

Chapter 12

The TRC and the Community: Competing Conceptions of Justice

1. Introduction

The data presented in the previous four chapters provides a picture of what different stakeholders think of the TRC's intervention in their communities. It also indicates deep differences in what they see as appropriate principles of intervention to promote reconciliation. These chapters looked at reconciliation broadly, including all three dimensions raised in Chapter 2: spheres of reconciliation, levels of reconciliation and substantive components of reconciliation. This chapter focuses exclusively on the issue of justice (one of four components of reconciliation) to illustrate in more detail how the different conceptualizations of reconciliation provide contrasting perspectives of how the substantive components should be managed.

A regular issue raised in the previous chapters on competing conceptualizations was their understandings of justice. The meaning of justice and the assessment of whether justice has been delivered was a constant point of contention. After examining different theoretical perspectives on the issue of justice raised in Chapter 3 (justice as paradigm, culture and ideology), and evaluating their utility in making sense of

individual and group beliefs about justice, it is argued that the ideological framework is most suitable for making sense of respondent viewpoints.

This chapter examines the respondents' contrasting views about justice as part of the analytical categories developed in the previous two chapters (principles and ideological frames of reconciliation). By focusing on the issue of justice, the division between top-down and bottom-up approaches to reconciliation are illustrated in much greater detail and the utility of the ideological frames are demonstrated as explanatory frameworks for specific strategic decisions.

2. Competing Perspectives on Justice

The term 'justice' took on various meanings among respondents in this study. Some saw justice as a key component of a reconciliation process, some saw it as the main concession they have to make in engaging with the reconciliation process, and for some it held no meaning.

a) Justice as a Component of Reconciliation

While most community respondents had a clear deep conviction about the injustices suffered by them and others in their communities and were clear about what needed to happen to correct this injustice, their responses to this sense of injustice were quite varied. Generally justice was an evocative concept about which respondents had strong opinions. For other respondents justice did not evoke much response. They had either

given up hope for justice or saw it as something that had been given up for the sake of political stability.

The most disturbing response to the sense of injustice was evident among victims who appear to have given up hope. While they did not give up hope for some possible assistance from the TRC or others, such assistance was not seen as a re-establishment or confirmation of some sense of meaning. They had, it appears, given up their belief in a moral order. This was most evident in a father whose son was blinded by police gunfire, and who did not feel supported by others in the community. His son's education was cut short, and he did not see any prospect for the son to find employment or to play a meaningful role in society. His own role was simply to see to the needs of the son. He saw the prospect of reparations as very desirable, but did not see that it would have any meaning other than lessening the extreme burden of caring for his son.

Other victims who were very focused on their own level of suffering and did not interpret it particularly in political terms were also vague about the meaning of justice. Rather than making claims for restitution on the basis of entitlement (legally in terms of the Act, or morally in terms of the responsibility of certain authorities), they framed their claim to restitution simply in terms of the desperateness of their need. They did not differentiate themselves from others who were suffering in society, other than to explain how dire their situation is. Alleviation of suffering, rather than re-establishing meaning, appears to be the central motive in their search for "justice". For people with less of a belief in the possibility of a moral universe or a moral community, the question of justice may be reduced to a practical strategy of accessing scarce resources and assuring personal safety.

This analysis would bear out the analysis of Merry (1989) who provides a less idealized view of popular perceptions of justice among the United States working class. On the basis of a study of the reasons people resort to the court, she found that utilitarian purposes (law as help) rather than some abstract justice motive underlies the resort to law.

A limitation of analyzing justice as a function of ideological frames is thus the fact that certain respondents, particularly some victims, had given up on the belief in a just world. For them justice was a meaningless concept in terms of ordering society, and they could only relate to the question of how it could directly benefit them.

b) Justice as Paradigm, Culture or Ideology

In terms of the analysis of the previous chapters, justice is examined essentially in terms of principle and ideology. Viewing justice in terms of ideology contrasts with approaches that see it as an expression of a paradigm choice or a cultural construct. These competing viewpoints can all provide some insights in interpreting the data. A brief review of how the various perceptions of the TRC can be interpreted by these approaches (paradigm, culture and ideology) provides some comparative understanding of their usefulness as explanatory frameworks.

The competing perspective of justice principles - paradigm, culture and ideology - are all related to the issue of how people view human nature and how they understand social order. While different cultural perspectives refer mainly to set values and norms about how to deal with specific injustices, competing paradigms refer more to broad ideal-type contrasts between different systems or principles of justice. From the perspective of justice as ideology, it is viewed as a system of values and theoretical

assumptions that promote specific interests. Justice, rather than being a given (cultural) or ideal (paradigm) construct, is a social program to achieve a certain outcome. From that perspective, the cultural or paradigm perspectives may be viewed as ways of obscuring the underlying interests served by a justice system.

i) Justice as Paradigm

Zehr's (1990) classification of two broad paradigms of rectificatory justice - retributive justice and restorative justice (as described in Chapter 3) - provides a useful way of contrasting different perspectives in this study. It does, however, appear as a contrast of ideal forms, ones that victims were only committed to, to the extent that it served their needs. This limits its usefulness in understanding complex issues of strategic decision making.

A belief in restorative justice appears to be most strongly held by those victims who had a strong belief in the attainability of a reconciled society. Many felt hopeful that racism could be overcome and that their community would be able to re-establish some form of social cohesion. Restorative justice was a process of re-establishing this cohesion and also of changing the way that blacks and whites see each other. Rather than arising from a concern for the individual perpetrator and what it would do to them, there appears a commitment to a new social or community order underlying the restorative ideal.

Those who felt that whites can not be changed, or that perpetrators were motivated by some form of evil, were generally more focused on retribution. The loss of hope for community or re-integration appears to be linked to a shift towards more punitive forms of social control. While giving up the belief in a society governed by a

moral order that motivates cooperation and social cohesion, these victims believed in the need to re-assert a social order that did not tolerate abuses, and that showed this intolerance through a punitive justice framework.

Rather than seeing justice as an isolatable (or self-encapsulating) variable, the violation of which would automatically elicit corrective action, the response to injustice appears in this study to be dependent on the belief of the victim (or other reactor) in a social or moral order that could be re-affirmed or re-established through the action of labeling the experience an injustice. The need for rectificatory justice is thus a response to a threat to the social and moral order on which the individual depends. Where both the social and moral orders are seen as having collapsed (and not being retrievable), the concept of justice becomes meaningless. Where there is no sense of moral community, and the social order is seen as being based on forced obedience, the preference is for retributive policies. Where there is a belief in the re-establishment of a moral order, the inclination is more towards a restorative approach to justice.

This contrast between restorative and retributive justice are ones of ideal types. In South Africa, the context of negotiated transition within which the TRC was formed as well as the political context that shapes its operation have compromised the possibility of implementing either in a pure form. Rather than a choice between two ideals, people were faced with complex strategic alternatives to deal with various aspects of the question. If respondents perceive the TRC as being unable to deliver on its restorative justice promises, they may call for retribution, not because it is ideally what they would prefer, but because it appears to be a process that is more likely to deliver. A non-ideal

form of justice that delivers the goods may thus be seen as better an ideal one that fails to deliver.

Different paradigms also appear to have been applied by the same respondent to different situations - restorative justice in some, and retributive in others. This contradiction also raises questions about the validity of a paradigm approach. If these were indeed paradigms that people were applying, one would expect more consistency despite situational variation, as a paradigm is a broad set of deeply held principles rather than a selectively applied set of beliefs.

ii) Cultural Differences

The cultural differences and their significance for dispute resolution orientation are very pertinent to this dissertation. While some differences in orientation were found in the study, the issue of justice as a form of moral judgment was found to be a particularly contentious cultural issue.

There is a general perception in South Africa (and particularly within the TRC) that African culture provides an inherent basis for a restorative approach to justice, while white (western) culture is more retributively oriented. While there appears to be some basis for this belief in the research results, the link between culture and justice orientation is quite complex.

As discussed earlier, the orientation towards a restorative approach by victims was usually linked to a belief in the (re)establishment of a moral order. The culture of restorative justice was applied only while they believed that the social order was one that was sustained by a common acceptance of these cultural values. Where these moral bonds were seen to be broken not only by the perpetrator but by the community at large,

their own perspective regarding their obligations and entitlements became re-oriented towards self-preservation and future security.

With regards to inter-racial reconciliation, black victims were also guided, either by a belief that their cultural frame could be extended (by the new democracy or “rainbow nation”) to also include whites in a new moral order, or by cynicism about the new social order that requires continued vigilance against probable (rather than possible) future abuses.

White perspectives of justice (speculating from minimal empirical data produced from this study) viewed justice very much within a retributive paradigm. Restorative justice was seen as an absence of justice rather than a different form of justice. The granting of amnesty was viewed as a dual admission that the other side had a moral basis for fighting the war. Amnesty was seen as a recognition of the irrelevance of justice when dealing with abuses during the war. The conflicts of the past were thus characterized as a period during which multiple moralities existed. Now that the conflict was over, a new common morality had to be built from scratch.

Applying principles of justice to the actions of the past was, according to white community leaders, to renege on this mutual recognition. While the need for a healing process was accepted, and the conditions for amnesty could be justified in terms of judging the actions within a framework of morality acceptable to all parties, viewing the TRC process as one of seeking justice was ultimately perceived as a way of attributing guilt to the National Party government. In terms of the future it also means elevating the

morality of the ANC to that of a new dominant political ethos (as opposed to starting with a clean slate).¹

Culture as an explanatory factor for understanding the different justice perspectives is therefore quite limited. Culture provides the conceptual tools for certain groups to engage with a model of justice such as the TRC. African culture is thus perhaps an explanation for why so many community members were willing to accept the restorative justice approach presented by the TRC. It does, however, not explain why restorative justice was interpreted in so many different ways and why different sectors of society (other than blacks and whites) were at odds over so many strategic concerns.

iii) Justice as Ideology

The ideological understanding of reconciliation and justice (as developed in the previous chapter) provides perhaps the clearest explanation for the various justice conceptions that individual respondents held. Propagating a certain conception of justice is at the same time a propagation of a certain social order that promotes the individual's or group's self-interests.

Rather than simply seeing this social order as either communitarian versus contractarian (as presented by Cordella, 1991) or as harmony versus adversarial (as described by Nader, 1990), the respondents in this research provided a range of overlapping ideologies of social order. While the competing principles of harmony

¹ Another component of the Afrikaner culture (as well as others in South Africa) that should be brought into this examination is the influence of a culture of authoritarianism. Vidmar and Miller (1980) argue that a central factor in determining a punitive response is the level of belief in the efficacy of punishment, a belief that characterizes authoritarian personalities (see e.g. Vidmar and Crinklaw, 1973). Authoritarianism is, moreover, linked to a higher retributiveness as authoritarian personalities view deviations from rules in moral terms and thus endorse punishment as an end in itself (Sherwood, 1966; Vidmar, 1974; Vidmar and Crinklaw, 1973).

versus adversarial and contractarian versus communitarian (presented in Chapter 3) were found to be relevant underlying principles which distinguish different ideologies, these factors need to be examined along with other such principles in order to provide a more cohesive framework of ideological systems (as developed in Chapter 11).

The principles of justice (e.g., communitarian versus contractarian; harmony versus adversarial), rather than providing universal categories of analysis, present competing principles within a particular context. Those motivating for the acceptance of these principles in relation to their particular context at a particular time, are in fact arguing for social change that will promote their understanding of how a particular network of relationships should be structured. The goals they promote are also influenced by their particular position in society, and reflect the benefits that can be anticipated by their group.

These principles are not universal - they apply to a particular relationship. There may be one principle for in-group relations, and the opposite for between-group relationships. The principle is called upon in order to maintain particular social relations or to challenge those same relations. Underlying these principles and the way that they are invoked (as if they are obvious, ancient or naturally just) can thus act to obscure the immediate or long-term interests of a group. In the words of Harrington and Merry (1988, p. 711):

Ideology is not simply a set of ideas or attitudes; it is constitutive in that it forms and shapes social relations and practices. Ideology contains

symbolic resources that can be drawn on by groups who use their power to promote their interests.

The ideological differences also played out at the political level in the public debates about the role of the TRC, and in the various legal battles about its intervention and final report. While there may have been formal agreement among most parties in enacting the legislation, this written agreement appears to have obscured the various differences in underlying interpretation regarding what the values were that it embodied, what the functions were that it was to serve, and what the focus of its energies should be. Reflecting the extensive debate among political parties and the significant public engagement in the process of developing the legislation, the compromise agreement contained something for everybody. It had the potential for being interpreted in a way that could have satisfied a number of groupings (although not at the same time). Because of the ideological nature of the justice process in a transitional society, the underlying differences were, however, played out very starkly in the operation of the TRC as its commissioners and staff imbued it with their particular interpretation of its mandate.

3. Individual Differences

The more subjective, emotional or situational component of justice - the individual/situational factors - were also found to be important variables in the justice responses of interviewees. These factors appear to provide a complementary level of

explanation to explain individual differences that are not picked up by the ideological frame analysis.

In terms of the literature reviewed in Chapter 3 (drawing on Vidmar and Miller, 1980), and Peachey, 1989), some tentative observations can be made from the data about certain factors: rule and offense characteristics, rule violator characteristics and individual differences. All these factors appeared to have some influence on victims' perceptions of what would constitute appropriate justice. (The size of the sample and the nature of the research methodology requires that these observations be treated very tentatively.)

a) Rule and Offense Characteristics

In this study, the level of harm experienced by victims did not show any clear link with the level of punitiveness. Some who experienced the most horrific abuses still favored restorative solutions. It is perhaps the question of contagiousness that is more relevant in this study. Those victims and other community members who felt a continued threat from the same source that caused their previous victimization appeared more punitively inclined. If they saw the political transition as essentially an effective guarantee that their victimization would not be repeated (e.g., that racism or police brutality was now constrained) they were less inclined to favor punitive measures.

b) Perpetrator's Motives

In the dissertation research it appears that those who felt that perpetrators were in some way a victim of their context (misguided, ignorant, scared, etc.) were also more likely to view restorative justice as preferable. The TRC's goal of contextualizing the various victim experiences within the framework of the political conflict of the past is probably

based on this underlying assumption: giving contextual meaning to the actions of the perpetrator makes the victim feel less resentful at the individual perpetrator of the abuse.

From the dissertation research it appears that the TRC has had a limited impact on the attribution of motive (which Peachey found to be a key factor influencing punitive response). While they have provided many victims with some insights about the context, patterns of abuse and motives of political parties, they have provided limited insight into the individual perpetrators' reasons for acting the way they did. Victims' demands have been more around knowing specific individual motivations rather than contextual factors regarding broader political dynamics that may have impacted on their case.

c) Subsequent Violator Behavior

In this research, subsequent perpetrator behavior was not a factor that could be measured. It was something that many victims, however, wished to witness, either in the form of a confession, expression of remorse, provision of reparations, etc. The lack of such actions by the perpetrator was, however, perceived as a further confirmation of the perpetrators' rejection of the moral order and lack of respect for them as individual victims. The fact that the TRC made many calls to perpetrators to come forward, the provision of incentives for them to do so (such as amnesty, provision of legal council, etc.) confirmed (in their minds) the suspicions of many victims that their perpetrators lacked remorse.

The experiences of some victims whose perpetrators had applied for amnesty and had apologized at their amnesty hearings were regarded with mixed feelings. Many victims did not see these apologies as sincere. Both the context within which they made the apology (before a committee that was to decide their fate) and their general behavior during the hearing were seen by some victims as negating the message of the apology.

Many victims, however, still held out the hope that perpetrators would show remorse if they were confronted in a different context. A face-to-face meeting was seen as a situation where perpetrators would not be able to hide from the inhumanity of what they had done to the victim. Such interaction was, however, not something that any of those interviewed had experienced.

Apologies by remote political figures also did not appear to carry much meaning to victims. These apologies did not recognize them as individuals and did not speak to their particular victimization. While victims were clear about the responsibility of groups (such as political parties) and institutions (such as the police), a blanket apology is not what they sought. An apology from a representative of the local “perpetrating” institution or group directly to them was, however, something that was seen as significant (if it was to happen). As the literature suggests, it would be something that signals a change in the perpetrator’s moral character (something institutions are perceived to have by victims) and their intended future behavior.

d) Relationship Between Violator and Victim

The issue of the relationship between victim and perpetrator was brought into sharp relief by this dissertation research. The strongest emotions and demands for justice by victims were often voiced in response to experiences of victimization by members of their own community. These demands were usually not for retribution however. Strong emotions or vocal demands are not the same as retributive demands. In the case where a person was victimized by a person within their own community (especially someone they had previously trusted), their focus was much more on getting the person to explain their

actions. This form of victimization is one that challenges the victims' sense of social and moral order more than that of being victimized by a stranger (especially where that victimization fits into a political framework).

4. Restorative Justice and the TRC

Following the discussion of the usefulness of various approaches to the examination of justice responses above, this section looks at justice in the case studies in terms of ideological frames.

a) Broad Acceptance of a Restorative Justice Approach

While there were strong voices that opposed the TRC as an appropriate form of justice to deal with past gross human rights violations, these were mainly individual responses or limited to a particular stakeholder group. While most people felt unhappy about the amnesty provision of the TRC, only a minority of victims opposed the TRC fundamentally on this issue. For these victims, there was no way in which this injustice could be circumvented or replaced by other forms of restorative justice. One group who saw the TRC as an inappropriate form of justice was the National Party leaders. They felt that any form of moral condemnation as applied by the TRC was inappropriate in the process of promoting reconciliation.

Most respondents and most stakeholder groups, however, accepted restorative justice as an appropriate or even preferable approach in addressing human rights violations. The reasons for this acceptance of restorative justice are examined later in the

chapter. What must first be explained is the issue of what restorative justice means to the respondents in this study.

b) Competing Perceptions of Restorative Justice

Assessing whether the TRC has contributed to delivering restorative justice depends on whether one views restorative justice from a top-down or a bottom-up perspective. This principled division about the meaning of justice is an illustration of the Locus of Reconciliation Initiative Principle (identified in Chapter 10) when applied to a particular substantive component of reconciliation.

i) Top-Down Conception of Restorative Justice

The TRC's (and the national government's) approach to restorative justice presents its approach both as a necessary compromise - a way to make up for the lack of retributive justice - and as an ideal form of justice for a transitional political context. It is thus a combination of a pragmatic and an idealized model of justice.

The various competing agendas that framed the composition of the TRC have already been examined in some detail. What emerged as the final legislation and intervention policies of the TRC was clearly a mix of different forms that was ultimately shaped by political pressures, with only a secondary consideration given to victims' and local communities' retributive or restorative needs and demands. The main function of the justice model presented by the TRC appears to be one that was negotiated to minimize the likelihood of escalation of disputes involving criminal and human rights abuse allegations.

The granting of amnesty to perpetrators was a settlement that compromised justice for the sake of peace and political transition to democracy. This compromise is

presented by the state (and by the TRC) as an unavoidable deal, with the only alternative being continued bloodshed and political oppression. The state presents this compromise as justified in the light of the benefits that the negotiated transition holds for the common good (Hansard, 1995, p. 1382-3).

The essential justice goal of the TRC is one of social rather than individual justice. Wilhelm Verwoerd, a prominent TRC staff member, argues, for example, that “the TRC is also (primarily?) making a contribution to “justice” in the classical sense, namely at the level of the social order.” He explains this contrast in terms of the fact that “justice” does not only operate at the more individual level, but also at the level of the social order. (This would mean that even if individual justice is limited, or even completely lacking in an institution dispensing amnesty, it doesn’t follow that the TRC is “only a truth commission” or that reconciliation amounts to “no/cheap justice”).

This line of argument was also used by the Minister of Justice in relation to victims’ compensation:

We have a nation of victims, and if we are unable to provide complete justice on an individual basis - and we need to try and achieve maximum justice within the framework of reconciliation - it is possible for us ... to ensure that there is historical and collective justice, for the people of our country. If we achieve that, if we achieve social justice and move in that direction, then those who today feel aggrieved that individual justice has not been done will at least be able to say that our society has achieved what the victims fought for during their lifetimes. And that therefore at

that level, one will be able to say that justice has been done. (Omar, 1996: p. xii)

The TRC also presented itself as holding out the prospect of greater satisfaction to victims who turn to restorative options for addressing justice. The TRC approach was presented as of greater benefit to victims when compared to the “normal” prosecutorial route that would alternatively have been followed.² The prospect for prosecutions was held out to be very limited (especially given the fact that many records have been destroyed, many offenses occurred years or decades ago, and the judiciary which has been inherited from the apartheid government has traditionally been conservative).³ Victims were thus faced with very limited prospects for retribution or truth through the formal legal system. Civil claims would also be similarly constrained. While it is admitted that reparations under the TRC would be very small compared to what a court of law would provide, many more victims are likely to benefit from the TRC reparations than would have been the case had they all gone to court. The total probable benefits to victims are thus presented as having been increased by the introduction of the TRC. The psychological benefits for victims to go through the TRC process rather than a court of law (where they would be subjected to hostile cross-examination) are also presented as a preferable route.

² Interview with Willie Hofmeyr, chair of the Parliamentary Portfolio Committee on Justice, March 3, 1998

³ The logic of this argument, however, partially backfires on the TRC, as they are largely dependent on the perception among perpetrators that they are likely to be prosecuted if they do not apply for amnesty. The weakness of the formal justice system is therefore just as much a weakness for the TRC.

Through the introduction of the TRC, the state in effect attempted to engage victims, perpetrators and society in a new justice contract. The TRC presented certain benefits to perpetrators, victims and whole communities, and in return required them to provide cooperation in fulfilling its functions.

The underlying social contract between the TRC and victims is one of providing information (by the victim and communities to the TRC) and community engagement (by community leaders to the TRC), in exchange for recognition, truth, reparations and the possibility of reconciliation (by the TRC to victims and communities). The victims and community leaders of the two communities examined do not feel that the TRC came through regarding their end of the bargain (and other sources indicate that it is unlikely to provide much satisfaction in the future).

ii) Bottom-Up Conceptions of Restorative Justice

Some respondents in this study blame the TRC for this failure in delivering on its promise of restorative justice, while others blame the perpetrators of abuses. Restorative justice, in terms of the TRC discourse, was an arrangement whereby the state took over the moral responsibility for reparations to victims from the perpetrators of these abuses, and took on the task of rebuilding the moral order through symbolic actions (building monuments, renaming public buildings, etc.) which recognized undeserved suffering and victimization and condemned actions which would be guarded against in the new social order.

This was, however, a deal that still required the participation of past perpetrators in order for it to deliver on some of its goals. The TRC's contract with victims is one that is largely dependent on its ability to entice or force perpetrators to also come on board.

In anticipation of this reluctance of perpetrators, the TRC was given extensive investigative powers. These powers, however, appear not to have been used to full effect.⁴

The compromise of retributive justice brought about by amnesty is not the only (or necessarily the central) grievance of the respondents interviewed. (Many victims interviewed in fact were hoping that their perpetrator would apply for amnesty, so that the facts of their case would be out in the open and there would be some prospect for either dialogue, apology or greater public recognition.) Most victims interviewed had bought into the restorative justice deal held out to them by the TRC. Victims made their statements with the humble expectations of receiving some compensation and some recognition for their suffering, or with the idealistic goal of contributing to a new social order that would see their community coming to terms with the injustices, not just of the past, but also of the present.

The grievances found in this study regarding the unjustness of the TRC were mainly regarding its failure to deliver on its promise of restorative justice. On the one hand, the TRC was unable to get enough from perpetrators (information about who was responsible, admissions of guilt, commitment to a new social order, etc.) to deliver on its promise. On the other, the interpretation of the TRC of its restorative justice mandate was one that was embedded in its own ideological frames of reconciliation as set out in the previous chapter. These ideological frames, essentially built around a top-down approach to reconciliation, set out different goals for proving its success as a form of

⁴ Piers Pigou (1998) presentation at *From Truth to Transformation*, CSVN Conference in Johannesburg. Also reported in the Weekly Mail, 24 April 1998.

restorative justice. The areas in which it does feel that it has delivered are thus not always recognized by the supposed beneficiaries. The provision/acquisition of acknowledgment, truth, restitution and confessions were done within the ambit of its own ideological frames rather than those of the consumers/beneficiaries at the community level.

Community members were also not always clear about the possibilities and limitations of the TRC. The TRC's model of restorative justice (its legal framework) confused some people, who did not accept it as a legitimate model of restorative justice. (The issue that reparation would come from the state rather than the perpetrator was, for example, commonly raised.) Rather than accepting it as an ideal form in terms of their values regarding justice, it was thus accepted at a more utilitarian level: a contract from which they could gain some benefit.

Restorative justice is not a self-evident or uniformly understood concept. It is given different substance within the various ideologies discussed in the previous chapter.

For victims, restorative justice is viewed mainly through the ideological lens of community building and moral conversion. Within this ideological context, the victims are motivated by

- (a) the desire to have the direct perpetrator confess (face-to-face)
- (b) the wish to be in a position where they can forgive the perpetrator
- (c) the desire to re-establish inter-personal relationships with those from the other side (or even with the perpetrator)
- (d) the goal of establishing a unified, stable political community
- (e) the desire to gain the respect of their neighbors and other community members

(f) the desire to rebuild an environment of trust and interdependence among community members

(g) a desire to see a new social morality for the community affirmed and enforced

From the TRC's perspective (guided by a mix of non-racialism, human rights and moral conversion ideologies), the goals of restorative justice are defined more in terms of national processes. Rather than have all the individual perpetrators at the lower end of the command chain come clean about their past actions, the priority is placed on the top end of the command chain. The politicians and generals are the ones targeted as appropriate conveyors of information and of statements of contrition and remorse. The search is for those who are willing to take responsibility for perpetrating the policies of apartheid (generally regarded as a crime against humanity by commissioners interviewed in this study) and for giving the security forces the scope to commit gross human rights abuses.

The act of confession is also seen as a public impersonal message to the country as a whole. The bond between perpetrator and victim is thus depersonalized and the capacity for abuse is located within the political context of the past conflict. The perpetrator and victim are framed as actors playing a role scripted by the political struggle, rather than as individual human beings.

Where the need for interpersonal reconciliation is recognized, it is seen as a symbolic interaction that is of significance more in terms of the way that it can be conveyed to the broader public. It is an image created for public educational purpose.

Where the TRC did facilitate interpersonal exchanges, these were usually among people with a public profile, or done in the presence of the media.

The following diagram summarizes this contrast between the TRC and community perspectives of restorative justice.

Table 12.1: Top-Down versus Bottom-Up Models of Restorative Justice

	Top-Down	Bottom-Up
1. Understanding of Nature of Victim	category of people subjected to particular types of abuses	individuals who are experiencing certain forms of suffering
2. Understanding of Nature of Perpetrator	senior official - person with ultimate authority	person who was directly involved in abuse
3. Type of Relationship Targeted	structural relationship between institutions and sector of society	personal bonds between individual community members
4. Understanding of Moral Community	national society of citizens	local community of residents
5. Nature of Apology Sought	impersonal, public and symbolic	personal, face-to-face
6. Narrative of the Past	key events or typical stories that mirror the country's story	particular, unique features that have meaning mainly to the particular victim
7. Audience	the public: particularly the groups to which the victim and the perpetrator belong	individual victim and the directly implicated perpetrator(s) - possibly the local community
8. Reparations	from the state (with voluntary, symbolic contribution by the perpetrator)	from the individual perpetrator

9. Process	done by predetermined formula, ritualized, formal	individualized, informal

c) Ideological Frames and Restorative Justice: Making Sense of Different Perspectives of Victim-Perpetrator Dialogue

Just as the different perceptions of restorative justice can be analyzed in relation to competing principles of reconciliation, the ideological frames discussed in Chapter 11 can also be contrasted regarding their views of the role of victim-perpetrator dialogue or mediation. This serves to illustrate the practical differences regarding possible reconciliation strategies that emerge from the underlying ideological frames.

From the viewpoint of certain ideological frames, interpersonal mediation serves no reconciliation purpose, while for others it performs significant, but quite different functions. The ideological frames also favor different forms of dialogue and different ideal outcomes.

From a human rights ideological frame, attempts to promote victim-perpetrator dialogue as a component of a reconciliation process are ill-conceived. Because of the likely private nature of most such initiatives, they have very little public education value. They also do not provide an effective message of moral condemnation of human rights abuses, and when presented as an alternative to punishment, they may even be seen to undermine goals of deterrence of future abuses.

From the non-racialism perspective, there is also not much scope for processes promoting such interaction in a reconciliation enterprise. Individualizing the relationship between the victim and the perpetrator runs counter to the logic of an ideological frame

that sees the unifying factor as being located within the broader realization of social identity. Individuals may benefit (i.e., overcome their racial prejudices) through such engagements though, and the goal of non-racialism may be illustrated by positive media images of such dialogue events, especially where perpetrators are shown to be sufficiently remorseful. The goal would largely be one of symbolic expressions of remorse and commitment to a new social unity.

The moral conversion frame is very receptive to victim-perpetrator dialogue processes. It is a forum that allows for moral confrontation and, if correctly facilitated, provides space for the key processes of contrition, remorse, apology and forgiveness. The personal nature of the process is conducive to processes of moral reflection through focusing on individual responsibility and the humanization of the enemy. The perpetrator is confronted with the human consequences of their actions (thus encouraging remorse), and the victim is confronted with the humanity behind the evil inflicted upon them (thus encouraging forgiveness). Ultimately the goal of the process is seen as individual moral conversion rather than an alteration of the relationship between the individuals involved in the process.

The community-building frame looks at victim-perpetrator dialogue as an opportunity to mend relationships within the community. It is seen as a practical strategy to overcome suspicions, resentment and mistrust. It is a channel through which perpetrators can seek re-acceptance by the community. It is practically oriented in seeking to change the way people interact with one another and to avoid the possibility of re-offending or revenge. The payment of reparations would be seen as significant in terms of a re-affirmation of social norms that were violated and a commitment to

rebuilding shattered relationships. It, however, only really makes sense among victims and perpetrators who live within the same community or who are likely to have some form of relationship in the future.

The healing frame approaches victim-perpetrator dialogue in terms of the psychological benefits that it would have for the victim and the perpetrator. The process of confronting the perpetrator could be deemed beneficial in terms of meeting various psychological needs that form part of the recovery process. Its appropriateness for the victims would be judged in terms of whether the victim has sufficiently processed the experience of victimization and whether their expectations of such a meeting can be realistically addressed (apology, explanation, overcoming irrational fears, expressing anger, etc.). The main concern of this perspective with a dialogue process would be that it is structured in such a way as to ensure that re-victimization does not occur.

The competing agendas that a dialogue process would serve (if it is seen to serve any useful reconciliation purpose) is thus evident. The contrasting goals required different forms of intervention such as: the different types of parties to include, the different outcomes that are pursued, the role of media coverage, the type of process that parties are to engage in, etc.

5. The Effectiveness of Restorative Justice in Promoting Reconciliation

While there was some support for punitive justice approaches among respondents, and some support for an approach that avoids the question of justice altogether, the majority

of respondents favored some sort of restorative justice approach to building reconciliation.

The major challenge to a restorative justice approach is the question of acceptance of responsibility by the perpetrators. The complex nature of conflict and human rights abuse dynamics in South Africa make this task of accepting responsibility very complex. The dynamics of the conflict were often played out in ways that allowed groups and individuals in society to distance themselves from taking responsibility. Those involved in direct violent confrontation were sometimes overtly manipulated, or were acting on vague orders of their leaders or their communities. The conflict dynamics also took on a momentum of their own (such as a spiral of violence) that made them appear unmanageable to those who may have given the initial instructions to the combatants. The line of responsibility between the person responsible for an abuse of human rights and the sector of society whose interests they serve and to whom they feel accountable is very complex. Victims and various sectors in society trace these lines differently. What is ultimately, however, required is a much broader sense of responsibility among people at every level of society and an awareness among those who benefited in various ways from both the oppressive system of apartheid as well as the violent struggle that was waged between the state and the oppressed. Such a recognition is, however, not a substitute for individual personal accountability for individual acts of abuse that were committed.

Another fundamental condition for restorative justice is the existence of some basic agreement regarding human values of acceptable and unacceptable behavior, i.e., what is a crime in the moral sense of the word. A restorative justice process requires that

the perpetrator is able to comprehend that they did something wrong when they committed the offense, or that the justice process is able to give them this understanding of their own actions. The offender must have the internal ethical framework (and recognition of the humanity of the victim) to evoke a sense of shame. The TRC has had only limited success in achieving this inducement of remorse. Its connection (both in the minds of Commissioners and non-ANC politicians) to the arena of party political conflict, has put up enormous barriers to its capacity to engage political actors (at national and local level) in a process of self-reflection. This self-reflection, however, appears to have been more effective among individuals who have distanced themselves from the fray of political party conflict.

One encouraging sign found in the data was that ex-combatants appeared to share very similar understandings of the meaning of justice and reconciliation as victims. The major barrier to constructive engagement by these two groups were the political barriers that blocked effective interaction between ANC and IFP sections of the community and the personal fears of revictimization by the victims and of revenge by the ex-combatants.

Generally the question of whether South African communities have moved to (or have always had) an acceptance of restorative justice is, however, not the right question. The restorative justice model is one that has certain strengths in addressing the functions of justice. The question of how the TRC has addressed these functions is likely to give better insights regarding the progress towards reconciliation. The functions are, however, not objective criteria, but have to be evaluated from the perspective of the various stakeholders. Promoting reconciliation would require a wide range of functions to be

addressed from the perspective of a wide range of stakeholders. The following is simply a brief overview of indicators picked up from the data regarding these functions.

These functions (using the framework developed by Nader and Combs-Schilling, 1976) include: (a) avoiding escalation, (b) dramatic restatement of values, (c) socialization, (d) rehabilitation, (e) restitution, and (f) regulation and deterrence.

a) Avoid Escalation

A justice mechanism must avoid escalation; specifically, it must cut short the possibility of vengeance. It must therefore assure victims that appropriate steps will be taken against perpetrators (through punishment or other process of accountability) or in some other way ensure that victims do not see vengeance as appropriate.

It appears that the TRC has had little impact on violent conflict in communities. While there was a dramatic reduction in violent political conflict after the political transition, the revenge motives of victims do not seem to have been altered by the TRC's actions. The danger of revenge is something that appears to have been contained by the strong desire for peace among the communities and the victims. It is feared that the political stability (a highly valued commodity) will be shattered if such goals were pursued. For many victims, though, such revenge would also do little to correct any sense of balance that was disturbed by the original victimization.

A few cases where revenge was thought to be a possibility were mentioned. In these cases the TRC was seen as very ineffective, as they did not deal with the interpersonal dynamics (and the continued local community hostility) that gave rise to the desire for vengeance. The effect was that individuals who feared revenge simply remained physically separated from the communities.

b) Dramatic Restatement of Values

A justice mechanism must dramatically restate the values of the social order. It must publicly affirm new values regarding what is not acceptable behavior in society. It must publicize the values of the new moral order. (A punitive approach would see harsher punishment as demonstrating the level of public outrage, while a restorative approach would find other ways of indicating degrees of social disapproval.)

The TRC was relatively effective in this regard. The values it attempted to communicate were, however, often unclear. Mixed signals linked to different ideological frames of reconciliation were conveyed, but a general condemnation of human rights abuses was communicated. Whether this condemnation related to only abuses within the framework of political conflict, or also to human rights abuses more generally is, however, not clear. If the message of condemnation is seen as only relating to politically motivated human rights, its significance is very limited in a society where criminal violence is now the main target of societal and state fear and hatred.

c) Socialization

A justice mechanism must educate new members of the society regarding the public values and help them internalize them as their own.

The TRC has had a high public profile that is likely to have had an impact on a broad cross-spectrum of society. In the communities concerned it was clearly a topic that was discussed at dinner tables, in the workplace and among friends. While the political controversies surrounding its operation may have taken over the spotlight, its images of concern for victims and condemnation of abuses is likely to have had some effect across the political spectrum.

The lack of community engagement by the TRC is, however, likely to have underplayed its potential for acting as a grass-roots educational tool regarding human rights abuses.

d) Rehabilitation

A justice mechanism must be able to rehabilitate offenders. Unless they are permanently removed from society (through execution, exile or incarceration), or permanently monitored, there must be a way in which offenders can be brought back into society and be given a meaningful role.

The rehabilitation impact of the TRC appears to have been quite minimal. While this is not a major concern for many victims who see the context which allowed and encouraged the abuses of the past as having been dramatically altered, the continued role of apartheid's torturers and abusers has become increasingly highlighted in recent months. Newspaper reports have linked these perpetrators with both sides of the new battle around crime. Prominent security police officials of the past have become involved both in the militarized criminal networks as well as in private security companies that have developed an increasing reputation for extremely abusive treatment of criminals.

e) Restitution

A justice mechanism must be able to provide restitution to victims. The harm done by crime must somehow be undone or ameliorated. The damage to victims or victimized communities has to be understood and addressed through restitution (for damages that can be financially assessed), and other programs that deal with emotional aspects of harm.

As has already been explained in detail in the previous chapters, victims have been deeply disappointed by the lack of urgency with which their needs for reparations are handled, and with the increasingly likely prospect that these reparations will be far below their expectations. The fairness of the procedure for allocating reparations is also a matter that may lead to intense conflict.

f) Regulation and Deterrence

A justice mechanism must also be able to play a deterrent role. Assuming the likelihood that some people will consider the possibility of committing similar crimes in future, the justice system must impose penalties that discourage this option.

While the TRC emphasizes that it can not play a deterrent role and that the existing justice system should be seen as fulfilling this function, the main deterrent function that has been fulfilled has been with regards to political parties and their role in promoting or allowing abuses. The political embarrassment of being confronted by such abuses in a public forum may convince them to be more circumspect in future.

There is, however, also a strong danger of impunity raised by the TRC. The possibility of a second truth commission (with further amnesties) has been suggested by politicians to deal with continued political violence in the KwaZulu-Natal province. If such repeated implementations were anticipated, perpetrators may see the prospect of getting away with their crimes rather than expecting prosecutions.

A justice system that effectively incorporates all the above elements goes beyond the functions normally expected from the legal system in Western post-industrialized societies. It must, however, also be stressed that such a system is still only one component of a larger social structure; it is not solely responsible for pre-empting other

social strains which produce conflict in the first place. The TRC should thus always be evaluated within the broader context of other social programs that are also geared towards addressing these same goals.

6. Conclusions

The social and moral order of society is always in flux, and never more so than during a period of deep political and social transition. Generally, the various respondents in this study had a belief in their ability to impact on the outcome of this process of transition. Rather than simply claiming rights within a set social order, there was an attempt to shape this new order. The experience of the various actors with the TRC was, however, one that diminished their belief in their own power to impact on this process of social reconstruction. The tremendous sense of potential that characterized the initial stages of the TRC's activities, was replaced by a growing cynicism by some, but also a new sense of pragmatism by those who were able to engage in a more sustained process of group mobilization. This pragmatism was characterized by an increased awareness of the limitations of change, a recognition of a new crystallizing social order within which claims can be made and a new discourse within which these claims need to be justified.

Respondents thus also used the framework of justice (and its deep symbolic power) to strengthen their claims to particular resources or to recognition from those in power. There is a utilitarian aspect to this, where people (particularly victims) can lend legitimacy to their claims (such as reparations) through appeals to abstract principles.

The mobilization of the discourse around justice provides them with a strong political tool in an environment where their claims to certain entitlements has to be elevated above those of other groupings in the society.

In the context of severe poverty, the numerous demands far outweigh the ability of the government to provide. The language of justice is thus one way of elevating a particular voice above the others. In a society undergoing transition from one social order to another (from apartheid to democracy), the principles of the new social order are open to debate. In South Africa particularly, where the concepts of human rights and social justice were such a strong part of the discourse of the liberation movement, the language of justice is a powerful tool of claiming entitlement.

The justice goals and understanding of justice by respondents varied widely. Restorative and retributive conceptions of justice competed for recognition: among groups, within groups and within individuals' own minds. While the morality of restorative justice discourse has become more acceptable, the actual ingredients of this approach have been left undefined. While those arguing for retribution have effectively been sidelined, little satisfaction has been granted to those who pursue restorative outcomes to their justice claims.

The top-down approach to justice implemented by the TRC marginalized the claims of victims and of communities to particular forms of intervention. While some victims' justice needs were addressed by the intervention, the majority of victims felt that the TRC had not delivered on its promises. The TRC, however, viewed these demands as unrealistic and referred responsibility to other state structures or to some follow-up intervention by civil society.

In the absence of satisfaction of restorative justice claims, there appears to be a range of responses by victims and communities. Firstly where the failure was seen as the fault of the perpetrator, the demand shifted to retributive justice. Secondly, where the failure was seen as that of the justice mechanism (the TRC or the state), the reaction was the emergence of a second perceived injustice: betrayal by those who were supposed to be the embodiment of the new social order.

On a theoretical level, this chapter evaluated the utility of different forms of analysis, and affirmed the usefulness of the theoretical framework developed in Chapters 2 and 7. This framework was one that outlined the links between specific reconciliation strategies, various dimensions of reconciliation (and corollary principles of reconciliation) and underlying ideological frameworks. It has also provided a clear illustration of the way in which the Principles and Ideological Frames developed in Chapters 10 and 11 can be applied to a very particular substantive issue, namely justice.