REPARATIONS: THEORY, PRACTICE, AND EDUCATION

Conference Report

Commonwealth Legal Education Association

12-14 June 2003, Windsor, Ontario

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The theme of this Conference was 'reparations' – understood as redress for wrongs done to people, perhaps a people, at a time which, compared to the usual legal case, is in the distant past, where compensation, atonement, or both, is sought from many people, perhaps a people, or from an institution or state, perhaps the government of the people wronged. You could define it equally well by citing the most prominent 'case' in this field: slavery, specifically the transatlantic slave trade of the 18th and 19th centuries, and the slavery system of the USA to 1861.

Before discussing how that theme was developed, I should describe the form of the Conference. Rather than the usual speaker-at-a-podium before audience-in-rows-of-chairs, this was a 'Roundtable': the University of Windsor's innovation. All participants sat at a common table, not in fact round; speakers, whether presenting a paper or merely commenting, spoke from their place, seated. It was like an ordinary seminar, and like an ordinary seminar, avoided the long passages of pointless paper-declamation that mar most conferences and lectures. (The exception proved the rule: one speaker insisted on presenting his paper from the side, at a separate table occupied by Conference hangers-on, U of W students for the most part, and sure enough within a few minutes the familiar insistent doze of conference 'talks' imbued the room.)

The participants included law teachers from Canada, Australia, Sri Lanka, South Africa, the Caribbean – and me, from the South Pacific. There were also teachers from Peru and the USA, as as a New Zealand historian.

TOPICS

As one would expect, the distinction between Theory (Day 1) and Practice (Day 2) was not very sharp. The theory discussions focussed on how one could construct a legal action from the stories of dispossession or abuse constituting the historical wrongs. Practice was largely stories, of two sorts: cases and courts. The cases most discussed were those of Canadian natives forced to attend residential schools as children, during the first half of the 20th century, the claims dealt with by the Waitangi Tribunal in New Zealand, land claims in South Africa, and of course the American slavery claims.

The last topic, Education (Day 3), featured discussions about packaging these issues for classes – which permitted conclusions about how theory and practice should be combined. But it also featured discussions

of teaching human-rights and rule-of-law subjects in societies where these concepts are opposed by the government (notably, apartheid-era South Africa, although also to lesser extents current South Africa and Peru).

Overall, the discussions came down to two corresponding dichotomies: litigation/politics and compensation/atonement.

IMAGINING LITIGATION

The obvious cause of action is negligence. In many cases the direct wrongdoers are dead, but institutions which at the time were responsible for them, or could have acted to prevent the damage they did, continue into our time. So there is a defendant. The damage can be construed as only having become clear enough to found an action recently, as long as one can connect present or recent problems causally to the original harms. So there's a plaintiff, within limitation periods. The real issue becomes whether it is just to impose an adequate duty of care (or standard of care), at least where the 'damage' is something that was generally accepted or legal at the time. If it was not, the case is clearer – this is the outline of the Candian residential-schools cases against the churches and government which ran the schools, insofar as these concern physical and sexual abuse by school staff.

Less obvious is an equity route: unjust enrichment. It requires a simpler, though ultimately as difficult, structure. One need show a reflection in material gain by defendant of the past wrong – the enrichment – and then that this is unjust. The gain may originally have been by the defendant's ancestors, or predecessors in title, as long as the defendant's current wealth still represents some of it. Thus even individuals now alive may be eligible defendants for events as distant as slavery in the US.

The problem is in applying a test of justice, when describing the enrichment as unjust, which could reasonably have been passed at the time of the wrong. Especially, this is a problem when the wrong was explicitly – by legislation – *legal* at the time. This is, of course, substantively the same issue as with the duty or standard of care in a negligence framework.

Only one approach seemed fruitful, for plaintiffs, on this point: that the legal system of today is tainted by acceptance, however implicit or indirect, of acts which by its own current standards are abominable. (This can be understood directly, as a matter of juridical integrity, or obliquely, as a matter of the repute of the administration of justice.)

The greater the enormity of the historical wrong, the more plausible this approach seems – the American participants were adamant that slavery, at least, was a wrong without parallel.

One participant advanced the judicial decision regarding a trust which accorded benefits on a racist basis as a model: although undeniably acceptable, and 'just' by contemporary standards at its creation in 1923, its recognition by a court today – in enforcing its terms – would be unacceptable, and inequitable.

In equity or at law, the core problem is the legal reflection of the political issue: retroactivity. I advanced the notion that since the common law routinely applies rulings retroactively on small scales – defendants are held subject to duties by decisions rendered years after their acts, duties which no-one pretends 'existed' at the time of those acts – it might permit, in these manifestly exceptional cases, retroactivity on rather large scales of time.

The common law did seem more fruitful, for plaintiffs, than international humanitarian or human-rights law, which at least until recently has been limited to formal expression in treaties. (Nonetheless one participant found an argument for characterising the later slave trade as 'piracy', which was illegal by treaty.)

Moreover, to hue as closely as possible to international law would require States as plaintiffs. Identifying modern governments which could claim both to represent the wronged people and to be themselves worthy of compensation, even at law, seemed an impossible task.

CHOOSING LITIGATION

There became apparent two objections to litigating these claims. One was eminently practical, or realist: of the several cases tried, none has succeeded – at least in the sense of winning the court orders sought. An American participant described, with chracteristic forthrightness, the failure of a slvaery claim before both the most liberal trial judge in the state – a black woman at that – and before the most liberal appeal circuit in the country – on which the most liberal appellate judge eschewed even a separate opinion – as conclusive evidence that slavery claims would never be allowed in US courts, whatever we might think of their plausibility.

Litigation has, however, contributed to political success, as in the cases of the ethnic Japanese interned during World War II by the US and Canadian governments, and the Chinese immigrants on whom a special tax was imposed at the turn of last century by the Canadian government.

But the other objection runs deeper. The conceivable legal arguments rely on analogies, analogies drawn with everyday, even petty wrongs. To most participants it seemed demeaning of the victims of wrongs like slavery and the dispossession of peoples – demeaning even to those affected as descendantws of those victimes – to lump them with the pedestrian who slips and falls on a sidewalk. An action in unjust enrichment smacks less of this – perhaps because it is a much less familiar cause of action than negligence – but it still promises the unedifying spectacle of redress for historical wrongs made to leap through the procedural hoops and over the technical hurdles of any court proceeding.

Insofar as the Conference created a consensus, it was that intriguing though the legal arguments may be professionally, an appropriate way to deal with these wrongs would much more likely be atonement than compensation, offered politically rather than won legally.

CHOOSING ATONEMENT ... PLUS

Atonement – as in the ‘Sorry’ notoriously unsaid by the current Australian federal government – seemed the essence of what plaintiffs, as indirect victims, want. But the distinction from compensation is not so clear, even apart from the use of such apologies, construed as *admissions*, which lawyers might make in litigation (a use PM Howard appreciates better than did the United Church of Canada). For the atonement to seem genuine, it should be accompanied by some substantial payment. Even construed as a gift, it would be that in a Pacific, rather than *ex gratia*, sense.