

Chapter 3

Top-Down Versus Bottom-Up Approaches to Justice

1. Introduction

The previous chapter located justice as one of four key components of reconciliation. This means that justice is a social need that is undermined in a conflict situation, and which requires an interactive process of negotiation and exchange for parties to feel that justice has been re-established. Without some sense of justice, a new relationship of trust and cooperation is not possible.

As with the other components (truth, security and healing), justice is something that can be interpreted in many ways. By looking at the literature on justice, it is possible to identify competing approaches to how it is defined and what interventions are advocated. A strong theme implicit in this literature is the tension between top-down and bottom-up approaches to justice. Just as reconciliation can be viewed in terms of three levels of focus (national, community and individual), the strains between these levels also characterize the justice component of reconciliation. This chapter provides a deeper examination of these strains.

Diagrammatically, rather than examining the strains present in the full cone of reconciliation, this chapter narrows its focus to one slice of the picture:

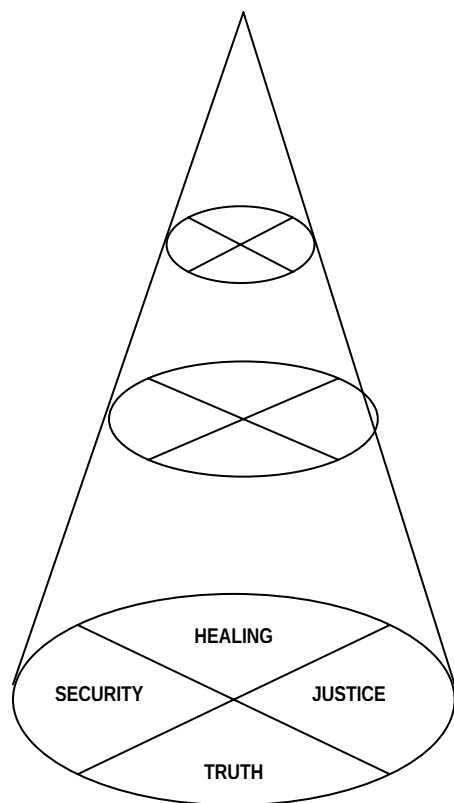


Figure 3.1
Levels and Components of Reconciliation

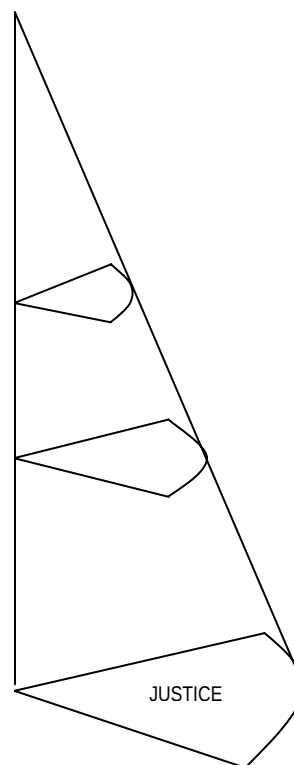


Figure 3.2
Levels of Justice

Many distinctions can be made regarding different approaches to justice. This section provides an overview of the literature regarding the different frameworks for

understanding competing conceptualizations of justice. The focus of the analysis is to reflect on how these frameworks make sense of top-down versus bottom-up approaches.

Underlying much of the conflict over different justice approaches is a tension between looking at the issue either from an individual or group perspective. This is particularly vivid in resolving rectificatory justice concerns in the context of political conflict, where (most) individual victims and perpetrators are members or supporters of rival political groupings.

This chapter examines the role of justice in the process of building reconciliation. The meaning of justice is unpacked through looking at its various functions, the competing interpretations of justice, and the way in which situational factors impact on peoples' approach to justice. These various approaches to the question of justice show it to be a key factor in reconciliation, but one that is subject to negotiation or transformation and that is likely to be prove contentious when examining group versus individual needs.

This chapter lays the foundation for a more detailed examination of how justice is interpreted in the context of the TRC's intervention in the communities studied. The fact that justice is given different meanings and functions by different stakeholders and is contested as a central element of the reconciliation process is a key element in understanding the problems the TRC experienced in gaining community acceptance for its intervention and legitimacy for its broader social goals. This chapter thus serves to illustrate how one component of reconciliation can itself become a terrain of intense disagreement, even among those who recognize it as a necessary element of the process.

2. Functions of Justice

In order to explore how the provision of justice is linked to individual as well as broader social reconciliation needs, it is helpful to firstly consider the various functions that a justice system may be seen to perform.

The most comprehensive discussion of the functions of a justice system in the literature is that of Nader and Combs-Schilling (1976). From a review of ethnographic literature, they arrive at six separate functions:¹

- (1) Prevention. Avoid escalation of the conflict through restoring the status quo or a sense of balance.
- (2) Rehabilitation. Reintegration of offenders so that they regain a position of useful participant in society.
- (3) Restitution. Provide for the needs of victims to restore balance and maintain belief in justice of society.
- (4) The dramatic restatement of values. Re-affirmation of the validity of the rules and values of a society.
- (5) Socialization. Educate members of rules and values and contributes to their internalization.
- (6) Regulation and deterrence. Imposition of sanctions on individual to deter future behavior.

¹ They refer to these as functions of the restitution process, but the restitution process is more broadly defined to include retribution.

Vidmar and Miller (1980) address these functions of justice in a more systematic manner by analyzing the motives underlying “punitive reactions.” (These motives, however, also reflect motives found in other, more restorative systems.) The two categories of motivation they identify are behavior control and retribution.² Retribution is defined in their analysis as the reassertion of the reactor’s values and beliefs. Retributive motives may be directed towards obtaining social acceptance of the reactor’s beliefs about the moral rightness of the violated rule. Punishment in this sense sends a message of condemnation of the violation and of vindication of the victim.

This retributive reaction is necessarily derived from the individual’s attachment to the group, internalization of group values, and perception of the offense as a threat to those values. It is not only the victim that reacts to such violation with a retributive response. The offense is an affront to the value system of the whole group. Vidmar and Miller (1980) cite Heider (1958) who:

... noted that when one person intentionally harms another (i.e. violates a rule), far more is involved than the physical or material hurt itself. The offender is frequently perceived as demonstrating contempt for the person harmed, asserting power over the victim, or declaring the superiority of the offender’s belief or value system. For the victim-reactor, therefore, punishment helps to reestablish the psychological equilibrium by redressing the sense of inferiority engendered by the offense. (p. 579)

² Kim and Smith (1993) make a similar distinction in their analysis of revenge and conflict escalation. They distinguish between deterrence and the restoration of a sense of self-worth as two possible motives

A powerful statement of this type of retributive emotion that fulfills a broader social purpose is expressed by Solzhenitsyn in *The Gulag Archipelago* (1974, p. 176-178) where he demands public trials on the Gulags:

That is the ultimate height a trial can attain: when evil is so utterly condemned that even the criminal is revolted by it.....
 For the sake of our country and our children we have the duty to seek them all out and bring them to trial! Not to put them on trial so much as their crimes. And to compel each one of them to announce loudly: Yes, I was an executioner and a murderer.
 We have to condemn publicly the very idea that some people have the right to repress others. In keeping silent about evil, in burying it so deep within us that no sign of it appears on the surface, we are implanting it, and it will rise up a thousandfold in the future. When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundation of justice from beneath new generations.

A second dimension that Vidmar and Miller spell out is the intended type of target at which the reaction is directed - the individual offender or others in the social environment. Both retributive and behavior control punishments are aimed at the individual offenders and/or others within the social environment. The functions of punishment (and also justice), according to Vidmar and Miller, thus fall into four categories:

Target	
<i>Offender</i>	<i>Others in the</i>
for revenge.	

		<i>Social Environment</i>	
	<i>Behavior Control</i>	Deterrence; isolation elimination; reeducation of offender; restitution to victim	General deterrence or threat; prevention of vengeance by victim or others; upholding morale of conformers; disavowal of act
Basic Motives			
rees-	<i>Re-assertion</i>	Change in offender's belief	Vindicating rule;
	<i>of social values and beliefs</i>	system vis-à-vis victim or societal rule; reaffirmation of private self-image of victim or surrogates; status degradation and differentiation of offender; assertion of power over offender	tablishing social con- sensus about rule; dif- fuse release of psy- chological tension through social comparison processes

(Vidmar and Miller, 1980, p. 571)

Figure 3.3: Vidmar and Miller’s Purposes Underlying Punishment Reactions

The similarities between the picture presented by Vidmar and Miller and that of Nader and Combs-Schilling are remarkable. The functions listed by the latter fit into the four categories pictured above. One fundamental difference, though, is that Vidmar and Miller’s framework explicitly looks at the offender as the prime focus, whereas Nader and Combs-Schilling’s functions are developed more with the victim in mind.³ Despite the overlap in categories, there are thus still deeper differences guiding the two

³ One exception is the reference to “reaffirmation of private self-image of victim or surrogate” in the Vidmar and Miller framework, but this does not, in fact, fit properly into the offender-as-target category of their framework.

approaches: one victim-centered and the other seeing the perpetrator as the main focus of social action.

One possible way to integrate them may be to add an additional column to Vidmar and Miller's typology, which would look at the victim as a target. Addressing the needs of victims is clearly a central dimension of many justice systems (particularly in pre-industrial and small-scale societies) that is lacking in the dominant western systems.

This revised framework would thus contain the following categories:

	Target	
<i>Offender</i>	<i>Others in the Social Environment</i>	<i>Victim</i>

<i>Behavior Control</i>	Deterrence; isolation elimination; reeducation of offender; restitution to victim	General deterrence or threat; prevention of vengeance by others; upholding morale of conformers; disavowal of act	prevention of vengeance by victim
Basic Motives			
<i>Re-assertion of social values and beliefs</i>	Change in offender's belief system vis-à-vis victim or societal rule; assertion of power over offender; status degradation and differentiation of offender	Vindicating rule; rees- tablishing social con- sensus about rule; diffuse release of psychological tension through social comparison processes	reaffirmation of private self-image of victims and their faith in the efficacy of social values and beliefs

Figure 3.4: A Classification of Purposes Underlying Punishment Reactions

This framework is one that subsumes various competing approaches and draws out their commonalities in terms of the basic functions of a justice system. When the various perspectives regarding what categories of this diagram should be emphasized, or what content they should each be given, the contrast between top-down and bottom-up approaches are elucidated.

From a top-down perspective, the focus is on the national social environment. Strategies are chosen in terms of their maximum impact at this level of society. The needs and concerns of victims and offenders are secondary to this focus. Whether the focus is on behavior control or on social values, the concern is that these issues be addressed at a national level. Behavior control is regarded as an imposition of national rules, the value system as one that encompasses the whole country. Individual cases are

addressed in order to create national awareness of the consequences for perpetrators (national scale deterrence) and to build national consensus around values. If the victim and the perpetrator are not directly affected by the intervention, but an effective message was sent regarding consequences of certain behavior or affirmation of certain rules, the intervention would be seen as successful from this perspective.⁴

From the bottom-up perspective, it is the individual victim and offender involved whose circumstances and needs have to be addressed. A lack of change in the offender's or victim's behavior, attitudes, values and identity would render the intervention meaningless. To the extent that this perspective engages with the impact on the social environment, its focus is on the local social environment, the community.

There may also be a contrast in the content of the messages that these approaches may convey to the community and the nation. The values, culture or ideology of a local community may lead to a preference for a particular message content, while the national agenda is around promoting a different image of society. There is thus the potential for competing agendas regarding the image of community and social order (values and behavioral consequences) that is portrayed by the justice system. The following section explores some broader conceptualizations of justice which inform these message contents.

3. Competing Perspectives of Justice: Paradigm, Culture and Ideology

⁴ This national message may, however, depend on a general belief that individual victims and

There are several different ways in which justice can be viewed. Different models of justice can be viewed in terms of manifestations of competing ideal forms (paradigms), as manifestations of different cultural understandings of human nature and social order (culture), or as social systems that promote (and/or obscure) the interests of certain groups in society (ideology).

a) Justice as Paradigm

Zehr (1990) contrasts two broad paradigms of rectificatory justice - retributive justice and restorative justice.⁵ He also refers to a third type, vengeance, but sees this as unreconcilable with social existence. He describes the two contrasting lenses as follows:

Retributive Justice: Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.

Restorative Justice: Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance. (p. 181)

Zehr contrasts these approaches not simply as strategies but also in terms of normative values. He argues in favor of the restorative paradigm, not only in terms of its

perpetrators have been changed by the intervention. As long as this belief (even if based on misconception) is maintained, the national message can be seen as effective.

⁵ Both these forms of justice (retributive and restorative) fall within what Peachey terms restorative justice and Aristotle terms rectificatory justice.

effectiveness in dealing with crime, but also as more reflective of Christian values and tradition. His analysis does not argue simply for a change of legal form in western society, but for a radical change in the way that people in these societies view crime and justice.

b) Justice as Cultural Expression

A cultural analysis of different conceptions of justice is presented by Wagatsuma and Rosett (1986) in their analysis of the different meanings of apology in Japan and the United States. They explain the central role played by apology in the resolution of disputes in Japan in terms of the underlying understanding of the nature of social relations. In Japan, much importance is attached to the interdependence between social actors that is based on their submission to a pre-existing social order that provides stability and social harmony. An apology is significant in that it reaffirms the value of this order and indicates that the offender submits him/herself to this order. In the United States, individual security is not seen as dependent on individual submission to a social order, but rather to a protection of individual rights. An apology is thus purely a statement of legal liability (and therefore avoided in any dispute) or an indication of personal character, neither thus contributing much to the resolution of disputes in a rights-based dispute settlement framework.

A key question in both of the above is the possibility of moving from one model/paradigm to another. Wagatsuma and Rosett recognize that the adversarial model of America is only part of the picture, and that apology can carry a lot of weight in resolving disputes in certain situations. The big obstacle they identify, though, is the

shadow of the legal system that would corrupt attempts at reconciliation between parties by implying/imposing a legal liability in cases where parties attempt to apologize.

Haley (1988) takes issue with the broad characterization of the contrast between American and Japanese dispute resolution processes (such as that of Wagatsuma and Rosett) as simply cultural expressions. In examining crime rates in the two countries (and other western societies), he argues that the low levels of crime in Japan (and more importantly the decreasing levels of crime since 1960) could be explained in terms of a criminal justice strategy which focuses on confession, repentance and absolution which is not simply culture-bound. He argues that the psychological literature on criminal recidivism presents “considerable empirical support for the notion that encouraging remorse and restitution does tend to reduce recidivism” (p. 208). These mechanisms are not culture-bound and can thus be effectively incorporated in other western legal systems. It is thus a paradigm choice rather than a culturally determined process.

Nader and Combs-Schilling (1976) offer a less hopeful picture of the transference of restitution models from other societies to western post-industrial societies. They warn about the difficulty in implementing restorative solutions in a situation where most legal disputes are between people who do not know each other, where legal access is determined largely by wealth, where crime closely follows class differences, and where corporate victims often form a very powerful class (e.g., insurance companies).

c) Justice as Ideology

Social anthropologists have examined justice as part of the way that different societies structure and make sense of their social context. The way justice is understood thus reflects

on their understanding of human nature and the meaning of community - how social solidarity is maintained. This, some argue, is, however, not simply a reflection of traditional patterns of belief that are perpetuated, but presents a confluence of cultural values and political strategies of in-group and out-group relation maintenance and building.

Nader (1990), for example, contrasts two general styles of dispute handling found in various societies. Nader's harmony ideology is one

... that seeks to settle a dispute by uncovering its underlying causes; urges compromise and concludes by agreement; takes into account social relations ramifying beyond the disputants at hand; and places the restoration of amicable social relations above a search for "objective truth". (Just, 1992, p. 391)

This is contrasted with the conflict or adversarial ideology that is essentially based on a zero-sum determination of which party was right. The

... difference is grounded in a deeper shared sense of what the community is in a moral sense, what human nature is, and what can be done about it....
[M]aking this distinction (between accommodation and adversarial style) may in turn depend on whether the community is viewed as a unitary moral whole or a congeries of competing groups. (Just, 1992, p. 402)

Nader treats these conceptions as ideologies because they serve a broader political purpose. They are part of a political strategy of the society concerned in engaging or resisting external control, e.g., the resistance of an indigenous society to colonial control. There is thus an element of choice rather than the ideology being simply an accident of history.

Cordella (1991) also contrasts two styles of dispute resolution arising from two broad conceptualizations of community. He contrasts the social contract model with the mutualist model of community (roughly equated to Tonnies's (1957) *Gesellschaft* and *Gemeinschaft* and Durkheim's (1960) mechanical and organic solidarity). The 'contractarian' approach is characterized by repressive, punitive, violent responses to conflict, while the mutualist model "makes reconciliation not only possible but necessary" (p. 31). He presents the 'communitarian' system as one which:

...generally views conflict as a weakening of communion among its members, which implies a need for restoration to full communion. The solution, therefore is inclusion rather than exclusion, readmittance rather than isolation, reinterpretation rather than adjudication - a system guided more by the altruistic than the adversarial. (p. 31)

He presents these as two broad philosophical perspectives - one based on self-interest and individual isolation, the other on altruism and belonging. He also, however, links the dominance of the contractual model to threats experienced by the individual:

When fear for oneself becomes the dominant motivation, personal behavior becomes egocentric. The preoccupation with individual rights and the punitive reinforcement of these rights in today's liberal democratic society are clearly manifestations of the motivation of fear. (p. 32)

The acceptance of fear as a permanent element of our relationships leads to a repressive system of justice. Cordella quotes Macmurray (1961, p. 151) on the implications of this for social coexistence:

[W]e may agree to cooperate on conditions which impose a restraint upon each of us and which prevent the outbreak of active hostility. The negative motivation, the fear of the other, will be suppressed. This will make possible cooperation for such ends as each of us has an interest in achieving. But we will remain isolated individuals, though it may appear to satisfy our need of one another, will not really satisfy us.

These systems of justice are also ideologies of community as they place value on the type of social bonds that society should pursue. It contrasts the ideology of individualism with that of communitarianism.

d) Tensions between National and Local Cultures and Ideologies

There is no necessary link between one social level (national or local community) and the type of culture or ideology supported. While there may be some inference in the anthropological literature that small-scale traditional communities are generally characterized by restorative forms of justice while nation-states are largely driven by a retributive paradigm, the opposite may be true in a particular situation. Local communities can be very retributive when confronted by a severe threat to their continued existence, and national political elites can be very forgiving of their erstwhile foes when pursuing political stability. The potential for conflict between the prevalent paradigm pursued by national policy and that favored by local communities is however evident in this context.

Moreover, it is also likely that different crimes are responded to with different types of justice values within one setting, and that these judgments vary depending on location. While certain crimes may be treated with severe punitiveness at the national level, other crimes may elicit more severe responses in the local community, and vice versa. Certain crimes may be met with greater moral indignation or be regarded as a greater threat to the social order in the local or national setting.

This tension between national and local is likely to be exacerbated when the local community is distinguished by its culture, its level of poverty or particular local history of intense conflict.

4. Justice as Situational or Individual Response

The above discussions dealt with justice as a component of a broader belief system, a system that society brings to bear on a situation where injustice threatens the social order and the value system. This discussion highlighted the potential gap between national and community understanding of justice or choice of appropriate form of justice in relation to a particular offense.

These concerns address the “others in the social environment” as indicated in *Figure 3.3*. They are relevant concerns to both the top-down and the bottom-up approaches to justice. For a fuller understanding of the meaning of justice, we also have to look at how justice is perceived by the other intended targets of the justice intervention: the victim and the offender. The literature, however, focuses almost exclusively on victims’ perceptions of justice.

In contrast to the approach that views justice systems as a rational choice between two polar paradigms, the literature on justice also recognizes this more subjective, emotional or situational component of justice - the variation in response to an injustice that arises due to the specific conditions or personal characteristics of the parties involved.

Vidmar and Miller (1980) reviewed the literature on factors that impact on the punitiveness of reactors (victims and others within the social environment). Peachey (1989) also examined the factors that determine a person’s retributive motives, but from the perspective of how a justice system can transform this orientation. In a study of victims he also found a similar range of factors impacting the victims’ views on the fairest approach (retribution, compensation/ restitution, and rehabilitation).

The following is a brief summary and discussion of the most notable findings that are presented in these studies, focusing on those that deal with rule and offense characteristics as well as the offender characteristics.

a) Rule and Offense Characteristics

The reactor's sense of personal threat is the most important factor in the literature reviewed by Vidmar and Miller. The type of offense and the level of harm both impact on punitiveness (Rossi et al, 1974). The more "contagious" the reactor believes the offense to be (how likely it is that others will also commit such an offense if this person get away with it), and the more perceived social consensus around the offense, the more he/she will favor punishment.

The more harm is caused by an offense, the more the reactor is also likely to ascribe responsibility to the offender (Lerner and Miller, 1978). This appears to stem from the fact that people want to believe there is order and stability in their environment and that very bad things do not happen without understandable reasons - someone or something must be responsible.

b) Perpetrator's Motives

Previous studies have found that the level of culpability, predictability and corrigibility impact on the level of punitiveness. Offenses committed as a consequence of forces external to the person (e.g., under duress) are seen as less matters of personal responsible (and less likely to be repeated).

Peachey (1989) also attached a lot of significance to this variable. He analysed this factor in terms of the psychological meaning that one party imputes to the other's

behavior - the cause or motive of the behavior. Peachey's study found a strong relationship between the victim's perceived cause of the offending behavior and their preference for outcome. He notes, however, that this relationship between attributed motive and preferred outcome is complex and interacts with the relationship-between-the-parties variable.

Victims did not opt for punishment when they attributed the action to emotional upset or environmental stress. On the other hand, the highest number of punitive responses came when the victims saw the offending behavior as being specifically targeted at them, whether out of revenge or some other interpersonal motive. (p. 313)

It is, however, an aspect of the conflict that can be significantly affected by third party involvement. A key question for Peachey is, to what extent can a mediator encourage someone oriented towards retribution to accept compensation instead? He contends that improved communication between disputants has the effect of moving victims' orientation from a retributive towards a restorative orientation. The mediator's ability to help the parties understand the reasons for each other's behavior is particularly significant.

To the extent that such dialogue provides a plausible external attribution for the other's behaviour, we might expect to see a decreasing concern for

retribution. In addition, people are often prepared to dismiss their claim for repayment or retribution if it appears that the other party will acknowledge responsibility for the wrongdoing and take steps to ensure that it will not happen again. (p. 316)

c) Subsequent Violator Behavior

Subsequent violator behavior, such as an expression of remorse, will lead to perceptions of lower likelihood of recidivism, and more importantly, would already acknowledge the validity of the rule, thus decreasing the need for retribution (see Sykes and Matza, 1957; Gusfield, 1967). Later research by Weiner et al (1991, p. 308) provides further confirmation of this:

[T]he presence and type of confession alter perceptions of the confessor's moral character and causal attribution for the negative action...affective reactions, forgiveness, and actual as well as intended behavior also were altered by a confession. when there was attributional uncertainty (before the confession), confession was especially adaptive.

d) Relationship Between Violator and Victim

The relationship between violator and reactor will also influence punitiveness. Particularly, perceived similarity between the offender and the reactor may lead to perceptions of that person as being perceived as less capable of future violations (Heider, 1958), but it may also have the reverse effect of causing moral outrage that someone from one's own group is challenging its value system (see Coser, 1957).

Peachey (1989, p. 310) produced very similar findings:

In the most intense interpersonal relationships, the most frequent desire was for rehabilitation, but these relationships also produced a considerable portion of punishment responses. Relatives, however, opted more heavily for rehabilitation, while casual relationships produced primarily punishment choices. In fact, this was the only category in which a majority of the respondents favored punishment.

He hypothesizes that the ambivalence of those in an intense relationship is the result of strong emotions of both attachment and resentment, while the punitiveness of a casual relationship does not present any inhibition to the expression of retributiveness.

Further confirmation is found by Nader and Combs-Schilling (1976) who found a similar trend in the anthropological literature: distance (social and spatial) is important in determining whether to choose retaliation over restitution.

e) Bottom-up Justice as Responsive to Situational Variables

The significance of this discussion about situational and individual responses to offenses is the variability of the justice response. Justice can not be seen as simple abstract principles or cultural rules that can be universally applied. Many variables impact on what would be considered an appropriate response. Some of these variables relate to the specific offense, some to the impact of the offense on the community and the individual, while others relate to the particular relationship between the offender and the victim. The

judgment of what appropriate justice is in relation to a particular situation can also change over time, particularly in the case of remorse.

When cases of abuse are treated by a nationally-imposed justice mechanism using nationally negotiated norms, their appropriateness may be challenged on the basis of their sensitivity to specific conditions, their relevancy in relation to the impact of these offenses on the local victims and community, or their rigidity in the face of changing circumstances.

The variability of justice responses at the individual level is a response to the complexity underlying different types of abuses. Restorative or retributive responses can be considered appropriate for offenses that are only slightly different. They may appear similar from the national vantage point (e.g. both politically motivated) but at the community or interpersonal level, more complex and subjective factors (such as the long term impact on the victim) could influence the local or national response.

5. Rectificatory Justice and Reconciliation

For reconciliation to be promoted one must address the need for justice, i.e., overcome the injustices of the past. Disputants must, to some degree, be able to say that “justice has been done.” For the creation of a unified moral order, this feeling of righting the wrongs has to be mutual. In political conflict, both sides are likely to have suffered perceived injustices, and both are to some extent responsible for excessive abuses. Both the victims and *those carrying some of the moral burden for victimization* must to some

extent be satisfied with the mechanism(s) that are devised to address these injustices.

Various solutions can be devised that are aimed at addressing one or another party, but creating a justice process that is capable of not creating deep resentment by at least one group is a major challenge to peacemakers.

While punitive justice is not normally conceived of as a contributor towards reconciliation, some aspects of its operation could be framed within a reconciliation program.

a) Punitive Justice and Reconciliation

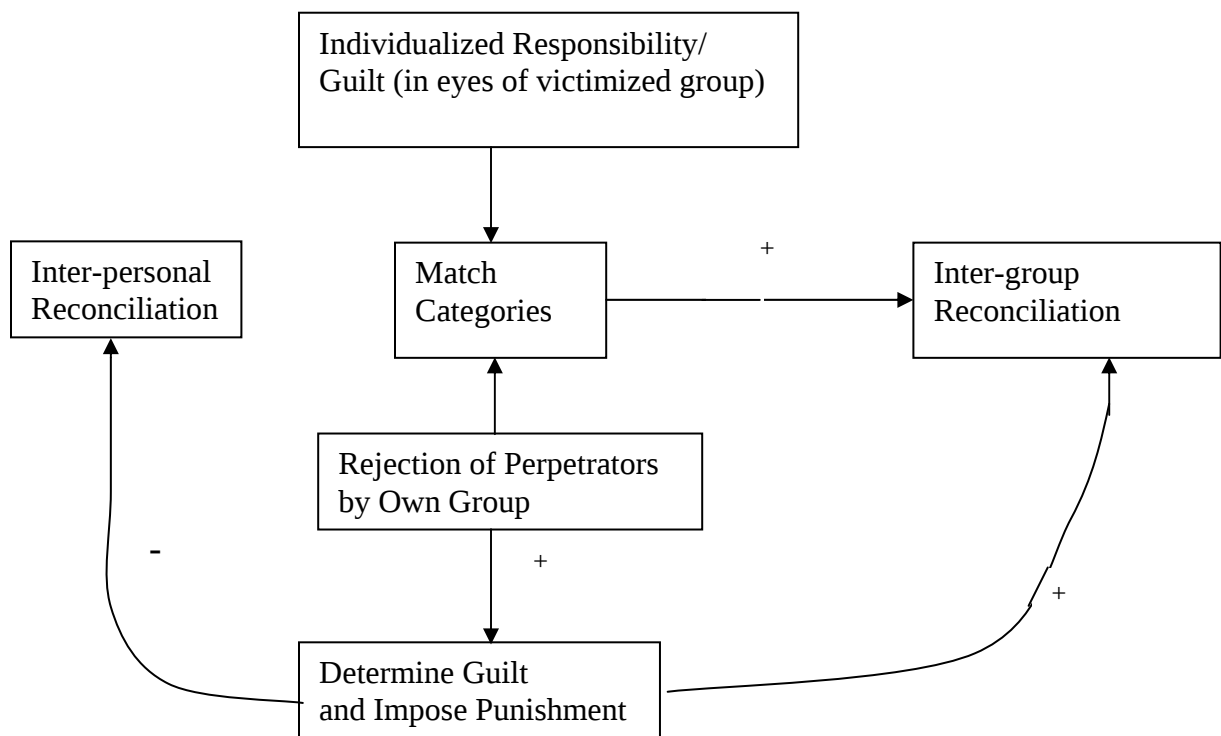
One could argue that a punitive approach is compatible with some form of intergroup reconciliation under certain circumstances. Assigning responsibility to individual perpetrators (who are most directly involved) and exonerating the group as a whole could be seen as one way of facilitating reconciliation among groups (e.g., as attempted in post-Nazi Germany⁶). This would, however, only work if (1) it is possible for the victimized group⁷ to separate out individual perpetrators to assume responsibility rather than assign collective responsibility to the whole group, and (2) the perpetrator group is capable of separating itself from the perpetrators within its own ranks. These conditions are, however, very difficult to meet. While the victimized group may want to assign

⁶ The case of Nazi Germany is to some extent, however, a mixed situation (as are almost all cases) as the German government also took some responsibility for paying compensation to individual Jews and organisations representing holocaust survivors.

⁷ The victimised group here can refer to both sides in a conflict in relation to their respective victimisation experiences. The same goes for perpetrators.

responsibility to a wide range of actors (e.g., politicians), the perpetrator group may only be willing to reject those offenders within their own group who committed the most vile deeds (e.g., torturers). Finding a match between these categories (those identified as responsible by the victim group and those identified as responsible by the perpetrator group) may prove impossible.

Punitive justice can thus be used in the pursuit of reconciliation, but this reconciliation is not extended to those who are considered guilty. They are in effect treated as scapegoats on whom the blame is placed. The rest of society is thus united through a condemnation of their actions and their exclusion from the new society. Reconciliation at the inter-personal level (between direct victims and perpetrators) is thus made impossible, and is in fact never defined as a desirable outcome.⁸



⁸ While this approach is one that does not provide scope for reconciliation at the interpersonal or community level, it may still satisfy individual victims' perceptions of justice.

Figure 3.5: Conditions for Reconciliation under Punitive Justice

b) Restorative Justice and Reconciliation

Given the lack of engagement of retributive justice models with issues of interpersonal and community reconciliation, the link has more often been made between restorative justice approaches and reconciliation. The implementation of restorative justice however encounters particular dilemmas.

While a punitive justice paradigm does not require a perpetrator to accept responsibility in order for justice to be done in the eyes of the victim, restorative justice does require this step. Punitive justice can be imposed, but restorative justice requires cooperation from those who are accused of misdeeds. They have to join others in condemning their own actions. The scope (and focus) of individuals, parties and institutions that are required to make such admission is, however, an issue that is open to different ideological interpretations.

A restorative justice approach could also be based largely on individual culpability, but does not depend on it. Restorative justice requires that someone takes responsibility for harm inflicted on the victim. Rather than a question of guilt, it becomes a question of moral and legal responsibility for righting the wrong. This responsibility can be shared among the individual perpetrators, a political party, a whole ethnic group, and even to some extent by a new government that is itself not implicated in violations (see, e.g., the case of Chile or West Germany).

The option of not choosing to purely focus on individual responsibility presents the huge problem of dealing with collective responsibility, guilt and shame. Getting a group to take responsibility for its sins or failures, either via its leadership or on a more personal basis, is not an easy task. Criminologists working in the restorative justice framework are still struggling with the question of invoking a sense of shame among perpetrators (see, for example, Braithwaite, 1989 and Scheff, 1996). Doing this on a national level presents a very serious long term challenge. (Germany, for example, is still struggling with this question.)

A fundamental condition for restorative justice is the existence of some common 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.

In a society where the conflict was largely between two sides who did not share the same culture, who have different understandings of justice, and a different vision of the future society that they want to build together, the prospects for restorative justice would appear quite slim.

In a society that experienced both group and individual victimization, there is also the question of what relationship it is that should be restored. Restoring relationships between groups would imply symbolic acts by those in leadership positions, reparations

in the form of broad redistributive social programs, storytelling processes which cover the broader experiences of each group and identity changes relating to broad categories such as race, ethnicity or ideology.

By focusing on individual victimization experiences, intervention efforts may, however, prioritize the issues of individual storytelling and healing, victim-perpetrator dialogue and reparations between individuals.

6) Conclusion

Rectificatory justice is a key element of building or reconstructing a social order. Justice plays a range of key functions such as explicating the values that a society holds dear. It also plays a key regulatory function in preventing disruptive social behavior. These social and individual functions are, however, subject to contention. This contentiousness can be framed as competition between different paradigms, cultures or ideologies. Specific situational factors must, however, also be considered in understanding how people view appropriate justice interventions.

Underlying each of these considerations (functions and competing paradigms, cultures and ideologies) there is the tension between addressing different levels of the conflict - national, community or interpersonal. These are outlined explicitly in this chapter in relation to retributive and restorative models of justice.

Resolving the justice question at the inter-group level is not necessarily done with the interests or needs of the victims or perpetrators (except those in senior positions) as a

central concern. The justice needs of those most personally affected by the past injustices (and by processes to address this past) are likely to be marginalized in a settlement that addresses broader social and political objectives.

It may be considered that victims' needs (e.g. financial compensation) are beyond the ability of the society, or that punishment of the offender would threaten the fragile social order. Offenders, on the other hand may be marginalized by their group and sacrificed (as scapegoats) in an attempt to avoid moral blame to the whole group and to reach a settlement. The manner in which justice conflicts are settled at the inter-group level (in pursuit of intergroup reconciliation and/or political stability) could thus place limits on the space for addressing individual needs or inter-personal reconciliation. Even where there is agreement on the broad form of justice (restorative or retributive) the way in which this is interpreted and implemented could cause tensions between local and national reconciliation goals. Whether this strains the nature or extent of reconciliation at either level remains to be explored in later chapters.

National justice systems have to use incidents of abuse to "teach potential offenders a lesson," to educate members about the rule of law, and to re-instill some sense of moral equilibrium. On the other hand, justice may be compromised by the national system in order to achieve some other national social goals (such as stability). Either way, these justice (or other social) goals do not necessarily match with those of the local community. They may also be at odds with the individual victim's justice response.

This chapter has illustrated how one component of reconciliation, justice, can become a deep source of division between parties or a source of tension between local

communities and national legal-political systems. The relevance of the central theme of the dissertation - top-down versus bottom-up tensions in the reconciliation process - has been illustrated at a theoretical level in relation to a central component of reconciliation.

This chapter also lays the theoretical foundation for a later analysis (Chapter 12) of the empirical data collected by this study as it relates to top-down versus bottom-up perspectives of justice. The next chapter explores how this tension between top-down and bottom up approaches to justice has been manifested in the international experience of post-war reconciliation initiatives.