliation in both these societies.
We have established that these processes would never have overcome the deep wounds created by the histories of oppression, however they were, to a certain degree, able to lay a foundation for future reconciliation.

Several obstacles were faced, and still face reconciliation in these two countries. These include: racism, divisions, stereotyping, recognition of past oppression. Further obstacles identified include: lack of historical common ground; lack of a geographical common ground; lack of cultural common ground; systemic poverty; and violent crime. In the case of South Africa, the HIV/AIDS pandemic was also identified as a major obstacle. A central obstacles to reconciliation in Australia is the Aboriginals' fear of assimilation.

We established that the ideal outcome of reconciliation is the creation of a new social compact that promotes and balances rights and responsibilities against the needs of the wider community, economy, and state. Australia prides itself on being a defender of human rights and a model Democracy. However, the government was committed to pursuing only its notion of

‘practical reconciliation’. In the next chapter we discuss how the debate between human rights versus ‘practical reconciliation’ was approached by these two countries.

CHAPTER 6: HUMAN RIGHTS VERSUS PRACTICAL RECONCILIATION

Introduction

Equality, human rights, and socio-economic disadvantage are the defining elements of the debate between the government and the indigenous community in Australia. In terms of equality, deciding whether to adopt a formal or substantive approach has been the greatest source of contention. In South Africa, the debate focussed primarily on incorporating socio-economic and other substantive rights into the new constitution. In Australia, unlike in South Africa, distinctions were made between different sectoral interests.

The distinction between formal rights and substantive rights is central when considering equality. Whether in South Africa or Australia, continuing indigenous disadvantage is at the heart of these substantive aspects. While South Africa's TRC appears to have had more impact in terms of acknowledging the human rights abuse of the apartheid era and for some victims to move towards reconciliation than in Australia, South Africa is still experiencing an equivalent level of indigenous socio-economic disadvantage. What is striking about Australia is the fact that there has been little improvement for Aborigines. Australia is one of the wealthiest countries in the world, and its indigenous population comprises only two percent of its total

population. In South Africa, wealth is concentrated in clearly delineated enclaves, which are inaccessible to the overwhelming majority of the population.

This chapter will consider two aspects. First how government spending has addressed these realities in both countries. It will also examine the core issue of contention in Australia's reconciliation debate: human rights issues (or what the government refers to as 'symbolic' issues) versus 'practical reconciliation' (dealing with socio-economic disadvantage). In South Africa, it was clear from the outset of the democratic transition that a balance between symbolic and practical action was sought on these issues: in other words, between acknowledging the past and recompensing the victims. In Australia, however, the government took a very different approach: the focus was on addressing the 'practical' issues of reconciliation. The government believed that focusing on 'symbolic' issues was not its responsibility: To do so would mean accepting responsibility for past violations committed against indigenous people. Essentially, the government believed that existing laws and rights available to all other Australian citizens should be adequate for indigenous people as well.

Equality

The 1967 referendum in Australia was a symbolic act of recognition that raised the expectation among the indigenous population that a new, inclusive relationship with Australian society was beginning. Indigenous people had actively sought symbolic inclusion since the 1960s in the hope that neutral

and formal equality would lead to an improvement in their circumstances and treatment. However, it became increasingly evident after the referendum that the formal structures and institutions of the country had not changed enough to equalise – let alone reverse – the socio-economic impact of colonisation and past policies and practices.

The principles of non-discrimination and equality before the law are basic democratic concepts. Yet, there still is no clear understanding in Australian civil society as to how these terms relate to the reconciliation process. Research conducted by the Council for Aboriginal Reconciliation found that while a strong commitment to 'equal treatment' existed across Australian society, there were sharply differing views as to the nature and effects of this commitment. A popular view of equality is that people should be treated the same. From this perspective, reconciliation should be about 'sameness', and not result in different or 'special' treatment for either indigenous or non-indigenous Australians. At its extreme, this view considers different treatment for indigenous people to be a threat to national unity or supportive of a notion of 'separate rights'.

In South Africa, a similar debate about the nature of a post-apartheid rights system began as early as the 1950s, with the Freedom Charter. The negotiations of the 1990s reflected the reality that thirty years of apartheid had redefined the parameters of what 'human rights' actually protect: in that case, it was formal protections for political, social, economic, and gender rights. Thus, the state took reasonable legislative and other measures to achieve the

progressive realisation of these rights. The Bill of Rights, entrenched in the South African Constitution, now provides all South Africans with fundamental protections, freedoms, and human rights, as well as many socio-economic rights.

The Australian federal government reflected this perspective in its response to the *Australian Declaration Towards Reconciliation* (2000). When the CAR publicly released the declaration, Prime Minister John Howard released his own 'preferred' version. It replaced the wording 'We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential' with: 'We desire a future where all Australians enjoy equal rights, live under the same laws and share opportunities and responsibilities according to their aspirations' . In a press release, the government indicated its 'reservations about the strategy to promote recognition of indigenous rights over and above those enjoyed by other Australians' (*Social Justice Report* 2000: 18, 19).

This view of equality as a neutral concept, although popular, does not reflect reality. The notion that everybody can be treated exactly the same overlooks the simple reality that indigenous people have been consistently discriminated against throughout Australian history. Regarded as racially inferior to Europeans, indigenous people were dispossessed, marginalised, and excluded from mainstream society. When they were allowed to participate in mainstream society, it was only if they behaved 'more like white people'. Before 1967, indigenous people were not counted as Australians for the

purpose of the census, and many were denied the right to vote or refused basic entitlements such as welfare (*Social Justice Report* 2000: 19). This historical failure to provide indigenous people with the same opportunities meant that insisting on identical treatment in the 1960s would have simply confirmed their position at the bottom of Australian society. Demands for identical or 'sameness' of treatment were tantamount to 'keeping indigenous people in their place' (*Social Justice Report* 2000).

The *Social Justice Report* (2000) argued that two factors have to be considered in order to facilitate the equal participation of indigenous people in Australian society. First, there has to be an acknowledgement of the historically derived nature of indigenous disadvantage, and that remedial measures are required to provide indigenous people with equality of opportunity. Such measures are seen as necessary and fair so that indigenous people can 'catch up'. Second, for indigenous people to be able to participate in Australian society as equals, they have to be free from external interference in deciding what is best for them. It also requires providing a space for the recognition of their values, culture, and traditions, so that they can co-exist with mainstream society while not losing their identity (*Social Justice Report* 2000).

Practical reconciliation sought to address indigenous concerns on a basis of restrictive equality. Ultimately, it was perceived as assimilationist, aiming for formal equality with only limited recognition of cultural difference. It sought to maintain rather than transform the relationship of indigenous people to

mainstream Australian society (*Social Justice Report* 2001: 205). The limited equality offered by the practical reconciliation approach was reflected in the government's response to the final report of the Council for Aboriginal Reconciliation. As noted by Prime Minister John Howard:

> And whatever may be our different perspectives and the different views we might hold as to how to achieve our goals, I believe it can be said with total sincerity and total accuracy that there is, within the Australian community, a great deal of good will towards the indigenous people of our nation; …a determination to bring about those changes in the circumstances of their education, their health, their employment and their housing opportunities that will enable this country in the fullness of time to say that in relation to each of their citizens and to each of the groups that make up the Australian community that all are receiving a fair go; that all are sharing in the Australian dream and all are in every sense of the word full and equally part of the great Australian nation (*Social Justice Report* 2001: 205, 206).

This form of equality promotes opportunities for participation in mainstream Australia on the basis of 'sameness'. A substantive equality approach necessitates acknowledgement of the impact of historically derived disadvantage, and involves measures that are both culturally appropriate and responsive to the inequity already experienced by indigenous people. Moreover, the terms of equal participation set out above do not allow for the recognition of the inherent uniqueness and diversity of indigenous values, traditions, and culture. The 'fair go' was restricted to an offer to participate in

the existing mainstream system, rather than exhibiting willingness for that system to adapt or accommodate indigenous cultural distinctiveness. This notion of equal participation combines all perspectives into one unifying 'Australian dream', thus obscuring the need for the specific recognition of indigenous social and racial identity. Essentially, this response halted the dialogue between indigenous and non-indigenous people that was envisaged as an essential part of the reconciliation process.

According to the *Bringing Them Home* report:

> Reconciliation cannot be imposed on one party by the other. It cannot be achieved when there is little or no consultation between the parties or when they adopt a "take it or leave it" approach to the terms of their reconciliation. Participation on equal terms and the full agreement of both parties are essential to genuine reconciliation (*Social Justice Report* 2001: 207).

On it is own, formal equality is not enough of a solution. Formal equality would be inadequate as an instrument of social change, and would likely further entrench existing inequalities. The problem is not simply that Aboriginals should be given equal rights and treated like everyone else; it is that formal rights would be the only rights given to Aboriginals. Australia needs to adopt a rights approach that has the capacity to transform the existing social, economic, and political relationship of indigenous people to society (*Social Justice Report* 2001: 218). There are consequences to establishing a system of 'differentiated citizenship'. However, using such a

measure is necessary to right the historical wrongs of colonialism and dispossession and achieve reconciliation (*Social Justice Report* 2001).

Similar arguments about restitutive justice were offered in South Africa. After 1994, the new government pursued a comprehensive equality and affirmative action legislative programme aimed at addressing the legacy of apartheid and traditional discrimination against blacks, women, and the disabled in various areas (e.g., employment, land rights, etc.). The *Promotion of Equality and Prevention of Unfair Discrimination Act* of 2000 (Act 4 of 2000) required every level of government to implement equality measures and forced the repeal of any remaining law, policy, or practice that perpetuated inequality.

In contrast, the call to abandon certain rights claims in the Australian reconciliation process implies that such an approach has been tried and it has failed. The *Social Justice Report* (2001) suggests that Aboriginals be given special rights through native title and other measures, but it has never been considered to be a realistic option by the government (*Social Justice Report* 2001: 219).

Indigenous Disadvantage and Indigenous-Specific Expenditure

Few countries are as infamous as South Africa for its contrasting extravagant wealth and luxury, and extreme poverty and destitution. In terms of the total population, inequality is growing within each racial category and now exhibits a distinct class-based character.

Professor Sampie Terreblanche (2002) suggests that even accounting for South Africa's colonial history, unemployment, poverty, inequality, violence, and criminality are problems with an indisputable *structural* or *systemic* character. These problems have been shaped and 'created' over an extended period by the power structures that formed the basis of colonialism, segregation, and apartheid (Terreblanche 2002: 26). He suggests that these problems are neither incidental nor temporary in nature. For Terreblanche (2002), 'A proper diagnosis of the true nature and root causes of these problems would be a precondition for any attempt to solve them or to ameliorate their negative and humiliating effects' (Terreblanche 2002: 26).

There is a range of concerns about the 'practical measures' approach employed in determining indigenous-specific expenditures in Australia. The first problem is the government's definition of 'indigenous-specific', which is extremely broad and can include everything from funding the Federal Court and National Native Tribunal to processing native title applications (including those made by non-indigenous parties) to general community initiatives relating to reconciliation and the National Museum of Australia. In other words, it could potentially involve any expenditure even remotely associated to indigenous people or indigenous issues, regardless of the specificity of the relationship or the benefit that it provides (e.g., some funding identified as indigenous-specific was clearly detrimental to the advancement of indigenous people).

This overly broad funding practice also misrepresents the actual cost of indigenous programs, which could be used as political fodder in public debates on reconciliation and indigenous affairs. The *Social Justice Report* (2001) argues that it is inappropriate to measure government progress in redressing indigenous disadvantage in these terms: An outcomes-based focus would be far more appropriate (*Social Justice Report* 2001: 209). Specific or specialist programs are 'designed to compensate for the disadvantage and particular needs of indigenous people – which stem from where they live, degree of poverty and particular aspects of their history or culture. But, while indigenous-specific programs are often strategic and targeted, they are not in a position to replicate the level of services and expertise provided by mainstream programs, such as specialist hospital services' (*Social Justice Report* 2001: 209).

The Commonwealth Grants Commission's (CGC) (2001) *Report on Indigenous Funding* found that indigenous-specific programs are required to do more than they were designed and funded to achieve because of the failure of mainstream programs to address indigenous needs effectively (*Social Justice Report* 2001: 209). Accordingly, the CGC report identified equity of access to mainstream programs for indigenous people to be the highest priority for a government seeking to reduce indigenous disadvantage (*Social Justice Report* 2001: 209).

From a substantive equality perspective, the supplementary funding provided for reconciliation projects was meagre, particularly in the absence of a long-

term nationally coordinated framework that could present an effective negotiated outcome. Aboriginals are faced with the continuation of an approach that 'manages' rather than seeks to overcome indigenous disadvantage and marginalisation. A significant component of the government's approach to reconciliation was its reference to record levels of expenditure on indigenous affairs. However, this additional funding still falls substantially short of the funds needed to meet outstanding deficits across a range of key areas.

While a commitment to overcome indigenous disadvantage was the only major point of agreement between the government and indigenous leaders concerning reconciliation, it did not follow that there was common acceptance of the practical reconciliation approach. This was a rhetorical 'slight-of-hand' on the part of the government, which indicated their general unwillingness to adequately consult or engage indigenous people in a dialogue about reconciliation. This is a trademark of the government's 'take it or leave it approach' to reconciliation, which inherently implies that indigenous people are dependent on the benevolence of government, and indicates an abhorrence to establishing a partnership based on consultation and consensus.

The Australian government's attitude was that past cultural conflict and unsympathetic policy-making had been instrumental in establishing a 'welfare mentality' and entrenching socio-economic disparity. 'This led to a culture of dependency and victimhood, which condemned many indigenous Australians

to lives of poverty and further devalued their culture in the eyes of their fellow Australians' (Behrendt 2003: 11). For Prime Minister Howard, the main issues were the development of dependency, victimhood, and poverty. He believed that these problems could be addressed by a more benevolent legislature according to the advocates of practical reconciliation (Behrendt 2003: 11).

Past government policies and practices, such as child removal, have contributed substantially to the present socio-economic inequalities and systemic racism experienced by indigenous communities. The *Kruger* case - the first 'Stolen Generations' suit brought before the High Court - illustrated that these problems have been compounded by the absence of a rights framework that might prevent unfair and racist policy-making in the future (Behrendt 2003: 11).

Although it frequently claims that money is not the solution to indigenous problems, the government tends to trumpet the amount of expenditures in these areas without analysing whether the money actually provides a substantial benefit. The consequence of failing to attend to broader long-term structural goals is to confine the government's activities to reactive policy-making.

Behrendt's (2003) view is that practical reconciliation does not attack the systemic and institutionalised impediments to socio-economic development. Simply put, the government has failed to address the issues at the heart of historical and institutional racism, or to recognise the need for the tangible

protection of indigenous rights, including economic and property rights. The recognition and protection of these rights would have put land under people's feet, allowed access to natural and other economic resources, and helped indigenous communities become economically self-sufficient (Behrendt 2003: 11).

Increased social spending on the poor represents a considerable redistribution of income from whites to blacks in South Africa. Nevertheless, Terreblance (2002) suggests that the structural dynamics in a situation of disrupted social structures, growing unemployment, poor health conditions, and increasing violence and criminality are such that the quality of life of the poorer section of the population has deteriorated considerably in the post-apartheid period. The legacy of colonialism, segregation, and apartheid has been far more difficult to overcome in the context of globalisation than was realised in 1994. The restructuring of the public sector mainly served the interests of whites, and redirecting public spending towards blacks, especially the poor, was enormously difficult (Terreblanche 2002: 28, 29).

The TRC strongly recommended that the government accelerate the closing of the extreme gap between the advantaged and disadvantaged in South Africa. It suggested urgent attention for the transformation of education, the provision of shelter, access to clean water and health services, and the creation of job opportunities. The recognition and protection of socio-economic rights were seen as crucial to the development and sustainability of a culture of human rights and equality (Boraine 2000: 357).

The TRC argued that the public sector alone could deliver economic justice. The Commission indicated the important role that the private sector should play in funding and providing training and economic opportunities for the disadvantaged and dispossessed (Boraine 2000: 357). The TRCs view was that reconciliation without economic justice would be unworkable and unrealistic (Boraine 2000: 357).

Human Rights versus Practical Reconciliation

It is impossible to talk meaningfully about reconciliation - and the transformation in relationships between indigenous and non-indigenous people that it seeks - without reference to human rights. The preamble to the Universal Declaration of Human Rights states: 'Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace' (*Social Justice Report* 2000: 17). Both the South African and Australian processes were defined in terms of human rights. Both were about rewriting who was a subject of 'the nation'. In the South African case, the settling of the past was easy to confront – it was so clearly cast in racial terms. However, the individualisation of abuse masked the systematic and systemic nature of apartheid. The Australian process was also about settling abuses of the past – it was also cast in individualistic terms. However, instead of providing a process that might incorporate Aborigines into the new nation, the manner in which it addressed the past simply redefined Aboriginal identity in terms that kept it

outside the nation. The major concerns of the first peoples were simply ignored. Where were they to come home to, if it was not to be their land?

Thus, if in Australia the concerns of the Aboriginal peoples was to be addressed, it would have required reversing their historical (land) and current (welfare and health) inequalities. The material aspects of citizenship, in terms of increased accountability and transparency in relation to indigenous policies required a focus on the effective participation of indigenous communities in service delivery and policy development; and the adequate protection of the human rights of indigenous people.

The prohibition of unfair discrimination in South Africa's interim Constitution sought far more than to prevent discrimination against members of disadvantaged groups; at its heart was the recognition that the purpose of South Africa's new democratic order was the establishment of a society in which all human beings were accorded equal dignity, and to prevent unfair or racist policy-making in the future. The adoption of the final draft of the constitution in 1996 (Act 108 of 1996) was a milestone for human rights in South Africa. The preamble states that the constitution was supposed to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united

> and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (RSA 1996: 3).

The economic and social rights recognised in the Constitution include: labour rights; the right to an environment that is not harmful to health or well-being; to protect the environment through reasonable legislative and other measures that secure sustainable development; equitable access to land; security of land tenure; restitution of property or equitable redress for property that was dispossessed after 1913 as a result of past racially discriminatory laws or practices; right of access to adequate housing and a prohibition on the arbitrary eviction of people from their homes or the demolition of homes; right of access to health care services (including reproductive health care); access to sufficient food and water; access to social security; the right against the refusal of emergency medical treatment; the right of children to basic nutrition, shelter, health care, and social services; educational rights; and adequate accommodation, nutrition, reading material and medical treatment at state expense for persons deprived of their liberty.

Many of the divisions that emerged in Australia – whether from the government's refusal to overturn mandatory sentencing policies, its response to forcible removal policies, its reaction to criticism from the United Nations, or its response to calls for the negotiation of a treaty – involved active attempts by the federal government to downplay the significance of human rights in resolving Australia's indigenous affairs problems (*Social Justice Report* 2000: 2). This approach has also relied efforts to de-legitimise a human rights

discourse and to promote the notion that democracy begins and ends with majority rule. Democracy means far more than such a limited interpretation: It also requires compliance with the rule of law and the principles of basic fairness and equality. It is also intimately related to the notion of responsible government: that government is there to protect the freedom of all sectors of society, including the vulnerable and minorities.

According to Thomas Fleiner, 'democracy and freedom are Siamese twins. The one cannot exist without the other'. In this respect, human rights are the 'bedrock' on which democracy is built (*Social Justice Report* 2000: 2).

Indigenous activists have argued that their human rights must be fully recognised in order for them to fully participate in Australian society. This requires that a strenuous effort be made to overcome indigenous disadvantage: to facilitate indigenous participation in such efforts and to promote indigenous governance; to put in place stronger mechanisms to prevent future breaches of the human rights of indigenous people; and to ensure increased accountability of governments in policy making from a human rights perspective.

'Practical reconciliation' emphasises the importance of addressing indigenous disadvantage in key areas of health, housing, employment, and education. Making progress in these areas is certainly crucial to meaningful reconciliation. Yet, what 'practical reconciliation' also does is to conceive of these four priority areas as the 'real issues', while representing other concerns such as the recognition of rights to land and culture and self-determination as

'symbolic' and lacking practical benefit. 'Practical reconciliation' has been used to limit debate about the importance of addressing disadvantage based on rights; by characterising them as a symbolic or emotional objective, they were depicted as being disconnected or a distraction from the 'real' issues of reconciliation.

The result of this approach is to construct an impression that indigenous people should be – or are - subject to the beneficence and good intentions of government. This certainly does not change the unequal basis of the relationship between indigenous and non-indigenous people, thereby disempowering indigenous people in the process.

The government's primary response to questions about the future of indigenous policy in recent years has been a stated commitment to a 'practical reconciliation' approach that addresses 'key priority' areas of disadvantage. This approach has continued independently of and without reference to or assessment against the recommendations of the Council for Aboriginal Reconciliation (*Social Justice Report* 2001: 205).

The problem is that this approach creates a simplistic, arbitrary, and artificial division between measures that are described as 'practical' and those considered 'symbolic'. In reality, no such clear distinction exists: the obvious relationships that exist between these different issues and approaches require multi-dimensional solutions. The focus on addressing disadvantage only through 'practical' measures is far too narrow. Moreover, this practical

approach is not accompanied by any sufficient accountability of government performance. Inadequate monitoring and evaluation mechanisms, the lack of sufficient benchmarks or targets, and an insufficient basis for program delivery characterises the entire process. Similarly, it does not provide indigenous people with a central role in determining their own priorities. Most significantly, the approach dismisses human rights as irrelevant (*Social Justice Report* 2001: 205).

This lack of participation on equal terms is evident in the dismissive approach the government has adopted by refusing to address what it terms the 'symbolic' aspects of reconciliation. Indeed, the list of symbolic issues that fall outside the government's interest keeps increasing: It includes an apology and reparations for those forcibly removed from their families, a treaty, and the facilitation of agreement-making processes to deal with the unfinished business of reconciliation.

One of the main concerns expressed by the *Social Justice Report* (2001) was that this approach clearly misconceives or misrepresents the purpose of a number of initiatives. Agreement-making processes and a treaty are not symbolic measures, but represent a fundamental realignment of the relationship between indigenous people and the state. They are also about ensuring the effective participation of indigenous people in decision-making processes in the broadest possible way, rather than within boundaries imposed without negotiation (*Social Justice Report* 2001: 207).

In Australia, there was a distinction to be made between two types of rights with regard to indigenous people. First were those rights that every Australian is entitled to, and second were those that recognise and protect indigenous culture and which are inherent to indigenous people. This important distinction has not been made in the Australian government's generalised attack on the rights approach as inadequate to deal with, if not causally related to, the high levels of violence perpetrated by indigenous people against their own families and communities.

The government condemns the rights approach as symbolic and incapable of producing practical results. It argues that symbolic rights should be distinguished from practical outcomes; practical outcomes, however, result from dealing with indigenous issues on an individualistic basis.

An analysis of the arguments offered in opposition to a rights approach to indigenous issues indicates that this perspective fails to distinguish between the two relevant types of rights: citizenship rights and inherent rights. What were actually damaged in some indigenous communities were the rights that came with equal citizenship. That is, the right of Aboriginals to be treated the same as non-Aboriginals without being discriminated against on the basis of race. These included the right to leave a mission or reserve without first seeking permission, the right to vote, the right to unemployment benefits, the right to enter a *de facto* relationship, the right to formal equality, and even the right to do something as basic as enter a pub and buy alcohol. (*Social Justice Report* 2001: 218).

However, none of those attacking the rights approach suggests that the solution would be to take these rights away and force Aboriginals back to missions or reserves under the supervision of the Crown, the police, or religious organisations. Such a move would strike at the very core of Australian society, as well as marginalise Aboriginal communities even further. Advocacy arguments suggest that these rights do not need to be abandoned, but they do need to be augmented. The real problem with citizenship rights is that they are incapable of alleviating the poverty and destitution that characterises the lives of so many Aboriginals. Simply put, they were not intended for such a purpose (*Social Justice Report* 2001: 218). Instead, The government's 'practical reconciliation' approach was characterised by the following assumptions a minimalist response to the symbolic issues raised in the CAR reconciliation documents; a perception that self-determination was divisive; an emphasis on perceived areas of agreement at the expense of continuing debate on other areas; and a misrepresentation of progress made towards meeting the goals of practical reconciliation (*Social Justice Report* 2002: 78).

The Australian government believes that a continuing dialogue on the 'unfinished business' of reconciliation on matters such as rights, self-determination within the life of the nation, and constitutional reform should be achieved outside a legislated process. Whatever community support there may be for a written declaration of goals and values, the Council's public opinion research indicated strong community opposition to the idea of a treaty

that can be legally enforced (such as those made between sovereign states). A number of Aboriginal leaders have also recently voiced concerns about the relevance, effectiveness, and importance of such an instrument. The government is deeply concerned that rather than offering closure, the pursuit of a treaty would act as a source of continual dispute and litigation, similar to that witnessed in North America and elsewhere (*Social Justice Report* 2002: 79).

There is evidence of widespread disagreement between the aspirations of some indigenous people and the wider community. The government maintains that it is committed to a process that fosters an open, honest, and ongoing dialogue on reconciliation. This process must respect the rights and differing views of all of the interested parties, while also fostering on-going and increased support for reconciliation based on the principle of equal and common rights for all Australians.

A bill of rights or special constitutional provisions are not supported by the government because it 'strongly believes that the best guarantee of fundamental human rights in this country is to have a vigorous and open political system, an incorruptible judicial system, and a free press' (*Social Justice Report* 2002: 81). The government also states that it is committed to the protection of 'the rights of all its citizens, and in particular its indigenous peoples, by recognising international standards for the protections of universal human rights and fundamental freedoms' through ratification of the ICERD, the ICESCR and the ICCPR, as well as its acceptance of the Universal

Declaration of Human Rights (*Social Justice Report* 2002: 81). The government maintains that the *Racial Discrimination Act* (RDA) provides sufficient protection for race rights without the need for further reinforcement through constitutional change or the creation of a bill of rights (*Social Justice Report* 2002: 81).

However, while the RDA embodies the principles for the elimination of race discrimination set out in the ICERD, it became clear during the late 1990s that it still did not provide adequate protection for the exercise of indigenous rights within the Australian legal system. Since 1999, three separate international human rights committees have expressed concern about breaches of indigenous people's human rights. What are they? Despite this notification, nothing has changed. Native title issues are still governed by the same legal structure that caused the CERD Committee to list Australia under its Urgent Action procedure in 1998 and to request an explanation for the imposition of this discriminatory policy (*Social Justice Report* 2002: 81).

Tension exists between the concept of practical reconciliation and the development of mechanisms that protect recognised human rights (i.e., a rights framework). The link between economic issues and rights issues is not being recognised. The notion of practical reconciliation is antagonistic to a broader rights framework because they are a set of policies that only react to emerging problems, and in doing so, ignore the long-term structural and institutional changes that can protect rights (Behrendt 2003: 9).

Grassroots issues that affect indigenous people on a day-to-day basis – violence against women, child sexual abuse, systemic poverty, lack of access to services, substance abuse, and high youth suicide rates – must be addressed, but it should be done in conjunction with, not in the absence of, a broader framework for institutional change.

By the end of the 1990s, it was clear that 'reconciliation' had assumed two competing meanings. In one vision, that held by the nation's unity would be predicated on the elimination of 'difference' between indigenous and other Australians. In the competing view, 'reconciliation' would enact and enshrine the different ways that indigenous and non-indigenous Australians 'belonged' to Australia.

In the South African case, the country must also deal with the issue of eradicating difference. It has attempted to do so by constituting a single citizenship that acknowledges the differential opportunities vested in past racial preference by establishing the principle of equity and affirmative action. That is expressed in the Constitution itself, and does not argue for a undifferentiated practice of citizenship. Although the ANC government has not been able thus far to eradicate the legacy of colonialism, segregation, and apartheid, it has introduced several laws aimed at laying the foundations for a non-racial society. While the government should be commended for this progress, it will be impossible to create a non-racial South Africa as long as the vast wealth gap between black and white remains intact, and the government continually fails to alleviate poverty or improve the existing

economic structure. Even with the legal foundations for a non-racial society, South Africa still has a huge task ahead in ridding itself of racial prejudices. However, an important indicator of change is that South Africa has been willing to acknowledge reconciliation in law and policy.

In a communiqué to the Southern African Development Community (SADC) summit of 2001, the South African government stated:

> Since racial inequality in South Africa is not a set of isolated aberrations that can be corrected by the equal application of the law, or the re-education of pathological individuals, it is not sufficient to simply tamper with or reform the system. It requires instead the complete and progressive transformation of society (Department of Foreign Affairs 2001).

In Australia, the articulation of policies to eradicate the gap of difference is far more complicated. The liberal democratic state was not in transition, as was the case in South Africa. There was an assumption, that it would be discriminatory to ordinary citizens to introduce special mechanisms to assist the Aborigines. One answer suggests that the starting point is acknowledging that indigenous people are different from other Australians, but also notes that these differences are primarily manifested in ways that bring shame to the country. This response seriously considers the reality that indigenous people are by all possible measurements disadvantaged (e.g., employment, income, health, education levels, etc). To alleviate this disadvantaged status, governments must devise special programs, many of which should be

delivered by indigenous agencies. The intended effect of these programs is to allow indigenous people to 'catch up' with non-indigenous Australians. In principle, when the social indicators show equality of well being between indigenous and other Australians, these special programs will no longer be necessary. This perspective has an honourable lineage in the Australian public policy debate. Some advocates of the 'Yes' vote in the 1967 referendum hoped that when the Commonwealth acquired power over Aboriginal affairs its policies would positively discriminate between Aboriginal and other Australians to deal effectively with the disadvantage of the former. Reducing 'disadvantage' is the basic task of what the Howard government has termed 'practical reconciliation' (Rowse 2002: 2, 3).

The alternative view is that 'practical reconciliation' is not nearly enough. In this perspective, indigenous Australians are a colonised people who remain 'different' from post-1788 immigrants, primarily evidenced by language and the imagery of their Aboriginal and Torres Strait Islander identities. Insofar as Aboriginals and Torres Strait Islanders remain distinct 'peoples', governments should concede to them the right to look after their own affairs and to practice self-determination. Part of that work is devising indigenous solutions to the problems of 'disadvantage'. Regardless of whether it takes a long or a short time to relieve this disadvantage, these indigenous structures must be entrenched in the machinery of Australian government. This can be achieved by recognising indigenous regional authorities (and securing a share of public revenue for their use), and by negotiating some kind of framework agreement (covering land tenure, public revenue, and other substantive issues) between

the various Australian governments and representatives of indigenous people. Some people would call this agreement a 'treaty'. The Senate took this idea sufficiently seriously in 1981 to ask its Standing Committee on Legal and Constitutional Affairs to examine the legal feasibility of such a document. The High Court's judgments in *Mabo* (1992) and *Wik* (1996) have been taken by some to imply that indigenous people retain a substantial measure of unextinguished sovereignty that should be acknowledged in a treaty and practically embodied in the design of their public institutions (Rowse 2002: 3).

These two contrasting responses to Australia's colonial legacy are linked to contrasting ways of thinking about Australian public policy (Rowse 2002: 3).

Exploring indigenous visions of equality, inclusion, and autonomy permit a re-conceptualisation of the approaches available to better protect indigenous rights. This means, as a starting point, exploring what indigenous political aspirations encompass. What is it that indigenous people need? Engaging in a public dialogue with (rather than about) Aboriginal people is a relatively recent approach to policy-making, so it is not surprising that many non-indigenous people are unfamiliar with the political aspirations of indigenous people and their communities.

Two political goals seem ubiquitous in indigenous expression of their political aspirations: claims for the recognition of 'Aboriginal sovereignty' and 'self-determination'. The key to understanding the indigenous political agenda is to

define what it is that Aboriginal people are describing when they employ such terms.

A deconstruction of these terms reveals a different political agenda from 'sovereignty' as it is used in an international legal context. 'Sovereignty' and 'self-determination' need to be defined in an indigenous context so that the proper parameters of the debate – and their relationship to rights - are understood in Australia. Autonomy is defined within the state coupled with inclusion through substantive equality; respect for individual identity is seen in tandem with the protection of group identity (Behrendt 2003: 18, 19).

Once the rights sought by indigenous people have been clearly articulated, finding ways to recognise indigenous aspirations becomes the next challenge. It is therefore necessary to look at what is contained within these claims of 'sovereignty' and 'self-determination' and then, from this deconstruction, to develop experimental democratic programs that will assist in making those aspirations realisable (Behrendt 2003: 19).

When deciphering the notion of 'Aboriginal sovereignty', it becomes apparent that many of the common international implications of the term are absent; moreover, many of the elements that are included in the claim are also rights that should *already* be protected and recognised under existing Australian law. They are rights that are recognised as fundamental, either within Australian law or within international instruments ratified by Australia (Behrendt 2003: 19).

It is here again that the lesson learned from the 'Tent Embassy' should be reiterated: a program of piecemeal, episodic changes has not taken indigenous people to a stage where they enjoy the same rights as other Australians. Another approach, one that challenges the institutions of Australian society and their entrenched biases, needs to be examined. Strategies for the better protection of indigenous rights must seek to implement a process of institutional change; in order to achieve this, it is necessary to expose and erode the dominant, seemingly neutral, ideological base of institutional frameworks. Without accompanying institutional change, indigenous people will be frustrated with the critique and be left wanting practical outcomes and the achievement of visionary aims (Behrendt 2003: 19).

CHAPTER 7: CONCLUSION

'Reconciliation cannot be made of concrete if it lacks the binding mortar of truth' – Patrick Dodson (2000)

In considering the main question explored in this thesis, the aim was to define the field and consider the content and processes of the discourse of truth and reconciliation in the two countries, as well as to analyse the interaction between the 'victims' and the state. An important question considered in the dissertation was how these truth seeking and reconciliation processes compare. The dissertation attempted to addresses the various issues of reconciliation, but also focused on the viability of a human rights-based versus a 'practical reconciliation' process.

In this dissertation, we compared the two institutions and processes as well as their context (colonial history, policy towards indigenous people, post-colonial history, demography etc.). Thus, this was a combination of addressing the comparison via case studies of two post-colonial societies, and the way they have dealt with that post-colonial history.

The following variables were identified at the outset: Colonial Conquest; Protection and Segregation; Assimilation - The Destruction of Indigenous Identity; Liberal Constitutionalism and the Struggles for Recognition; Land and its Implications; Establishment, Construction and Aims of the Processes;

Strengths and Limitations of the Processes; Government Responses to Reconciliation; International Pressure; Equality; Human Rights versus Practical Reconciliation.

Drawing a comparison between the Australian and South African reconciliation processes may seem to some to be incomparible. Australia, after all, is an 'ordinary' liberal democracy, and not a transitional society like South Africa. The oppression of indigenous people in Australia and South Africa occurred in different ways, at different times and in different contexts. Both countries, however, do share a history of oppression, discrimination and the violations of the human rights of their indigenous populations. Hence providing a basis for this comparison.

The human rights violations in both these countries were shaped by a colonial past which included dispossesion, displacement, disappearances, genocide, brutality, oppressive legislation, the loss of identity and a lack of collective memory. We can deduce that the ensuing poverty and lack of access to opportunities within the respective indigenous communities stem from a colonial past.

In both countries racial exclusivism meant that democracy 'belonged' only to the whites. This lead to an increase in political activism. In Australia, the struggles were mainly of a civil nature. In South Africa, liberation movements took up arms against the apartheid regime and a thirty year civil war unfolded. A major distinction between the Australian and South African liberation

movements was the fact that in South Africa, the oppressed consisted of the majority and in Australia, the indigenous population was a small minority. I have found that population size is an important variable in mobilising support.

Transition required coming to terms with their pasts and each country, within the context of a global human rights movement, developed institutions for investigating past violations, establishing the truth, and embarking on a path towards reconciliation. South Africa and Australia developed their reconciliation processes in this context. The Australian process faced once big hurdle in its efforts to come to terms with its past – the Australian government. Whereas in South Africa, this process was supported by the transitional government.

The view of those involved in the CAR process was that the past should be dealt with by an acknowledgement of the atrocities committed against indigenous people, recognition of the status and role of indigenous people within Australian society, giving Aborigines and Torres Strait Islanders their outstanding human rights, and providing some form of reparations. It also meant assisting Aboriginal and Torres Strait Islanders in attaining an equal socio-economic position with all other Australians. This process, in my view, is essential in establishing a new shared history and identity. The only route to laying a foundation for a succesful reconciliation process. The Howard government, however, decided that under no circumstances would it take responsibility for past injustices against the aboriginal population, offer an

apology, or implement any policies relating to reparations, land restitution, or a treaty.

The Australian government held the position that 'formal rights' rather than substantive equality was the primary issue, and that it would thus be wrong to give any group rights or opportunities not provided to all other citizens - even if such an approach would assist in uplifting indigenous people. The government insisted on only focusing on 'practical' issues relating to reconciliation. Their notion of 'practical reconciliation' included providing a limited amount of money for housing, unemployment, health, and education, believing that anything beyond this narrow interpretation was not their responsibility. Although these 'practical' measures are essential in establishing equality, I do not see how the road to equality can be paved without an acknowlegment of past human rights violations – providing the victims a platform for expressing their painful history seems to be useless if the findings it produced are not validated by the government. How does a country create a shared history and identity is it refuses to acknowledge its history?

South Africa, unlike Australia, chose to deal with reconciliation by redressing the issue of past human rights violations as part of formal negotiations for a democratic constitution. Thus, there was an agreed commitment to truth telling and acknowledgement of past abuses.

The approaches of the two governments to the reconciliation processes has thus been identified as another important variable in the success of these processes. Even though the ultimate goal of these two countries was similar, the methods and processes developed by the two countries were completely different.

How do the formal reconciliation processes of South Africa and Australia compare? The South African Truth and Reconciliation Commission (TRC) determined that reconciliation was not about avoiding the reality of history or pretending that events of the past had not occurred. In South Africa, establishing democracy and a human rights culture were essential elements of the reconciliation process, with the hope that such changes would foster a more decent, caring and just society.

The Australian notion of reconciliation was intended to focus on recognition, rights, and reform. For the Australian government however, reconciliation only involved implementing practical measures to achieve improvements in the livelihoods of indigenous people. In this process the focus on creating awareness about past human rights violations was avoided and discouraged by the government. Once again, as the indigenous population is a small minority in Australia, it was relatively easy for the government to dominate the process and place only practical measures on the agenda without the threat of a violent uprising.

Equality, human rights, and socio-economic disadvantage were defining elements of the debate between the governments and the indigenous communities. It is impossible to talk meaningfully about reconciliation - and the transformation in relationships between indigenous and non-indigenous people - without reference to human rights. Both the South African and Australian processes were defined in terms of human rights. Was there in fact an increase in the basic human rights of the indigenous people in both these countries?

In South Africa, the incorporation of international human rights laws into a national constitution was seen as coterminous with democracy, freedom, and the creation of a new social contract with citizens. The transition to democracy brought constitutional supremacy – a constitution which includes a comprehensive bill of rights. In Australia however, the government of the time felt that current legislated rights which applied to all other Australians were sufficient, even if the provision of additional rights would increase equality among all Australians.

The next important question to be addressed regarding the success of these processes is: does truth really achieve reconciliation? In South Africa, although the TRC was subjected to much criticism, it was ultimately successful in establishing some form of common truth about the human rights violations of the apartheid era. The outcome of the formal reconciliation process was probably unacceptable for many. However, in the comparison to the Australian process, the TRC achieved more tangible results.

It should be noted that the tangible results towards reconciliation in South Africa are not attributable only to the TRC. The new democratic government, and especially those involved in creating the country's new constitution, were instrumental in bringing about fundamental change. The TRC was, in my opinion, as successful as it could be in establishing 'truth', however the new democratic regime bore the brunt of the responsibility of bringing about reconciliation in South Africa.

The outcome of the CAR process appears to have been to generate a vicious and often counter-productive public debate, and to instigate a continual struggle between the government and indigenous and pro-reconciliation groups. The reconciliation debate in Australia has fractured into two seemingly intractable perspectives: those who seek practical measures (the government who is only prepared to take part in measures relating to improving the socio-economic conditions of Aboriginals under particular conditions), and those who seek symbolic measures. One of the wealthiest nations in the world has been unwilling and unable to counter the continued deterioration of only two percent of its population.

South Africa, too, has struggled to deal with the socio-economic disadvantages of its indigenous people. However, South Africa's success relating to 'practical reconciliation' - given its resources - has been substantial compared to Australia.

Although both the South African TRC and the Australian reconciliation process achieved much in a short time, 'real' reconciliation was not achieved in either country. Until the disadvantages caused by the past are eradicated and real economic and social equality is achieved, reconciliation will be incomplete.

Research leads me to conclude that in terms of 'practical reconciliation', truth, and human rights, South Africa has made substantially more progress compared to Australia. For a process that has been ongoing for more than 16 years, Australia has failed to make any substantial changes to the status of indigenous people in their country.

I find that the degree of success of a formal reconciliation processes depends largely on the domestic support it receives from the government and the public. In my view, the two reconciliation processes assessed in this dissertation have been essential in establishing the truth about and awareness of past violations, as well as in the articulation some relatively clear reconciliation plans (even if they have not been implemented). However, neither South Africa nor Australia has substantially achieved reconciliation.

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