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Finding a Theory of Justice for Canada's Truth and Reconciliation Commission

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Introduction

In 2008 the Prime Minister of Canada, Stephen Harper, apologized for the Indian Residential School (IRS) system saying that "the government now recognizes that the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language" (Harper, 2008). The apology was a part of the Residential School Settlement Agreement signed by the government of Canada. Another key component of the settlement was the establishment of the Truth and Reconciliation Commission (TRC). Reconciliation and truth building are clearly goals for the commission but both are left undefined in the commission's mandate. In this paper I bracket the issue of what these terms mean in order to examine an issue I think must be dealt with first. In order to move closer to truth and reconciliation, whatever those consist of, the TRC must be able to make intelligible the harms that Aboriginal people experience(d). Aboriginal authors have identified multiple harms that must be addressed by the TRC. The commission must operate from a broad theory of justice that conceptualizes these harms as unjust.

Indian Residential School System and its Harm

From the mid 19th century onward the government of Canada operated residential schools for Aboriginal children[1],

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1   The history of the IRS system is long, complex and not fully known. In recognition of the fact that I cannot provide a full account of the schools and the injury they caused I offer a very brief outline here. I only provide the facts that are necessary to situate the theoretical discussion which comprises the bulk of this

in partnership with the Roman Catholic Church, the United Church and the Anglican Church (Walker, 2009). Attendance at the schools became mandatory for all "Indian"[2] children in 1920. The children lived at the schools many of which were located too far away from their homes to allow for family visits (Walker, 2009). These schools were instituted in order to teach and train but primarily to "civilize" Aboriginal children (Walker, 2009). Students at the schools were forbidden from speaking their languages and practicing any aspects of their culture (Walker, 2009). Physical and sexual abuses and rampant neglect of children took place in schools across the country (Walker, 2009).

The first type of harm includes those that took place *at* the residential schools. Scholars (see for example Kusugak, 2009; Angeconeb, 2008) have documented instances of sexual and physical abuse that took place at the hands of the teachers and administrators. The second type of harm is the inherent harm of the residential schools. The assimilationist theory on which the schools were premised meant that students were stripped of their language, culture and identity as Aboriginal peoples (Rice & Snider, 2008). The third type of harm is the larger harm of colonization, of which the IRS system was only one part. Examples of these harms are the dispossession of land and resources from Aboriginal communities, the underfunding of contemporary child welfare services for Aboriginal families living on reserves and the widespread poverty of Aboriginal communities as a result of colonialism. Dussault (2009) argues that in order for reconciliation to take place state-political-legal systems must be redesigned to address the lack of political access and self government that exists for Aboriginal peoples in Canada. Rice & Snyder (2008) argue that the "TRC must be used to publicly identify systematic changes that will address the unequal relationship

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paper.

2   I use the word Indian here only to designate the legal status of those under the jurisdiction of the Indian Act. I in no way use it as a racial or cultural designation and I use it in quotation marks to highlight the highly problematic nature of the term.

between Aboriginal and Non-Aboriginal people" (56).

The TRC is a process which has been established in order to document the history of the IRS system more fully and assist Canadians in moving forward. The introduction to the TRC's mandate outlines these goals in more detail:

> There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation (Indian Residential Schools Settlement Agreement, 2006).

Though the mandate includes responding to harms and injustices and reconciling those who have harmed and those who have been harmed it includes no description of how it will do so. In order to deal with the harms of the schools, to heal those who have suffered and build future relationships the TRC must work from a clear theory of justice. As the mandate does not offer such a theory I analyze two theories of justice here that have potential relevance for the TRC's work.

A Theory for the TRC: Jennifer Llewellyn's Relational Restorative Justice

Jennifer Llewellyn has offered, both in print (Llewellyn, 2008) and public lecture, her theory of relational restorative justice (RJ) as a theory of justice capable of supporting the TRC and its work (Llewellyn, 2008; 2006; Llewellyn & Archibald, 2006; Llewellyn & Howse, 1998).

Llewellyn begins her description of restorative justice by

contrasting it with three other justice theories: justice as restitution, corrective justice and retributive justice. She argues that restorative justice draws on the positive aspects of these theories while at the same time correcting some of their weaknesses (Llewellyn & Howse, 1998). Restitution can be a part of RJ theory as restorative justice focuses on the harm that was done to a victim and strives to rectify that harm. Restitution focuses only on quantifiable reparations, such as monetary compensation or the return of property. Llewellyn argues that restitution assumes the possibility of returning to the status quo. Restorative justice differs on both of these issues. RJ focuses on all types of harm, not just the quantifiable, and does not strive to restore people to the way they were before the harm.

Corrective justice moves past the quantifiable harms and repairs that restitution focuses on. Under corrective justice theory, and restorative justice, a harm is an assault on the rights of the victims. Thus it will not be enough to compensate only the material losses of the victim, there must also be some symbolic balancing of the scales. While corrective and restorative justice share this starting point, they differ in their solutions to harm. RJ does not share corrective justice's assumption that responding only to the wrongdoer will right the wrong done to the victim (Llewellyn & Howse, 1998).

Finally, Llewellyn argues that both retributive and restorative justice are alike in their assertion that social equality must be established to right wrongs. Where these two theories depart is in the method for achieving that equality. Retributive justice "names punishment as the necessary mechanism through which such equality is to be achieved" (Llewellyn & Howse, 1998: 32). RJ leaves the identification of the mechanism to those injured, to be found through a dialogue process. The comparison of RJ with other justice theories begins to reveal some of the key features of restorative justice in relation to other forms of justice. It does not, however, provide a clear enough account of what RJ is. It is to that task that I now turn.

For Llewellyn, justice is done when social equality is estab-

lished between the affected parties of a harm. Social equality can be said to be reached when "each party has their rights to dignity, equal concern and respect satisfied" (Llewellyn & Howse, 1998: 39). These rights are interpreted by Llewellyn in a relational sense. Social equality consists of relationships that are characterized by equal dignity, concern and respect. Llewellyn argues that justice must not be an abstract concept; instead it must be grounded in the realities of social life. For Llewellyn a primary feature of that reality is the fact that human beings are relational beings, that "selves exist in and through (are constituted by) relationships with other selves" (Llewellyn & Howse, 1998: 39). The self is neither wholly independent nor wholly dependent but must always be located in relationships. This means that justice, too, must be located in relationships.

Justice is achieved in this theory when relationships between those who are harmed and those who have harmed are restored. The idea of restoration "implies the existence of a state of wrong that disrupts the relationship in society between those implicated in the doing and the suffering of a wrong" (Llewellyn & Howse, 1998: 2). RJ takes the connection or repair of that relationship as its goal. This does not imply, however, a return of the relationship to the state it was in before the harm. Instead, once a wrong occurs RJ dictates that we examine the relationships between those involved and examine whether they are characterized by equal dignity, concern and respect. If the relationships between those involved in a harm "are not ones of equality, justice must identify what is necessary to restore them to this ideal" (Llewellyn & Howse, 1998: 41). Llewellyn is extremely adamant on this point and so it bears repeating; restorative justice does not look to return relationships to their original state it looks to restore them to the ideal relationship of equal dignity, concern and respect.

Each set of relationships may look different and may require different solutions to bring them to the ideal socially equal relationship. This means that the justice process must be

context specific. Restorative justice brings together those involved in a harm, victims, offenders and the community, and engages them in dialogue in order to determine what must be done to restore their relationships. The focus of RJ theory is on the process of justice rather than any set outcomes. This theory "is flexible in terms of what must be done in response to a wrong with the one proviso that whatever is done must achieve the goal of restoration" (Llewellyn & Howse, 1998: 36). The focus on process gives agency to the participants and ensures a justice response that is embedded in relationships.

Conceptualizing justice in this way offers many advantages. RJ broadens the focus from a legal crime to a more flexible "wrong" or "harm". This acknowledges that not all harm is criminalized and that justice may still be necessary even when criminal justice does not apply. Focusing on harm and the restoration of relationships includes victims in the justice process in a meaningful way. This theory rightly addresses the fact that we exist in relationships. Conceptualizing justice as relational seems necessary in light of the fact that harms take place through relationships and not in some isolated sense. Restorative justice's flexibility is another strength, allowing it to respond differently to different situations.

These strengths allow this theory to take seriously many of the harms that have been identified by Aboriginal people in relation to residential schools. This theory can clearly conceptualize the physical and sexual abuses of students as serious and demanding of attention. It can also provide a strong justice response to these harms because of its focus on victims and dialogue. The TRC, if based on restorative justice, would focus on giving victims a voice with which to tell the various stories of abuse and harm that occurred at the schools. This theory would allow a range of harms to be voiced by victims because of its flexible nature. The focus on dialogue and victims voices would also provide a much more complete historical record than a narrow legal process would be able to construct.

Restorative justice can also be an adequate frame for the second group of harm; the inherent harm of residential schools. Because RJ's focus goes beyond legal crimes it could include residential schools as a harm even though they were legal entities at the time. An institution dedicated to forced assimilation quite clearly assaults relationships of equal concern, dignity and respect. Despite allowing the TRC to respond to the first two groups of harm identified by Aboriginal peoples, RJ has a variety of weaknesses that prevent it from being an ideal theory of justice for the TRC.

The first problem with this theory is that it is conceptually vague. The definition of key concepts such as "equal", "concern" and "respect" are left as self-evident when they are highly contested terms. This opens the possibility of an overly narrow interpretation of these terms being applied by those using the theory. This is especially true because of Llewellyn's introduction of the notion of rights. She argues that "social equality exists when relationships are such that each party has *their rights* to dignity, equal concern and respect satisfied" (Llewellyn & Howse, 1998: 39, emphasis added). This immediately brings the conception of Charter rights into the theory and pulls the theory in its entirety back into the narrow legalist framework from which Llewellyn is attempting to offer an alternative. Once this legal terminology is reintroduced it makes the rest of RJ's concepts vulnerable to the same legalistic interpretation.

A lack of normative grounding is a second weakness in this theory. Llewellyn offers no norm against which things can be found to be right or wrong. She, in fact, consciously argues against such a standard and states that "a society has to work out in moral and political argument the boundaries of wrongfulness" (Llewellyn & Howse, 1998: 17). There is an assumption in RJ that the community is capable of coming to a just consensus on issues such as what constitutes a wrong and what is necessary to right that wrong. This ignores structural power arrangements that leave some in society with a louder voice than others. These are the exact arrangements that led

to the Indian Residential School system in the first place. At the time "moral and political argument" in Canadian society concluded that the IRS was well within the bounds of what was right. While the theory focuses on social relationships, Llewellyn seems to ignore systemic power relations in society.

Relational restorative justice's focus on discrete harms and its affirmative dimension are two final problems with this theory. Even though RJ broadens its gaze to harms, a discrete harm must still occur in order to engage the justice process. The necessity of identifying a harm seems to preclude the idea that relationships may simply be, in and of themselves, unjust. This idea is linked to the notion that harms can be righted in an unjust social context. The goal of restorative justice is to restore relationships to an "ideal that survives at least *qua* ideal when basic rights such as security of the person are respected even within a basically unjust context of social equality" (Llewellyn & Howse, 1998: 3, emphasis in original). Justice can be accomplished even in an unjust context. This leads RJ to address only the symptoms of injustice, the discrete harms, while keeping the causal unjust social relations firmly in place.

These weaknesses mean that RJ is severely limited in its ability to adequately address the third category of harm that has been identified, the structural harms. Perhaps in moral and political argument Canadian society has come to the consensus that the IRS system was wrong. This consensus has not been reached on the unjustness of the colonial project in its totality. Building the TRC on a restorative justice theory that focuses solely on discrete harms would lead the commission to focus only on those harms which the broader society has identified as wrong. This would silence Aboriginal peoples yet again and would lead to the continuation of structural harms that they have clearly identified but which remain "right" in the eyes of the broader society.

Not only would the TRC be able to ignore harms that were identified by Aboriginal peoples it could also declare success with very little actual change in the relationship between Ab-

original peoples and non-Aboriginal Canadians. The process would be successful by RJ's definition as long as individual victims of the IRS system felt that the specific harm they suffered had been addressed and that they felt restored as a result. This is true even if the larger political, structural systems are left unequal and unjust. A TRC based on restorative justice theory would be unable to conceptualize the third category of harms and it could potentially mask them further by declaring the Aboriginal and non-Aboriginal people restored based on the experiences of individual survivors.

Nancy Fraser's Tri-Partite Theory of Justice

For Fraser justice is done when participatory parity is present. Participatory parity is present when "social arrangements permit all (adult) members of society to interact with one another as peers" (Fraser, 2003: 36). There are two conditions that must be met in order to ensure participatory parity: the objective and intersubjective conditions. The distribution of material resources in society must be sufficient to allow all members to equally participate in order for the objective condition to be met. Social arrangements that institutionalize deprivation and vast inequities in wealth and income do not meet this condition and are thus unjust. In order for the intersubjective condition of participatory parity to be met the patterns of cultural value in a society must give all participants equal respect (Fraser, 2003). Ideologies and norms that classify some groups of people as worth less respect than others are unjust. Doing justice, for Fraser (2009), means "dismantling institutionalized obstacles that prevent some people from participation on par with others" (16). There are three axes on which this must be done: recognition, redistribution and representation.

Recognition refers to the cultural sphere of social life. Injustices, here, are cultural and "rooted in social patterns of representation, interpretation, and communication" (Fraser, 2003: 13). Injustices include cultural domination, nonrecognition and disrespect. This theory is a relational theory of

justice but it is not concerned with individual relationships in which misrecognition or disrespect leads to injury. Disrespect only becomes a matter of justice when it is constituted by social institutions. Misrecognition occurs when "institutions structure interaction according to cultural norms that impede parity of participation" (Fraser, 2003: 29). A situation is unjust when social institutions and structures create classes of individuals who are devalued. The aim of justice on this axis is to dismantle these cultural patterns and replace them with norms that provide equal recognition and respect for all members of society thereby allowing them to engage with each other as peers (Fraser, 2003).

Redistribution refers to the economic sphere of social life. Injustices here are socio-economic. Any economic structure that allows the economic exploitation of some by others is unjust (Fraser, 2003). So too are structures that allow economic marginalization or deprivation. Like recognition this axis is concerned with economic structures that create deprivation not just individual work relations. Economic restructuring is the only remedy to these injustices (Fraser, 2003).

Most justice claims can not easily be classified as ones of pure recognition or pure distribution. Most claims can be seen to involve both of these axes "in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original" (Fraser, 2003: 19). Fraser illustrates this with the example of race. Injustice, lack of participatory parity, for racialized groups is rooted simultaneously in both the economic structure and the status order (Fraser, 2003). The work of racialized groups is devalued in the economic structure. In Western societies there is a concentration of racialized groups in low paying jobs and consequently high levels of poverty within such groups. Culturally, racialized groups are constantly set against the White norm and thus found lacking. This leads to cultural devaluation and exclusion. While injustice is found on both axes neither can be said to be the sole result of or fully reducible to the other

(Fraser, 2003).

The third axis of justice, one Fraser added onto her original two dimensional theory, is representation. This axis involves the political sphere of social life. Fraser (2003) is concerned here with who gets let in and left out when we construct our political structures. Injustices here are representational. When examining whether representational systems are just we must ascertain whether anyone is improperly excluded and ask if "the community's decision rules accord equal voice in public deliberations and fair representations in public decision making to all members" (Fraser, 2009: 18).

There are two issues in this sphere of justice. The first is ordinary political representation. This is what we address when we debate the merits of various electoral systems in ensuring a fair and equal voice for everyone (Fraser, 2009). The second issue is that of misframing; "here the injustice arises when the community's boundaries are drawn in such a way as to wrongly exclude some people from the chance to participate at all in its authorized contests over justice" (Fraser, 2009: 19). Fraser (2009) is primarily concerned with the distinction between national and global concerns. She argues that in many cases we are still making decisions in national political contexts which influence and impact people on a global scale. The national frame for political decision-making is wrong; instead we need a global frame. This is a crucial injustice because it disqualifies members from making recognition or distributive justice claims.

Fraser's theory shares a number of strengths with Llewellyn's. It is context specific. There is no set solution for any one justice claim; instead each claim must be resolved through public discussion and debate (Fraser, 2003). The process for creating just outcomes is dialogic. There is a recognition that it is only through dialogue that the local effects of claims and remedies can be determined (Fraser, 2003).

Fraser's theory can conceptualize the two groups of harms that Llewellyn's theory addresses. The harms at the schools were inflicted on an entire group of young people, based on

their status as Aboriginal. The harms impeded their participatory parity. The second group of harms, the inherent harm of the schools, can also be easily conceptualized as unjust in this theory. They would be seen as unjust acts on the recognition axis. The status order of Canadian society devalued Aboriginal identity so completely that residential schools were established to destroy that identity. The fact that it was social institutions through which this took place meets Fraser's criteria that the injustice be structural in nature. Fraser's (2003) theory contains the same strengths that Llewellyn's theory does and can conceptualize the same harms as unjust.

Fraser's theory is superior because it remedies the weaknesses of Llewellyn's theory and can contain the third group of harms. Fraser provides a clear normative basis for justice in the concept of participatory parity. The definition of this term is clearly set out as the presence of cultural, economic and political "patterns [which] constitute actors as *peers*, capable of participating on par with one another in social life" (Fraser, 2003: 29 emphasis in original). It is a flexible enough principle to be a normative basis even in communities which hold no shared moral framework (Fraser, 2003). Anything which violates this principle is wrong and unjust, even if the majority group does not think so (Fraser, 2003). Participatory parity is the normative basis for justice, injustice and the remedies. Claimants must show, through dialogue, that the current structures impede their ability to participate and they must show that the solution allows them parity (Fraser, 2003). This addresses the lack of normative judgements in Llewellyn's theory and centres Aboriginal concerns for the TRC. Rather than requiring consensus from the wider Canadian society on whether an act or structure was/is unjust or not, claimants would only have to demonstrate how their participatory parity was violated.

Fraser understands justice to be inherently structural, which is a similar but more robust conceptualization than Llewellyn's argument that justice is relational. Fraser's theory is relational. She does not conceptualize individuals as existing in isolation. For Fraser, however, justice is not the

realm for harms that take place in relationships between individuals; "to be misrecognized, accordingly, is not to suffer distorted identity or impaired subjectivity as a result of being depreciated by other. It is rather to be constituted by institutionalized patterns of cultural value" as inferior (Fraser, 2003: 29). Fraser (2003) concentrates on the social structures that shape our individual relationships. This focus solves two of the problems with Llewellyn's theory. Firstly, it negates the necessity of a specific wrong act occurring. An inherently harmful structure is enough to invoke the need for justice. Secondly, if harms cannot be reduced to individual people it follows that remedies cannot either. This enables Fraser's theory to be inherently transformative.

Affirmative remedies to harm address the unjust symptoms of a society, which manifest themselves in individual relationships, but leave the unjust cause, the social structure, in tact (Fraser, 2003). Llewellyn's restorative justice theory is an affirmative theory of justice in that it consciously allows for these types of remedies and labels them just. While Llewellyn recognizes larger unjust structures, for her justice is satisfied if individual relationships are restored. Fraser's theory is transformative. Transformative strategies "aim to correct unjust outcomes precisely by restructuring the underlying generative framework" (Fraser, 2003: 74). Justice is accomplished in Fraser's theory only when economic, socio-cultural or political changes are made in a way that strengthens participatory parity. If the TRC were based on this theory of justice it could only declare success if institutional changes were made which created participatory parity for all Aboriginal peoples in Canada.

Fraser's theory is a superior theory for the TRC because it contains a normative principle, is a transformative theory and because it can bring all three groups of claims that are being made by Aboriginal people into the frame of justice. A criminal justice frame could only hold the harms suffered at the schools in its horizon of understanding. A restorative justice frame could expand to contain the harms suffered at the schools and the inherent harm of the schools but only

with Fraser's theory can the larger structural harms be seen as a matter for justice. I have outlined above how Fraser can include and address the first two, here I explain how her theory can deal with the third group of harms.

The axes of distribution and representation could address and remedy the structural harms identified by Aboriginal people. If the TRC were based in Fraser's theory, land and resource claims would have to be considered because "distributive questions must be central to all deliberations about institutionalizing justice" (Fraser, 2003: 87). The economic position of Aboriginal peoples in Canada would be recognized as unjust and requiring of a remedy.

The axis of representation would highlight the political position of Aboriginal people in Canada. Both the axis's components could be useful. The focus on ordinary representation issues would address two aspects of Aboriginal political rights. This focus would contribute to the historical record as it would highlight the representational issues that existed at the time of the Indian Residential School system. Aboriginal scholars have described the continuous stripping of political rights which took place in order to thwart Aboriginal resistance to the IRS system (Sinclair, 2010). Fraser's theory would emphasize the injustice of this theft of political rights. A focus on participatory parity in the political sphere would also have to tackle Canada's electoral system and the presence or lack of Aboriginal members of parliament.

The concept of misframing would also have application for the TRC. The issue of self government or nationhood for Aboriginal people could be addressed by examining how it is an issue of misframing. Fraser (2009) argues that injustice exists "even when those excluded from one political community are included as subjects of justice in another – as long as the effect of the political division is to put some relevant aspect of justice beyond their reach" (19). Though Aboriginal people do have rights and responsibilities as members of the Canadian political community they are excluded from a nation to nation relationship with Canada. In the case of Aborig-

inal people in Canada, and other settler societies, it may be that the national frame is insufficient and instead the frame should be that of nation to nation.

While Fraser's theory could lend support to the TRC's work, it has one aspect that may not be applicable for Aboriginal people's struggle for justice. For Fraser recognition, in its transformative form, involves the eventual deconstruction of master identities (Fraser, 2003). As an interim affirmative step recognition involves raising all identities to a position of equal worth but in its ultimate transformative form "far from simply raising the self-esteem of the misrecognized, it would destabilize existing status differentiations and change everyone's self identity" (Fraser, 2003: 75). This would mean eventually breaking down the binary "Aboriginal vs. Non-Aboriginal" so that neither identity existed. Fraser comes out of a tradition of feminist theorizing that has, in the main, come to the conclusion that this is the most useful approach for sex/gender identities. I'm not sure that it is an approach that moves comfortably from the context of feminist justice claims to Aboriginal claims for justice. Despite this one weakness I am comfortable concluding that Fraser's theory is a good one on which to build the TRC.

The TRC must address all of the harms related to the Indian Residential School system if we are to move towards any sort of reconciliation. A strong theory of justice is necessary to conceptualize these harms as unjust and also to provide a definition of and standards for reconciliation. If the TRC worked from Fraser's theory, reconciliation would be accomplished when participatory parity was present. Only when the cultural, economic and political structures are such that Aboriginal peoples and non-Aboriginal Canadians can interact as peers in social life will reconciliation take place.

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