

Review Essay: Reflections on Reparations and Reconciliation

International Third World Legal Studies Association, New York and the Community Peace Program, School of Government, University of the Western Cape, Into The 21st Century: Reconstruction and Reparations Conference, Cape Town, South Africa, January 4-6 2001. Barkan, E (2000) The Guilt of Nations, W.W. Norton and Company, New York. 414pp. ISBN 0 393048861. Rrp \$39.95.

Reparations and reconciliation are global issues, and both the recent *Into The 21st Century: Reconstruction and Reparations Conference* in Cape Town and Barkan's book *The Guilt of Nations* reflect the scope of issues that fall within the frame of reference. According to Barkan, international moral commitments have assumed a new force in the post-Cold War era with growing public awareness of state responsibility for crimes against humanity and the demand for effective responses. Reviewing these issues as an Australian involved with the demand for reparations for Indigenous people, it is inevitable that my own context influences what I consider to be important. And perhaps the first issue that struck me from the conference in Cape Town was the importance of context: the historical and political context in which the demand for reparations arises and the political, legal and social context in which the mechanisms for achieving reparations takes place.

Not surprisingly given the location of the conference, there was considerable discussion of the South African Truth and Reconciliation Commission (TRC) and whether it might provide a model for dealing with reparations and reconciliation in the aftermath of the gross violation of human rights. Dumisa Ntzebeza, a commissioner with the TRC, noted some of the limitations of the Commission. There were severe time constraints: the Commission was expected to conduct hearings over 18 months into violations which had occurred over a 34 year period from the Sharpeville Massacre in 1960 to the first democratic elections in 1994. Secondly, there was not enough attention paid to the institutional context of apartheid crimes. The process was one which emphasised individual perpetrators and individual responsibility. According to Ntzebeza, this problem arose partly because the TRC was itself modelled on South American experiences where Truth Commissions dealt with the outcomes of political dictatorships. Yet in South Africa it was the institutional processes of law which provided the framework for apartheid - not the actions of aberrant individuals. Finally, the actual reparations to people victimised under apartheid had not been forthcoming. Thus there was an imbalance between the amnesties which had been granted to people who had admitted to the most serious of crimes, yet the promised reparations to the victims still seemed far off.

The gap (or indeed incompatibility) between law and justice in South Africa was discussed by Kendall Thomas from Columbia Law School. Given that law provided the infrastructure of apartheid, what role could law play in achieving justice in post-apartheid South Africa? In this sense the TRC attempted to achieve what the law could not: justice. The Commission became an acceptable form of transitional justice; a hybrid structure that bridged civil society and the state; that sought truth and reconciliation outside of normal legal institutions and processes. Francois Dubois (University of Cape Town) complicated this view somewhat by suggesting the TRC was still dependant on law. To the extent that the truth was unveiled through the TRC process, there was a backdrop of a real threat of criminal prosecution of those who did not seek an amnesty through full admissions.

Barkan uses the concept of *restitution* in his book to describe the full spectrum of attempts to rectify historical injustices. This is a much broader use of the term than the usual legal definition, and is in fact closer to the notion of reparations as it has been increasingly defined in the context of international responses to the gross violation of human rights - as for example in the Van Boven principles (1995) or the more recent Bassouni principles (2000) prepared for the United Nations. For Barkan the discourse of restitution arises out of the discussion between perpetrator and victim - it is a new form of political negotiation and it is based on historical injustices which have been committed because of the distinct identity of victimised groups (p xviii). The process involves the opportunity to develop a new interpretation of the past which both victim and perpetrator can share. The modern notion of restitution for historical injustices arose with the German-Jewish agreement following World War II. According to Barkan,

Reparation became part of a continuous and significant dialogue between the perpetrators and the victims over the memory of the Holocaust. The dialogue enabled some Germans to confront their past, it strengthened the Jewish (and non-Jewish) belief in the moral rights of victims, and it established the moral principle of restitution for injustices. But an unintended and profound result was that each nation's identity, as well as its growing impact on world politics, was enhanced by the dialogue's significance, and it contributed to the perception of the unique status attained by the Holocaust as the ultimate of suffering (p 28).

The Guilt of Nations has a chapter on Japanese Americans who were compensated in 1988 for internment during World War II. The US legislation contained a declaration by the Federal Government that historical injustices ought to be amended and an apology to Japanese Americans. The legislation provided for \$1.25 billion in restitution. A decade later 80,000 individual claims had been paid at a cost \$1.6 billion. The political strategies in the lead-up to reparations are interesting - particularly in the contemporary Australian context of the Stolen Generations. Two divergent strategies were followed by two different groups representing Japanese Americans. One group (the Japanese American Citizens League) followed a path of influencing the legislature to demand an apology and moderate individual compensation and a trust fund for the community. In contrast the National Council for Japanese American Redress filed a class action suit and demanded \$27 billion. In the end the court case was unsuccessful. Meanwhile, Congress had established a commission of inquiry which recommended compensation of \$20,000 per person.

At the Cape Town conference, Natsu Saito from Georgia State University discussed the lessons which could be drawn from the Japanese American experience of reparations in the United States. She noted the need to identify the past wrongs properly, that is to identify clearly what it is that needs to be remedied. And then to ask the question whether these past wrongs can be fixed through a reparations process. What I take from this is perhaps the need for some modesty about the possible outcomes of a reparations process. To what extent can we remedy through a tribunal or commission broad historical processes like colonialism or slavery or their contemporary outcomes of racism and inequality? In this context can reparations be more than

symbolic? There is a need for the reparation process to be firmly grounded in the specific issues which need to be addressed. The issues which are being addressed need to be precisely articulated, as do the possible remedies which will be forthcoming.

Thus it seems to me that one danger of the reparations process is that it promises too much. Listening to some of the complaints of the failings of the TRC, or the expectations of reparations for slavery in the United States and elsewhere¹, it sounded as though a reparations process could and should deliver social justice. Social justice may be a fundamental goal, yet can we really expect a commission to deliver a social and economic revolution? These are important issues to consider in the Australian context of reparations for Indigenous people who were removed from their families as a result of Government policy. We need to be clear about exactly what a reparations tribunal would be responding to, and how and with what it is likely to be responding. A reparations tribunal in Australia will be a step towards reconciliation but will not achieve it in itself. It will certainly not deal with all past wrongs which arose from the colonial process; however, it could deal with the outcomes of one or more specific policies.

Barkin discusses this issue from a somewhat different angle when he asks how it is that claims to restitution and reparation come to be seen as legitimate. He contrasts the demand for reparations for slavery to the demand for reparations to Japanese Americans. 'By certain criteria, descendants of slaves in the Atlantic diaspora are seemingly the perfect candidates for benefiting from restitution. Nobody contests the profound historical injustice' (p 324). Yet there has been little movement towards reparations. By way of contrast Japanese Americans succeeded in gaining reparations despite their small numbers and limited political leverage. Barkin contrasts the specific and manageable nature of reparations to Japanese Americans compared to the profound injustices arising from slavery which by their nature are difficult to demarcate. A further complicating factor is the absence of a united African American voice on the issue of reparations for slavery.

As Barkin notes, there have been examples of specific reparations for racist atrocities against Black Americans. Florida provided compensation for the victims of the Rosewood massacre in 1923 where a small black town was completely destroyed by a white mob. Several people were killed and the rest forced out of the town. Their property was 'acquired' by local whites. The state accepted responsibility for negligence and the failure of law enforcement. The model of reparations for Japanese Americans was used in responding to the victims of Rosewood, including financial compensation, tuition scholarships and educational materials about the incident. In Oklahoma a Race Riot Commission was established in 1997 to investigate the Tulsa race riot of 1921 which led to the deaths of possibly hundreds of African Americans. The Commission is to report on what type of reparations would be due and to whom (Barkin, p 299).

While reading about reparations for the massacres at Rosewood and Tulsa, I was immediately struck by the absence of such conversations in Australia. Two large scale massacres of Aboriginal people occurred at Forrest River in 1926 in Western Australia, and at Coniston in the Northern Territory in 1928. Both punitive expeditions were led by Government officials, both were the subject of subsequent official inquiries and whitewashes. What of reparations for the survivors, families and communities? Discussion of reparations for the Stolen Generations really is only the beginning of this issue in Australia. The reparations issue globally will no doubt cause us to rethink the effects of specific incidents like Forest River and Coniston, as well as colonial policies more generally.

1 The final plenary session of the conference was on the issue of reparations for slavery.

Other speakers at the Cape Town conference raised more general issues. For example, Paul Hughes (University of Michigan) discussed the framework of principles which might underpin reparations and restorative justice. An interesting part of his discussion with relevance to Australia was the distinction which needs to be drawn between individual responsibility for particular actions and Government responsibility for the effects and wrongs that have arisen as a result of previous Government policies. To deny responsibility on the basis of individual actions (I never engaged in slavery, I never removed Aboriginal children, I never engaged in wartime atrocities) is to miss the point of reparations policies. Reparation and restitution arise from the recognition of Government responsibility for the outcomes of state policies. This point needs to be made clear because it is likely that the costs of reparations will be borne collectively through taxation, including the anomalous situation where victims who are citizens of the state will contribute through tax to their own reparations.

A related question is how should we consider victimisation. Heidi Rombouts and Stef Vandeginste (University of Antwerp) argued for a broad definition of victims including those directly and indirectly affected by the violations of human rights as well as social groups as opposed to only individuals. However, while 'victim' might be a relatively capacious status, other questions will need to be addressed. Should all victims be legally entitled to a right to reparation? Given the finite resources implicit in any reparations process, how should we prioritise the claims for reparations of different groups of victims. Again this issue has relevance to Australia. While a reparations tribunal might be capable of ordering broad reparations to the families and communities of those affected by the removal of Aboriginal children, direct monetary compensation might be restricted to those who can directly demonstrate they were removed.

John Torpay (University of British Columbia) presented typologies of sources of reparations claims and the types of claims which have been mounted. The sources for reparations include acts of injustice arising from World War II; those that have arisen in the context of transitions to democracy; and those that derive from colonialism and its aftermath. Barkin's book divides the reparations issues between those which derive from World War II and those which derive from colonialism and its aftermath. Much of Barkin's discussion on colonialism and its aftermath relates to Indigenous people, with chapters on Native Americans, Hawaiians, Aboriginal people in Australia and Maori in New Zealand. This is a broad ranging discussion which deals with matters such as the claim for self-determination, land and resource issues, heritage protection, the return of artifacts and human remains, and so on. My view is that there is a need for greater conceptual clarity here between policies and laws which arise within a framework of reparations for past injustices, and those which arise in the course of eliminating racial discrimination from existing laws, policies and practices. It seems to me that the protection of sacred sites or the return of human remains is more about treating Indigenous peoples as equal before the law rather than as necessarily reparative for past injustices.

John Cerrone (United Nations Mission in Kosovo) discussed the problems of reconciliation between Serbs and Albanians in Kosovo where the preconditions for reconciliation have not yet arisen: there are totally differing versions of history and politics. According to Cerrone, preconditions for reconciliation include economic development and the re-establishment of the rule of law. By way of contrast we might consider the extent to which reconciliation between Indigenous and non-Indigenous people has advanced in Australia over the last decade. There is widespread support among civil society for reconciliation despite the lack of support or initiative from the Federal Government.

The question of formal government apologies for past injustices was raised both at the Cape Town conference and in Barkin's book. The view of the conference seemed to be that an apology was a necessary precondition for reparations, although it was unlikely to be sufficient in itself. Barkin argues for the importance of the apology:

In every restitution, at the very minimum, the injured party benefits from the international recognition of its victimization and the restitution of its history. Consequently, its history, not just the perpetrator's history, becomes part of the global narrative.

Often, by validating and showing respect for the victim's memory and identity, the very recognition of past injustices constituted the core of restitution. It is a recognition that transforms the trauma of victimization into a process of mourning and allows for rebuilding (p 323).

Barkin argues that the apology is necessary because of the magnitude of the past injustices, the likelihood that financial compensation will be of secondary importance to the victims and that often most victims will not be alive to enjoy any economic benefit.

In discussing the relationship between an apology and financial compensation, Barkin uses the example of Korean women's refusal to accept financial restitution from a Japanese private fund because the Japanese Government refused to acknowledge responsibility and apologise for sexual slavery during World War II. There are parallels with the prioritising of an apology over financial compensation by members of the Stolen Generations who gave evidence to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in Australia.

Indeed, Barkin's chapter on sex slaves (Chapter 3) provides some interesting parallels between the Japanese view of World War II and the current Australian Government's view of the Stolen Generations. The debate over 'comfort women'² or sex slaves was emblematic of the failure of Japan to come to terms with its role during the World War II. During the early 1990s there were a number of lawsuits by Korean women against the Japanese Government - which the Government fought at every turn. By the mid 1990s the Japanese Government supported the establishment of a privately run fund for women affected by the forced prostitution programs. However it refused to acknowledge formal responsibility or legal liability. As pressure on Japan mounted, the Prime Minister issued a personal letter of apology, but refused an official apology.

Barkin notes the following.

Germany has been, and is, the subject of intense criticism for its insufficient atonement for the crimes that it committed during World War II. But compared with Japan, Germany has atoned extensively. Japan has yet to recognize that it was guilty, let alone begin to atone or retribute its victims... Japan neither embarked on any introspection nor accepted responsibility for the war...

The Japanese government and society have conducted an intensive and successful repression of any information about the war in which Japan is not presented as a peace-loving nation or in which anything negative about its history is mentioned (p 60).

There are some striking similarities here with Australian responses to the Stolen Generations: the refusal to consider compensation, the substitution of a personal apology for an official apology, the struggle for justice through the courts against a Government determined to deny liability, and the more general attempt to quarantine from revision an official version of history which might recognise systematic human rights abuses.

2 The name given to the military's organisation of forced prostitution in brothels between 1931 (the invasion of China) and 1945. The majority of the women were Korean.

Perhaps an original response to the battle of history and truth has been provided by the Swiss (Barkin, chapter 5). The controversy over Nazi gold and the accounts by Holocaust victims held in Swiss banks lead, among other outcomes, to the appointment of the Bergier Committee. The committee of historians, comprising Israeli, British, American, Swiss and Polish members, will spend five years assessing the role of Switzerland during the Second World War.

During the visit to South Africa the most succinct statement for me on the problem of reparations and reconciliation came not from a conference speaker but rather a visit to the former prison on Robben Island just off the coast at Cape Town. Tours of the prison, which is now a world heritage site, are undertaken by former political prisoners. Our guide told us he had spent relatively little time on Robben Island as a prisoner - only five years. In a matter of fact manner he told us that his former torturer had visited the island last year with his wife and children, and had apologised for his actions. Our guide responded that the apology was all very fine, but as a result of him being tortured he and his wife would never have children. I couldn't detect any bitterness, sadness, hatred or forgiveness in his voice when he told this story - just a deep, deep chasm that separated him from the emotions we might expect. I was left wondering what meaning concepts of reparations and reconciliation have at this personal, subjective level.

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