Power, Politics and Truth: A study of South Africa and Australia

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Prepared for the annual meeting of the Canadian Political Science Association, Waterloo Ontario, May 2010

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Introduction

Truth commissions are instances of restorative approaches to post-atrocity justice. Distinct from familiar retributive approaches to domestic criminal prosecution, restorative justice "is about restoring both the victim and perpetrator of crimes back into harmony with the community."[1] Truth commissions are established in this context as bodies to "look at widespread human rights violations that took place during a specified period of time, on a temporary basis."[2] That is to say, truth commissions are non-permanent bodies that look at a specified period of rights violations according to their terms of reference. This contrasts with ordinary judicial proceedings which seek to punish law-breakers and constitute a permanent apparatus of the state, whose ability over time to prosecute crimes is only bounded by statutes of limitation.

Priscilla Hayner characterizes truth commissions as possessing four primary elements. First, truth commissions are backward looking, that is their focus is "on the past."[3] Second, truth commissions do not focus on a specific event, but rather look at a broader picture of human rights abuses.[4] Third, truth commissions conduct their work within a specified period of time; that is, they are non-permanent bodies which disband with the issuing of report.[5] Fourth, Hayner argues that truth commissions are always vested with certain powers by their sponsor that allows

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[1] Joanna R. Quinn, "Transitional Justice," in *Human Rights: Politics and Practice*, Ed. Michael Goodhart (London: Oxford University Press, 2008), 368.

[2] Ibid., 368-9.

[3] Pricilla Hayner, "Fifteen Truth Commissions-1974 to 1994: A Comparative Study" *Human Rights Quarterly*, vol. 16 no.4 (1994), 604.

[4] Ibid.

[5] Ibid.

them to conduct their work with great access to information and the ability to deal with sensitive issues.[6] These four characteristics differentiate a truth commission from the ordinary operation of the judiciary within countries which exist on a permanent basis to provide law and order by punishing individual breaches of domestic law. Moreover, the first characteristic differentiates truth commissions from human rights commissions that might be needed on a permanent basis to upload standards of human rights within states. Truth commissions are backward-looking and "generally do not investigate current human rights conditions."[7] Thus, truth commissions do not fill the need for either a permanent judiciary or a permanent human rights commission.

While transitional mechanisms implicitly deal with issues of political power dynamics—the main transition in many societies in which truth commissions are used is in political power—the effects the prevailing power constellation have on the institution of truth commissions has been paid little attention. By undertaking a comparison between the post-apartheid South African Truth and Reconcilaition Commission (TRC) and Australian Council for Aboriginal Reconciliation (Council), these differences can be brought to the fore. This comparison can also help scholars of transitional justice better understand the Truth and Reconciliation Commission of Canada, and shed light on the possible challenges this commission faces.

South Africa

Although by no means the first truth commission, the South Africa Truth and Reconciliation Commission (TRC) has become, perhaps, the most famous instance of such a mechanism. This

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[6] Ibid.

[7] Ibid., 611.

TRC was established to create a record of the crimes committed under the Apartheid regime of South Africa.

Adopted by the National Party government of South Africa in 1948, Apartheid was a system of racially differentiated citizenship which lasted until 1993. Apartheid, the Afrikaans word for 'separateness', established a legal hierarchy of racial typology where white South Africans sat at the pinnacle of economic, political, and social power. By far the minority in South Africa the white regime employed extra-legal, violent, and repressive tactics to enforce the separation between blacks and whites, and thus a tyranny of the minority. Racist laws enacted in 1958 stripped black South Africans of their citizenship and concentrated them in specially created self-governing 'homelands' called 'bantustans'. Apartheid, however, was not a unique occurrence in South African history, nor a break from the past, but rather the most institutionalized point of a 350 year exclusion of the black majority from from political and economic life.[8]

Internal resistance and international pressure mounted against the South African government throughout the latter half of the twentieth century, to which the state response was an escalation of violence and repression. Internal violence and international pressure, including embargoes, lead to reforms of the Apartheid system in the 1980s. These adjustments, however, could not save the Apartheid system and in 1990 President de Klerk began to negotiate an end to Apartheid. This lead to multi-party multi-racial elections in 1994 which resulted in a victory for

[8] Johnny de Lange, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 16.

the African National Congress and the election of Nelson Mandela as president of post-Apartheid South Africa.

While 1994 signaled an important break from Apartheid, South Africa remained (indeed remains) a society with deep racial cleavages. In an attempt to provide the basis for healing in South Africa the Truth and Reconciliation Commission was created in 1995 under the terms of the *Promotion of National Unity and Reconciliation Act*.[9] The TRC represents an instance of a broader transition in South African society to one that is more equitable and inclusive; one based on justice.[10] While Apartheid itself represents a sort of crime against most liberal and democratic principles (since 1994 Apartheid itself is a crime under international law), the TRC was only tasked with investigating crimes in the context of Apartheid committed by the regime. That is to say, the TRC's focus was on the extra-judicial/extra-legal activities committed by officials outside the law of the Apartheid regime itself. Despite the fact that most resisters of Apartheid did not recognize the 'legal order' of Apartheid as legitimate, this compromise was necessary for reconciliation to get underway.[11] Even in this context the TRC had many crimes to set on the public record. Similarly objectionable was the compromise over job security for the five years following the beginning of the TRC process given to civil servants, including security forces, that was needed to establish the TRC process.[12]

At the time the TRC was being discussed an historic change over in power from the Apartheid regime to a democratic one was taking place. This process was fragile in its infancy, as

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[9] Ibid.

[10] Ibid., 17.

[11] Ibid., 19-20.

[12] Ibid., 22.

it was taking significant, albeit unjustly acquired, political power away from white South Africans as well as threatening the unjust domination of the economy by whites. Whether white South Africans could legitimately claim the accrued benefits of Apartheid is entirely beside the point. Rather any increase in the diffusion of economic, social, and political power to include non-white South Africans necessarily implied a reduction in power and threat to the interests of white South Africans. There was a real fear that the old guard, in the police and military especially, would refuse this new settlement.[13] Thus, to avoid further alienation of the right-wing core of Apartheid and risk an outright revolt by the white security forces, the above limitation of scope of crimes and job security were necessary.[14]

Within this context the TRC was tasked with addressing the legacy of Apartheid South Africa by promoting national unity and reconciliation, to help the nation to heal.[15] In order to accomplish this the TRC set out to undertake four main tasks. First, the TRC needed to construct as complete a picture as possible of the violations committed under Apartheid between 1 March 1960 and 10 May 1994, as established by the terms of reference. Second, people able to help fill out this picture who were reluctant to disclose crimes they may have committed needed to be granted amnesty from those crimes in exchange for testimony. Third, the TRC had to restore dignity to victims and survivors of these crimes by locating them, giving them an opportunity to relate their story, and to recommend reparations. Last, the TRC had to issue a report at the end of

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[13] Kader Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective" *Modern Law Review* vol.63, no.1 (2000), 11.

[14] Ibid.

[15] de Lange, 22.

the five year period that detailed the abuses and crimes, and recommended measures to prevent future abuses.[16]

The South African TRC is part of genealogy of truth commission that began in Uganda in 1974 with the 'Commission of Inquiry into Disappearances of People in Uganda Since the 25th of January 1971.'[17] While it shared affinities with the truth commission that preceded it, the South African TRC represents something different from it predecessors.[18] Hayner argues that the South African TRC differed in: the powers of the commission, in particular the amnesty power; the quality of the public hearings; and the emphasis on reconciliation as its main focus.[19]

The power afford the TRC in South Africa to grant specific amnesty in exchange for testimony was a significant tool to get to the truth and construct a public record of it. Unlike the commissions in Latin America, for example, that gave blanket amnesty there was a *quid pro quo* in the South African case. For the first time a truth commission heard and recorded testimony from a large number of perpetrators regarding the crimes they committed.[20] This unprecedented source of information allowed the TRC to build a historical record much more thoroughly. Moreover, the powers of subpoena and witness protection allowed the commission to call uncooperative witnesses and protect fearful ones.[21] The special powers that the South African TRC possessed allowed it to get to the truth in a way that other TRCs have not.

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[16] This list of tasks is detailed in Ibid., 22-3

[17] Hayner, "Fifteen," 611.

[18] Pricilla Hayner, "Same species, different animal: how South Africa compares to other truth commission world wide," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 32-41.

[19] Ibid., 36.

[20] Ibid.

[21] Ibid., 37.

The public nature and the wide publicity of the proceedings of the South African TRC was a significant departure from other TRCs. The Uganda commission of 1986, for example, held public hearings, some of which were broadcast live on state television, and attracted a wide following.[22] The number of witnesses that came before the South African TRC, however, differentiated it from other commissions, even ones such as Uganda 1986 where there was wide publicity.[23] No other truth commission saw so many people testify in public proceedings, often carried live on radio and television. This can be seen as related to the powers of protected and amnesty, as these created a safe environment in which perpetrators and victims could share their stories.

The crafting of the terms of reference for the South African TRC was a collaborative and deliberative process which took over a year and involved many debates in the legislature of South Africa and consultation with many NGOs and civil society groups.[24] This consultative approach dovetails with the major emphasis of the TRC on reconciliation. Even before the TRC was established there were high hopes for a mechanism that would provide a transition to a new South Africa, one premised on acknowledging the truth of the past which must be undone.[25] The emphasis on reconciliation in the TRC was made to restore "... a fractured nation and heal the wounds of its troubled soul."[26] As Kader Asmal, Louise Asmal, and Ronald Suresh Roberts argue reconciliation based on an acknowledgment of the crimes of the past could "...trigger real

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[22] Hayner "Fifteen," 619. As Hayner points out in this article Uganda is the only case in which there have been two commission in a country in the recent past.

[23] Hayner, "Same Species," 37.

[24] Ibid., 38.

[25]Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* Second Edition (Cape Town: David Philip Publishers, 1997), 47.

[26] Hayner, "Same Species," 40.

catharsis, a word which, in its original Greek meaning, contains the idea of purification and spiritual renewal."[27] Moreover, it is the process of reconciliation alone that offers the possibility of charting a new course and "...so upset any possibility of smooth sailing on a previously immoral course."[28]

The South African TRC then represent a concerted and famous example of one society's attempt to deal with a history of colonialism and mass human rights abuses. However, as Jonny de Lange points out, the TRC itself was only one mechanism to deal with the past: "It is important to stress that reconciliation, reconstruction and development are a process."[29] That is to say, that the TRC can help to create an environment that can facilitate meaningful reconciliation and justice, but is not reconciliation or justice itself, *per se*.[30] The TRC here is something like a symbol site in a landscape of processes that work toward the goal of creating a just society. In South Africa the TRC's value lies in what Asmal calls "the impact on social consensus."[31]

Apartheid placed white South Africans at the pinnacle of social, economic and political power, and addressing the crimes and excesses of political power alone—the human rights abuses and extra-legal activity of the state—cannot facilitate the type of new course Asmal et al. hoped for. Rather the TRC must be read a long with a package of initiatives, such as the mutli-party and multi-racial elections which brought Nelson Mandela and the African National Congress to power in 1994. This sea change in political power and the opportunity to establish the South African TRC are part of process of redressing historic injustice in South Africa. The

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[27] Asmal et al., 48.

[28] Ibid.

[29] de Lange, 30.

[30] Ibid.

[31] Asmal, "Truth" 16.

TRC itself recognized the holistic approach that a new justice South Africa required, proposing redistributive taxation policies to correct the concentration of economic power in the hands of white business elites.[32] The answer to such a pernicious and society-wide injustice must be articulated at a number of levels and in different sites. As Asmal points out: "It is less important to me, personally and as a Minister of State, to see P.W. Botha behind bars than to see his ideological followers stalled in their quest to perpetuate his socio-economic legacies."[33] Thus, the TRC offers not a mechanism of punishment, but rather an opening of a conversation in which the fallacies and pseudoscience of Apartheid can be dealt with and a new social agreement or climate can be reached. The TRC was a part of 'generative conversation' that could "...result in new horizons of thought and action..."[34], one ultimate begun by the change in power over the state in 1994.

Australia

If South Africa is one of the most famous examples of transitional justice through truth and reconciliation, then Australia's approach through the Council for Aboriginal Reconciliation is among the least known. While not a truth and reconciliation commission in name it did share some affinities with the TRC form. The Council was established to "...undertake initiatives for the purpose of promoting reconciliation between Aborigines and Torres Strait Islanders and the

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[32] Sampie Terreblanche, "Dealing with systematic economic injustice," n *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 276.

[33] Asmal, "Truth" 16. Botha was both Prime Minister of South Africa and later State President of South Africa under the National Party. He famously refused to testify at the TRC and was fined.

[34] Charles Villa-Vicencio, *Walk with us and Listen: Political Reconciliation in Africa* (Washington D.C.: George Georgetown University Press, 2009), 111.

wider Australian community..."[35] Moreover, the Council was to educate the public on the history of relations between the dominant society and Aborigine and Torres Strait Islander communities and provide a forum for issues related to reconciliation to be discussed.[36]

The need for such a Council was felt as the centenary of the Australian federation approached and in 1991 the Parliament of Australia established this Council to issue a report by 2001 (the centenary of the Federation). As the final report of the Council notes it has become "...most desirable that there should be such a reconciliation..." by 2001.[37] The desire was present because of the "...unfinished business that the Aboriginal affairs policy represented."[38] As with every other colonial venture undertaken by the great European powers in the Age of Exploration, colonial development of Australia brought settlers in direct contact with preexisting communities. Unlike British colonization in other parts of the world, the settlement of Aboriginal lands in Australia was made possible by a tricky piece of legal fiat called *terra nullius*.[39] This meant literally empty land and allowed settlement to occur without hinderance from the first peoples found there. While Captain Cook, the first British explore to the Australian continent, had a favorable view of the native population encountered there and suggested the Crown negotiate with them as they did with indigenous peoples elsewhere, it was the botanist Joseph

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[35] *Council for Aboriginal Reconciliation Act 1991* Section 6 (1)(a).

[36] *Council for Aboriginal Reconciliation Act 1991* Section 6 (1)(b) and (d), respectively.

[37] Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge*, Chapter 1 found at http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text01.htm

[38] Michelle Gratton, "Introduction" in *Essays on Australian Reconciliation* ed. Michelle Gratton (Melbourne: Black Inc, 2000), 3.

[39] Bruce Buchan and Mary Heath, "Savagery and Civilization: From Terra Nullius to the 'Tide of History,' *Ethnicities* vol.6 no.1 (2006), 6.

Banks who thought the land effectively vacant.[40] Banks' view won out and by the time the first convict settlement was established in 1788 the governor of the new colony was only given instructions to establish friendly relations with the people encountered there, not negotiate with them any terms of settlement.[41]

This contrasts with the settlement of Canada by the British, where lands were opened up to settlement only by agreement of the first peoples through treaties and the purchase of land from them by the Crown alone.[42] This is not to suggest that there were no problems with the settlement of British North America, as many treaty obligations were derogated almost as soon as they were signed, especially in the numbered treaties of the Canadian West.[43] The status, in effect, of non-human the Aboriginal peoples of Australia received under *terra nullius* meant that they were not only excluded from the constitutional construction of the Australian Federation in 1901, but were normatively excluded from the society, polity and economy of the Federation. Aboriginal rights to land were denied under the rubric of *terra nullius* and something like indigenous land rights were only restored by the High Court of Australia in 1992 with the landmark Mabo case.[44] For the entirety of post-contact history in Australia it is safe to safe that Aboriginal peoples there have faced systemic disadvantage and exclusion form the operation of

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[40] Peter H. Russell, *Recognizing Aboriginal title : the Mabo case and indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005), 69-70.

[41] Ibid., 70.

[42] This method of land acquisition and Aboriginal negotiation is provided for in the *Royal Proclamation of 1763* and forms the basis of arguments for recognition by the Crown of preexisting Aboriginal nations in Canada.

[43] In the case of Treaty One the Lieutenant-Governor of Manitoba essentially duped the Aboriginal signatories into believing that the treaty would only make room for agricultural settlement, whereas the text of the treaty demanded the surrender of considerable hunting lands to the Crown in perpetuity. Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence: A History of the Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000), 67. Moreover, the *Indian Act* significantly transformed Aboriginal governance at the same time treaties respecting the independence and traditions of the plains peoples were being negotiated.

[44] See Peter H. Russell *Recognizing Aboriginal title : the Mabo case and indigenous resistance to English-settler colonialism* (Toronto: University of Toronto Press, 2005), especially Part 4.

Australian society as a whole. The terms of reference for the Council expressly set as an objective the goal of "...ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage."[45]

Perhaps the clearest example of exclusion and secondary status of the Aboriginal peoples of Australia is what has been called the 'stolen generations.' This refers to the rounding up of mixed race children in the Northern Territory of Australia begun in 1911 and lasting about 50 years, separating these children from 'full blooded' Aborigines and putting them in an institutionalized settings.[46] For their own protection these 'half-caste' children were removed from their families and homes to rescue them from "...the prospect of a worthless and degraded life among the blacks."[47]Moreover, it was not even until the 1950s that the welfare of the child was considered beyond the simply goal of improvement through removal from their indigenous culture and family.[48] That is to say, until the 1950s regardless of stable and loving home environment children were removed from Aboriginal homes. As Robert Manne argues this half-century of colonial abuse of children was motivate by good, albeit racist, intentions on the part of the removalists. This fact however, neither saved the children removed from families in the early years of the program from squalid condition in the institution to which they were removed, nor did it save the children removed in the latter years from the physical and sexual abuse, and moral humiliation they suffered.[49] This era of 'stolen generations' exemplifies the deeply held racism in

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[45] *Council for Aboriginal Reconciliation Act 1991,* Section 5.

[46] Robert Manne, "The The Stolen Generations," in *Essays on Australian Reconciliation* ed. Michelle Gratton (Melbourne: Black Inc, 2000), 131-2.

[47] Ibid., 131.

[48] Ibid., 137.

[49] Ibid., 138.

Australia, Manne argues most clearly expressed in the inability of the dominant society to understand the suffering inflicted on parents and children by this policy.[50] This policy, however, must be read as part of history of dehumanization of Aboriginal Australians, the legal-philosophical genesis of which is the declaration of *terra nullius*.

Thus, against this backdrop of normative exclusion form the Australian society, the desire to create reconciliation with Aboriginal Australians before the centenary of the Federation in 2001 was born. The enabling legislation of the Council passed by the House of Representatives on 31 May 1991 allowed the Council to operate until 1 January 2001.[51] This expansive, nearly ten year period, allowed the Council ample time to undertake the activities mandated by the *Council for Aboriginal Reconciliation Act 1991.* The objective, as established in the act, of the Council was to "...promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements..."[52] To foster this process of reconciliation the Council was empowered to: "(a) invite submissions; (b) to hold inquiries; (c) to organise conferences; (d) to undertake research and statistical surveys; (e) to organise public education activities."[53] That is to say, in contrast to the South African TRC the Australian Council had every limited powers to undertake its mandate to promote a process of reconciliation.

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[50] Ibid.

[51] *Council for Aboriginal Reconciliation Act 1991* Section 2 established the conditions for commencing activities and Section 32 for cessation.

[52] *Council for Aboriginal Reconciliation Act 1991,* Section 5.

[53] *Council for Aboriginal Reconciliation Act 1991,* Section 7(2)(a)-(e).

The weakness in powers the Council received under the enabling legislation pose difficulties in defining the Council as a truth and reconciliation commission under the criteria that Hayner sets out. Namely, the fourth characteristic discussed above, that the commission be imbued with special powers from the creating body, is clearly not met in the case of the Australian Council for Aboriginal Reconciliation. Far from implying that the Council is not a truth and reconciliation type of body, however, this simply points to poor institutional design to the extent the lack of special powers—like subpoena, detention, or the like—prevent the Council from achieving its ultimate goal. Moreover, it is not the only such body to lack special powers as the current Truth and Reconciliation Commission of Canada similarly lack meaningful powers to compel documents in the construction of a public record of the abuses in Indian Residential Schools. In both intent and design both the Council and the Canadian commission are truth and reconciliation bodies.

With such a long term of operation the Council was bound to see change in federal government, as indeed it did over the course of its life. When the Howard government was formed in 1996, this prime minister signaled his intention to concentrate on 'practical reconciliation' rather than the more symbolic acts of reconciliation such as apology for past wrong doing. [54] It was Howard's contention that "we cannot change what happened in our history but we can ameliorate the legacy of those events and practices that proved deeply damaging."[55] The focus, then, is put on policy matters related to health, education, housing and infrastructure, employment, and an overall discourse of unity in the Australian community,

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[54] Emina Subašić and Katherine J. Reynolds, "Beyond 'Practical' Reconciliation: Intergroup Inequality and the Meaning of Non-Indigenous Identity" *Political Psychology*, vol. 30, no.2 (2009), 244.

[55] John Howard, "Practical Reconciliation," in *Essays on Australian Reconciliation* ed. Michelle Gratton (Melbourne: Black Inc, 2000), 88-89.

"...not making demands on each other that cannot be realized."[56] This move by Howard was controversial and roundly criticized at the time. Moreover, as Emina Subašić and Katherine Reynolds argue the degree to which the current and historical context of inequality is in unseen by non-indigenous Australians, meaningful inter-group reconciliation will be difficult to achieve.[57] That is to say, white Australians need to feel impacted by the history of colonialism in Australia and see past *and* current inequality as illegitimate and unjust. The focus on 'practical reconciliation' ended with the Howard government's defeat by the Rudd Labour Party in 2007, significantly obscured the historical aspects of inequality and with the lack of symbol measures —such as apology which Rudd offered in the House of Representatives in Feb. 2008—failed to capture the public's attention or alert them to their role in reconciliation.[58] This initial focus on 'practical reconciliation' may have sent a message regarding the government's receptiveness to reconciliation as a means of current and historical redress. Andrew Gunstone argues that the Council failed to achieve its goals of educating the wider community about reconciliation and indigenous issues; it failed to develop a national commitment to address socio-economic disadvantage on the part of Aboriginal Australians—despite the Howard government's exclusive focus on mechanisms of 'practical reconciliation'; and it failed to produce a document that include many of the concerns of Aboriginal peoples themselves.[59]

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[56] Ibid., 96.

[57]Subašić and Reynolds, "Beyond 'Practical' Reconciliation," 261.

[58] Ibid.

[59] Andrew Gunstone, *Unfinished Business: The Australian Formal Reconciliation Process* (Melbourne: Australian Scholarly Publishing, 2007), 5.

(Im)Balance of Power

Notwithstanding the lack of special powers afford the Council for Aboriginal Reconciliation by the Australian Parliament, and the contention by Hayner that South Africa is a different 'animal' within the species of truth commissions, we have a picture of two examples, among many, of formal truth and reconciliation processes. In the section I will discuss the difference between these two cases, the goal of which is to suggest the influence the constellation of power within these societies has had, not only on the prospect for success, but also on the construction of these temporary institutions themselves.

As discussed above the South African TRC made initial concession to Apartheid era agents in order to include them in process. The job security and amnesty provisions of the TRC, coupled with the fear of outright insurrections among Apartheid security forces are among the concessions to the still change power imbalance between white and black South Africa at the time of the TRC's creation. The dismantling of the political regime of Apartheid meant the power over the state itself by white South African was being diminished and the restoration of democratic principles of equality and proportionality in the function and creation of government was beginning. That is to say, post-Apartheid South Africa was a truly transition society—indeed is still wrestling with the legacies of inequality—before and during the creation of TRC, where the tyranny of the minority was being eroded in the political, social, and economic spheres. Moreover, there were genuine questions that required answers in dealing with the legacy of extra-judicial actions by the Apartheid regime. People had disappeared, the whereabouts of bodies, how people had met their deaths and why, where not public record. The truth process that was a main function of the TRC—as Hayner points out the wide publication and high level of

testimony in TRC are among of its distinguishing features—involved establish a public record of abuses, in many cases for the first time.

By contrast, Australia's formal reconciliation process seems to have been motivated more by a symbolic celebration of the centenary of the Federation and a desire to clear up 'unfinished business' as Grattan puts it.[60] There was certainly a desire to address inequality between the minority Aborigines and Torres Strait Island population and the dominant Australian society, however, the demographics of injustice are the reverse of South Africa. Moreover, initially there was little desire from the government of John Howard to discuss, consider, and least of all apologize for the wrongs of the past, the lasting influence of which is still felt in the disadvantage of the Aboriginal population of Australia today. Unlike South Africa, the history of colonialism was all too apparent in Australia and extra-judicial, or at least unjust, acts such as the 'stolen generations' was not a secret in the same sense that extra-judicial abuses in South Africa were. The Council, however, still had the goal of creating a public record of the history of colonialism in Australia. The Council's main truth function appears to have been education—which Gunstone contends it failed to do adequately[61]—of the general population on history to which they were largely indifferent. While the Council may not have had the same truth setting agenda as the South African TRC, bring to light government decision making and thinking on subjects like the 'stolen generations' would have been an important part of the Council's work.

The main difference in the constellation of power between South Africa and Australia, is that in South Africa a process of decolonization was underway and the TRC was important site of larger transitional process which sought to reshape unjust political, social, and economic

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[60] Gratton, "Introduction," 3.

[61] Gunstone, 5.

power dynamics of the country. In Australia, on the other hand, the concentration of political, social, and economic power in the hands of the settlers remains largely unchanged form the colonization period and the time of the abuses. That is to say, the power constellation in Australia is a colonial one. Thus, the legislature which created the Council was (dis)empowering the Council to investigate the very source of its power, the colonial constellation. The corollary of this in South Africa would have been the government of de Klerk creating the TRC to tell the truth of Apartheid and foster a new just South Africa, which would pose clear problems of bias and conflict of interest.

The clearest manifestation of the constellation of power in the institutional design of the Council is in the powers the enabling legislation gives to the Council. As discussed above, special powers are a key characteristic of truth commissions according to Hayner, and one which is somewhat absent from the Council for Aboriginal Reconciliation. While the Council clearly did not need the same sorts of special powers as the South African TRC did in the revelation of the truth of Apartheid, such as witness protection or subpoena, something more than the power to convene conferences, for instance, may have helped in the construction of public and historic record. The ability to compel documents and meaningful tell the truth of actions of the colonial government throughout the history of Australia may have helped the Council, however, the colonial power dynamic seems to have mediated against this.

For both South Africa and Australia the formal commission was conceived as part of process of addressing inequality and disadvantage, however, the fundamental difference is in the ordering of the process. In the case of South Africa a formal handover in political power had occurred before the TRC was struck, manifest in the 1994 election of the African National

Congress, while in Australia the Council was conceived as the beginning of a process that would lead to a correction of Aboriginal disadvantage. However laudable the goals of reconciliation in Australia may have been, the concentration on 'practical reconciliation' and the Council's failure to address key issues identified by Aboriginal peoples have lead to little movement toward a just society. Howard is right in certain regard when he contends that reconciliation cannot be legislated,[62] however, this emphasis on practical over symbolic reconciliation—aside from artificially separating these two approaches—misses an important opportunity for the government to show moral leadership to foster the type of reconciliation felt in "...the hearts and minds of the Australian people..."[63] This lack of leadership may have been motivated, wittingly or unwittingly, by a desire not to threaten the colonial power of the state.

A final difference between the two truth and reconciliation mechanisms can be seen in the funding of each. In the case of the South African TRC the funding of operations was accomplished by the creation under the *Promotion of National Unity and Reconciliation Act 1995* of a fund that would receive money by grant of Parliament, to be called the 'President's Fund.'[64] While the Fund was empowered to receive money donated and "...money accruing to the Fund from any source"[65] the guarantor of operational funds for the TRC was ultimately the Parliament of South Africa. In contrast the Council for Aboriginal Reconciliation in Australia had no source of funding established in its enabling legislation. Moreover, the body which the Council established in 2001, Reconciliation Australia, tasked with continuing the work of

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[62] Howard, 89.

[63] Ibid., 91.

[64] *Promotion of National Unity and Reconciliation Act 1995*, Section 42.

[65] *Promotion of National Unity and Reconciliation Act 1995*, Section 42(1)(a).

reconciliation, is a not-for-profit body which is funded by private donations, rather than government funds.[66]

This is not to suggest that the comparison here is between unmitigated success and failure, but that powers given to these reconciliation bodies, their timing in a process and source of funding are, in part, a function the power dynamics of society. More fundamentally, however, the way that especially the Howard government conceived of reconciliation in Australia as addressing deficits in education, health, and housing, there was no real threat to the prevail colonial power dynamic. In fact, in important ways I believe this reinforces at least the cultural cultural or social power imbalance. That is to say, the efforts in Australia and South Africa differ to the extent they are decolonial, which is fundamentally affected by the pattern of power in the respective societies; there are significant differences between colonial and post-colonial societies.

Clearly, I have not offered anything like conclusive evidence here. Instead, this narrative of power can be read as another factor that should be considered when studying these mechanism transitional justice. In order to create a more compelling account and link the power constellation's influence on institutional construction a much more thoroughgoing study than is possible to accomplish here would be necessary. Interviews of key stakeholders and agents in the construction of both the South African TRC and the Council for Aboriginal Reconciliation would be a good place to start.

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[66] About RA, http://www.reconciliation.org.au/home/about-ra/who-is-ra-.

Conclusion

Power is an influential factor in the construction of institutions, so what? I do not mean to suggest that the dynamics of power can be obviated in the construction of institutions, least of all in transitional societies, but that paying closer attention to how the prevailing pattern of political, economic, and social power affect theses institutions can help us better understand the process of reconciliation that includes these mechanisms. The powerful merely being aware of how their power effects their actions may give pause to reflect, and possibly change behavior. Moreover, the lessons from the Australian case can help researchers looking at a similar mechanism being used currently in Canada in the form of the Truth and Reconciliation Commission of Canada.

Certain affinities between Australia an Canada immediately present themselves, such as demographics—in both cases Aboriginal peoples represent a minority in society—and most obviously in the pattern of colonial power. Where South Africa was in a process of what we might call decolonization, of sorts, the power in Australia and Canada between first peoples and the dominant society remains fundamentally unaltered from the periods of abuse. That is to say, I would tend to agree with Prime Minister Harper's comments at the Pittsburgh G20 summit that "We also have no history of colonialism"[67], but only because colonialism—or at least its (im)balance of power—is very much present, not past. By understanding what effects imbalance of political, economic, and social power can have on the creation of temporary institutions of transitional justice we can gain a richer understanding of the process underway in Canada. It can cue researchers to examine more closely the powers, timing, and funding of the Truth and Reconciliation Commission of Canada. The Canadian TRC faces some of the very problems of

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[67] David Ljunggren, "Every G20 Nation Wants to be Canada, insist PM," *Reuters,* 25 Sept. 2009 *: http:// www.reuters.com/article/2009/09/26/columns-us-g20-canada-advantages-idUSTRE58P05Z20090926*

visibility, relevance to the dominant society, and adequate government support that the Council in Australia did. While a thorough comparison of the Canadian case is not the aim of this paper, the difficulties outlined above in yet-colonial Australia should be looked at closely in the context of a yet-colonial Canada. Moreover, by acknowledging the influence this power dynamic can have research can be more critical of the motivations and prospects for success of a broader process of reconciliation outside the site of reconciliation in formalized mechanisms.

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