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Restorative Justice
Ambiguities and Limitations of a Theory

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The ideal of the South African transition is captured in the postamble to the Interim Constitution (Act 200 of 1993), which commits the nation to a

secure foundation for the people of South Africa to transcend the divisions and strife of the past which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimisation.

The Truth and Reconciliation Commission (TRC) is lauded and criticised for having both succeeded and failed to promote this ideal. Howard Zehr suggests that the process was ‘flawed, opportunities have been missed, but the importance of this understanding [of justice] – not only in South Africa, but for the world – must not be underestimated. It is a bold step on an uncharted path.’ George Bizos argues that South Africa had a choice between ‘the silence of perpetrators without justice being done and learning the truth without perfect justice having been done.’ The choice of the latter involves amnesty. In this situation, he concludes, if justice and amnesty ‘are not sisters, they are at least first cousins.’

Restorative justice, it is generally argued, prioritises beneficence to victims and survivors. Yet it is important to recognise, not least in a time of political transition, that rehabilitating perpetrators is ultimately in the interest of victims and survivors. Of course, this idea raises as many questions as it answers: What about the demands for retribution by victims and survivors, recognising that there is perhaps nothing more ‘natural’ in human relations than a call for revenge in the wake of deliberate and unnecessary hardship and suffering? How does one counter the argument that retributive justice
is the only viable alternative to 'wild justice' – the revenge of vigilante groups? And yet how do perpetrators, in the words of the late Chief Justice Ismail Mahomed, 'become active, full and creative members of the new order' if left to languish in jail or live under perpetual threat of prosecution? The need, Mahomed suggested, is for both victims and perpetrators to cross the historic bridge from the past to the future, not with heavy dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge. The realisation of this end within the contextual contradictions and ambiguities of transitional societies is rarely achieved through textbook theory on retribution or restorative justice. Transition is inherently a process that emerges in situ. It is born as a result of exposure, talks and what are more often than not messy negotiations. The outcome is almost inevitably a hybrid of mechanisms of justice, politics and coexistence that emerge from interim and experimental initiatives designed to promote nation-building.

The outcome is rarely a neat set of solutions to the inherently complex problems of transition. Progress has primarily to do with attitude. It involves a commitment to find a way through a set of dilemmas to which there are no simple solutions. At the heart of this process is a recognition that legal and political solutions which constitute conventional wisdom in established societies often fail to provide a way forward in transitional ones. It is the kind of dilemma that President Mandela focused on in his final address as head of state at the opening of Parliament in February 1999, when he spoke of the need for an 'RDP of the soul' – literally a set of ethical ideals capable of realistically addressing issues of reconstruction and development in transitional society. The restoration of relationships, the adjustment of material imbalances, the healing of memories and the willingness not to demand revenge are never an instant affair. It takes time, usually requiring home-grown compromises and solutions, which constitute the next step forward rather than the ultimate solution. There is no easy route to this end. And the danger is, of course, that once the initial pressure to find a way forward is over, the incentive to continue the transitional journey is frequently lost. The result is that the initial step beyond the conflict becomes the end of the road. There is political stagnation, which invariably gives rise to a new call for retribution. To use the analogy of Isaiah Berlin: The danger is always there that the bent twig, if held down by force alone, will in due course snap back with redoubled force.7

In what follows, it will be argued that political restorative justice for societies in transition involves negotiating a way through the ambiguities inherent to political transition from oppressive, autocratic rule to the beginning
of democracy. As such, it cannot be a pure or unencumbered theory. It must necessarily be shaped by the complexities of the context within which a particular country in transition finds itself at a given time. The first section of this essay will address the ambiguities of the demands for justice in the South African context. It will next be argued that theories of restorative and retributive justice are not necessary mutually exclusive within transitional societies. The one needs the other to enable a nation to cross the historic bridge from the old to the new. The latter part of the essay will raise issues around South Africa’s unfinished transition.

The Ambiguities of Political Transition

The South African settlement was an ambiguous and confusing affair – driven as much by pragmatic needs and rugged compromise as by high ideals and moral intent. And yet, Archbishop Tutu’s sense of the South African transition being a miracle provides important insight into the South African settlement, when compared with many countries undergoing transition in other parts of Africa, the Balkans, Russia and elsewhere. The danger is, however, that idealistic perceptions of the South African transition can camouflage the level of resentment, alienation, disappointment and compromise that some brought into the settlement. And yet this too is inevitable in a compromise settlement that was probably the only alternative to an escalation in war and the destruction of any realistic possibility of reconstruction. Justice Richard Goldstone put it thus:

*The decision to opt for a Truth and Reconciliation Commission was an important compromise. If the ANC had insisted on Nuremberg-style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy. And if the former government had insisted on a blanket amnesty then, similarly, the negotiations would have broken down. A bloody revolution – sooner rather than later – would have been inevitable.*

The TRC is a bridge from the old to the new.*

Human beings respond to tragedy and options for renewal in various ways. Victims and survivors are no more a single homogenous group than are perpetrators or bystanders. It is this that makes any generalised observation about what victims and survivors either want or ultimately need both dangerous and insensitive. The remarkable thing is that some are ready to restore relations with former enemies, to reconcile – even to forgive. Having spent 27 years in prison, former President Nelson Mandela was ready to for-
give and be reconciled with those who jailed him. Cynthia Nomvevu Ngewu, whose son, Christopher Piet, was one of the Gugulethu Seven shot by the police in an ambush in March 1986, was asked for her response to the position of those who supported the imprisonment of perpetrators. She replied:

*I do not agree with this view. We do not want to see people suffer in the same way that we did suffer, and we did not want our families to have suffered. We do not want to return the suffering that was imposed upon us . . . I think that all South Africans should be committed to the idea of re-accepting these people back into the community. We do not want to return the evil that perpetrators committed to the nation. We want to demonstrate humanness towards them, so that they in turn may restore their own humanity.*

Neville Clarence, who lost his sight in a bomb blast outside the airforce headquarters in Pretoria on 20 May 1983, seemed to look Aboobaker Ismail (who was responsible for the bomb) in the eye when he said, 'I forgive you for what you have done. I came . . . to share my feelings with you. I wanted you to know that I harbour no thoughts of revenge.' Brian Mitchell, responsible for the Trust Fields massacre in December 1988, asked for forgiveness from those who survived the attack, and committed himself to working in the community he had destroyed. Jabulisiwe Ngubane, who had lost her mother and her children in the attack, observed, 'It is not easy to forgive, but because he stepped forward and asked for forgiveness, I have no choice. I must forgive him.'

Others did not forgive. Forgiveness cannot be demanded. It cannot be presumed. It cannot be expected. Chris Ribeiro, the son of the murdered Florence and Fabian Ribeiro, objects to anyone 'pushing reconciliation down my throat'. Marius Schoon, who lost his wife and a daughter in a South African military raid into Botswana, in turn complains about 'the imposition of a Christian morality of forgiveness'. The Polish dissident, Adam Michnik, says that when he was in prison he resolved never to seek revenge or refuse to forgive. Yet he kept repeating to himself a fragment of Zbigniew Herbert's poem: 'And do not forgive, as it is not within your power to forgive on behalf of those betrayed at dawn.' He argued that we can forgive harm done to us. But it is not in our power to forgive harm done to others. 'We can try to convince people to forgive, but if they want justice, they are entitled to demand it.'

Most South Africans are ambivalent about reconciliation, finding themselves pushed and pulled between recognising the need for reconciliation
and complete indifference towards it. Victims and survivors who have borne the brunt of the past are often unable to forget, while wanting to engage in the future. The government is, in turn, eager to enable the nation to move on. The fear is often that too much memory will fuel continuing resentments, reopening past divisions and undermining possibilities of peaceful coexistence. The outcome is endless compromises by government, designed to appease opponents as well as the disgruntled among government supporters, which contains the long-term danger of failing to deal creatively with the conflicting demands of the electorate. Most beneficiaries of the past become impatient with the whole process, asking why the past cannot simply remain the past. Often unwilling to address issues of transition, they question the need for further truth-seeking and resist calls to take responsibility for past wrongs. It is amid these diverse and contradictory demands of victims and survivors, beneficiaries and perpetrators, that the restorative justice debate needs to be located. In this context, the theory begs as many questions as it seeks to answer.

In a national survey conducted last year, despite concerns expressed on a range of issues that continue to divide the nation, South Africans across the colour line indicated that they thought the country would be a poorer place if there were no other racial groups in the country. A significant result, considering the prominence of racial tension in South Africa. The survey further shows that South Africans are ready to find compromise solutions to such divisive issues as amnesty and reparations. Black and white South Africans indicated that amnesty for perpetrators of gross violations of human rights in the apartheid context is morally unjust, and yet 65 per cent of black South Africans conceded that amnesty was a price that needed to be paid in order to secure a peaceful transition to democratic rule in South Africa. Interestingly, only 18 per cent of whites saw it so. Black South Africans in particular were also ready to accept that the inherent injustice of amnesty can be compensated for in various ways. Even the payment of compensation was not seen as the only palliative. A sincere apology and an opportunity for victims and survivors to relate the stories of their suffering in public were cited as important alternatives to normative forms of retribution and even reparation.

Of course these results can be challenged. They do, however, suggest that the incredible amount of goodwill and willingness to find a formula for coexistence in the South African situation should not be squandered. And yet the same survey shows that while the majority of South Africans of all races support the payment of reparations to apartheid's victims, only 10 per cent of whites indicate that they are personally ready to contribute to such
payments. It is this kind of response that can give rise to the kind of retributive backlash referred to earlier. The words of President Mbeki are pertinent in this regard: 'It's a very delicate thing to handle the relationship between these two elements [transformation and reconciliation]. It's not a mathematical thing; it's an art . . . If you handle the transformation in a way that doesn't change a good part of the status quo, those who are disadvantaged will rebel, and then goodbye reconciliation.'

There are contradictory forces at work in the quest to obtain this balance, as is seen in the intensity of national debate on amnesty and related forms of reprieve, occasioned by the presidential pardon of 33 prisoners. The majority of those pardoned were denied amnesty by the TRC, resulting in a new call for perpetrators to take responsibility for their past deeds. Some human rights groups demand the prosecution of those denied amnesty by the TRC and those who failed to apply for it. The Department of Justice has, in turn, indicated the need for a mechanism designed to advance the cause of nation-building, suggesting that the historic bridge of compromise will need to be crossed yet again. Again the nation is confronted with the kind of moral and legal concerns that it faced with the passing of the Promotion of National Unity and Reconciliation Act, 34 of 1995, that required the TRC to facilitate the granting of amnesty to persons who make full disclosure of all relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.

Few contest the need for national healing and reconciliation. The question is how? There is a need, on the one hand, to restore confidence in the rule of law as a basis for peaceful coexistence, and on the other, a need to bring closure to a dark chapter in South African history. The prospect of indefinite prosecutions does not augur well for national healing. The state lacks the capacity to prosecute all who should perhaps be prosecuted. It is also very difficult to prove in court the guilt of high-ranking officers who are allegedly behind past gross violations of human rights. The court judgments concerning the former Minister of Defence, General Magnus Malan, and the South African architect of chemical and biological warfare, Dr Wouter Basson, make the point. Clearly, punitive justice should not be romanticised. Even where a guilty verdict may be possible, there is no assurance that civil claims and compensation will necessarily result from it.

It is not easy to cross the bridge of compromise or to restore a nation. Suffice it to say, the restorative expectations and needs of victims and survivors on the one hand, and those of perpetrators and beneficiaries of the apartheid dispensation on the other, are as contradictory as they are complex and diverse. National healing requires the unresolved anger and trauma of
past victims and survivors to be appeased. It also requires that the restlessness and uncertainty of perpetrators be addressed. Individual demands for retribution need to be integrated with national needs for amnesty and reconciliation. Some who testified before the Human Rights Violations Committee hearings of the TRC found the process a healing one. Others found that it opened old wounds; for them it was not cathartic. Some learned enough to bring closure to their quest for truth. Others remain unsatisfied, demanding that the state institute further investigations; some want prosecutions and the right to institute civil claims against those responsible for their suffering. Still others suggest it is time for complete closure on the past. Several people on both sides of the political divide call for a general amnesty. Others argue that a general amnesty will undo the progress made in national healing through the TRC. It is the magnitude and complexity of these kinds of demands which persuade John Braithwaite that restorative justice is a decidedly ‘immodest theory’. He also suggests it is a ‘pessimistic theory’—in the sense that it can scarcely succeed, given the magnitude of what is involved in restoration. This includes the need to expand existing notions of liberty, equality and community that ultimately go beyond the realm of the justice system. Differently put, conventional solutions to problems of governance—ranging from legal accountability, citizen responsibility, and material acquisition to the forging of new notions of belonging—need to be explored.

**Where Restoration and Retribution meet**

Howard Zehr provides contrasting definitions of retributive and restorative justice. He argues that retributive justice views crime as ‘a violation of the state, defined by lawbreaking and guilt’. As such, it ‘determines blame and administers pain in a context between the offender and the state directed by systematic rules.’ Restorative justice, on the other hand, views crime essentially as ‘a violation of people and relationships. It creates obligations to make things right.’ As such, it ‘involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance.’

In a transitional society that struggles to establish the integrity of the state and the efficacy of the administration of the rule of law—in the wake of an extended period of illegitimate rule and lawlessness—the upholding of the integrity of the state and its laws is as important as the need to forge a partnership between victim, offender and community in seeking to correct past wrongs. Both forms of justice, as defined by Zehr, are necessary. Indeed the
one depends on the other. Justice is a negotiated concept with a political dimension that requires the democratic participation of citizens in a structure of authority by which they agree to be governed. While established democracies acquire certain practices, values and behavioural trends over time that make for state legitimacy, new democracies need to establish that legitimacy by demonstrating the constitutional and legal capacity of the state to enforce the rules and values that are enshrined in their founding constitution. Where, for example, government fails to demonstrate an ability to deal with poverty and alienation, the affirmation of basic human rights, corruption, crime, greed and related concerns, the competency and legitimacy of that government will be questioned. Needless to say, this is something that any government, let alone an emerging democratic government committed to taking its people beyond past abuse, cannot afford to allow to become a common perception.

The question is how, at the level of governance, to create a situation that promotes the fullest participation by citizens in a process that claims to be driven by the high constitutional ideals of reconciliation and ubuntu. The question is important, not least in a situation where the principles involved, although crucial to the ending of the earlier conflict, do not enjoy the unquestioned support of all the nation’s citizens. To enable the settlement to be sustained, the emotions, demands and expectations of those most alienated by the settlement need to be seriously addressed. Restorative justice effectively argues that this can occur through the implementation of substitute measures that offset the more excessive (retributive) demands of victims and survivors. This, for example, happened where the Constitutional Court judgment in the AZAPO case against the TRC ruled that the right to civil prosecution could be substituted by making reparations to victims and survivors.

Within transitional societies, restorative justice necessarily involves three interrelated steps: the acknowledgement of resentment among victims and survivors as well as the justified moral outrage of society; the addressing of the material needs of victims and survivors; and the restoration of relations between victims and survivors on one hand and perpetrators on the other.

A. Resentment and Moral Outrage

The `retributive emotions’ that brood beneath the surface of perhaps most victims of perpetration must necessarily be addressed. Donald Shriver argues that there is "nothing more “natural” in human relations than revenge’. He also suggests that there is “nothing less political’. These emotions need to be procedurally controlled and creatively directed to ensure they are not
Reduced to naked revenge. They must also be respected and acknowledged. A failure to show anger and moral outrage at the kind of unmitigated suffering characterised by the human rights abuses of totalitarian regimes, mitigates against the very respect of human dignity that is required in order to establish what Rajeev Bhargava has called a 'minimally decent society'. It suggests indifference to human suffering, fails to affirm the moral worth of individuals, and disregards the most fundamental rules that make for a society governed by the basic tenets of human rights law.

Anger and resentment, even moral hatred, are appropriate in certain circumstances. These sentiments often give expression to the victim's struggle for self-respect and self-worth. They affirm the dignity of others when the anger is in response to the suffering of others. They constitute a refusal to turn the other cheek in the face of the bully and the perpetrator of evil. To fail to recognise this is often construed, by those whose emotional trauma is at its height, as patronising and abusive: 'I refuse not to be angry and cannot forgive. What is even more difficult is to have someone tell me I should not still feel like this', notes Brian Mphahlele, a victim of apartheid abuse who had appeared before the TRC four years earlier. ‘What really makes me angry about the TRC and Tutu is that they are putting pressure on me to forgive’, says a young woman named Kalu. ‘I don’t know if I will ever be able to forgive. I carry this ball of anger within me and I don’t know where to begin dealing with it. The oppression was bad, but what is much worse, what makes me even angrier, is that they are trying to dictate my forgiveness.’

Restoration and reconciliation rarely begins with the overcoming of resentment, anger and retributive emotions. They begin rather with trying to find constructive ways of dealing with such emotions, recognising that unmitigated resentment and hatred can entrench a sense of victimhood and defeat. Such suspension or forswearing of revenge and the dealing with anger can open the way for 'moving on' and the beginning of a restorative process that indeed involves victim, offender and community in a search for ways to redress past wrongs in a viable and responsible manner. To ensure viability and sustainability of this process, however, restoration needs to do more than address the unresolved anger of victims and survivors. It must create a society within which victims and survivors, as well as perpetrators and others, can feel safe against the recurrence of gross violations of human rights. It is here, of course, that arguments for retribution as a deterrent and moral persuader are located.

Jean Hampton's affirmation of the 'retributive idea' goes beyond such arguments. She insists that it is the violation of the human dignity of both
the victim and the perpetrator as a moral agent that lies at the root of her outrage. She insists that retribution involves more than a malicious desire to make the perpetrator suffer. Moral truth is something worth defending in and of itself. Hampton defends it as an ethical principle that provides moral order and human protection in a world threatened by radical evil.

Approaching the problem another way, Carlos Nino reminds the perpetrator that there is a price to be paid for violating the agreed rules of coexistence. He does so on the basis of human autonomy (which affirms the right of the individual to defend him- or herself against attack) and social responsibility (which involves the obligation of society to uphold moral decency). These, he says, are values entrenched within a morally defensible theory of retributive justice. He predices his argument on a social contract that he sees as implicit in societal coexistence, one that lets no one off the hook. In brief, we either have to contribute to the common good or accept the consequences for failing to do so. We explore the four principles that Nino argues are required for a viable contract:

1 The Vindication of Moral Consensus
Understood thus, he argues, retributive justice carries within it a dimension of distributive justice. It involves a set of moral principles which regulate ‘living together’, which benefit all and which all are morally obliged to uphold. Those who are seen to undermine this need to face censure and retribution. While deterrence may well be a consequence of this approach, it is not its primary concern. In essence, vindication embodies a corporate or communal responsibility to uphold and promote those values that a society, through the democratic process, regards as the basis for its national raison d’être. Communal responsibility here means that every member of society has a moral and political responsibility to uphold the common good of the nation. There can be no freeloaders and no one should be allowed to benefit over others by not carrying their fair share of the load. It involves ‘striking a blow for morality’.

In wrestling with the question how best ‘to live with evil’ – with ‘massive human rights violations’ – Nino writes: ‘I believe that some measure of retroactive justice for massive human rights violations helps protect democratic values.’ Alex Boraine pertinently asks what is meant by ‘some measure of retroactive justice’. He goes on to point out that while ‘there are those who argue that in order to protect democratic values no restorative justice should be attempted, particularly in states undergoing transition to democracy’, transition is often not possible where retribution stases the perpetrator in the face.
The measure to be paid for violating the moral consensus, suggests Jean Hampton, need not necessarily involve inflicting pain on the wrongdoer. ‘Punishment has a color’. Its purpose is not to inflict punishment, but rather to restore good order and promote the common good. Ronald Dworkin in turn speaks of ‘law beyond law’, which needs to inspire us to continually discern the ‘best route to a better future’. In essence, both suggest that the mere application of a law in all situations, whatever the circumstances, could undermine the very purpose a particular law is expected to serve. The deconstruction of law by sociologists of law and critical legal scholars in a similar (yet even more radical) manner emphasises the importance of uncovering the values implicit in law. Their concern is to ensure that the ‘good of society’ is what decides which law to affirm in a given context. To the extent that law fails to promote the common good, as was the case with racist and oppressive laws in apartheid South Africa, law itself comes under the threat of illegitimacy.

2 The Dignity of Victims and Survivors
Related to the notion of moral consensus and the affirmation of ethical values is human worth. The symbolic significance of punishment is the assertion of the dignity and the worth of victims and survivors. For society to disregard or play down the suffering of victims and survivors says something about the value attached to those members. If society fails to take some kind of action against the perpetrator, the suggestion lingers that it is not particularly concerned about the victim – dismissing him or her as a cipher to be expended in pursuit of some greater cause. What is important is to ensure that society gives the victim equal status to everyone else. This means redressing the implied imbalance of human worth between perpetrator and victim. It means stating that the victim, whatever his or her station in life, is recognised by society as someone whose dignity is worth protecting. This worth can be affirmed in various ways. It does not necessarily require the imprisonment of the victim. It does require society and the perpetrator to contribute in some way to the well-being of the victim.

3 The Moral Responsibility of Perpetrators
If retribution involves reducing the perpetrator to an equal footing with his or her victims, it also elevates the level of moral responsibility expected of the perpetrator. It insists that the perpetrators (except in cases of insanity or some related affliction) are capable of better behaviour, and requires them to take responsibility for their actions. This affirms the autonomy of the perpetrator as a potential agent of the common good. Retribution says to the
perpetrator, ‘Because we acknowledge your humanity, we demand that you take responsibility for having behaved as you did.’ On this score, retribution is not punishment in order to satisfy some basic need for revenge. It is, at its best, a means of restoring the moral order of society, which requires society constantly to ask to what extent the justice system is helping to restore that moral order. The restorative side of the justice system may well require the perpetrator to contribute to the restoration of victims and society as a whole – through, say, some form of compulsory community service or an income tax surcharge. What the South African experiment in restorative justice since 1994 shows, however, is that, unless legally-imposed, restorative measures are not likely to be either common or extensive enough to meet the demands of most victims and survivors of gross violations of human rights. Few perpetrators (or benefactors) voluntarily seek to restore the damage of the past. But restoration ultimately involves more. It seeks to persuade the perpetrator to try to recover his or her capacity for agency – even to manifest a desire to participate in restorative action. It takes responsibility for the creation of a new kind of community, one which includes former enemies. The process involved is complex, requiring a remarkable kind of political leadership that cajoles, challenges, invites and rewards participation. It should draw in citizens of differing persuasions – those who cling to the past, those who doubt, and those who are not convinced that there is more to be gained at the level of security, peace and long-term prosperity through contributing to the nation-building process rather than through undermining it.

4 A Space for Mercy and Forgiveness
The genuine non-malicious retributionist does not accept the lex talionis principle in its entirety. The essential (non-malicious) retributionist will settle for less than an eye for an eye – provided that the primary objective, which is the restoration of the moral order and the common good, is served. This may be by way of showing mercy and understanding to the perpetrator. Alternatively, pardon or the imposition of a lesser penalty may be the price that needs to be paid for peace – as a first step towards the creation of a better society.36

B. The Material Needs of Victims and Perpetrators
Empathy and understanding, even moral outrage on its own, are not enough. Commensurate action is needed, aimed at redressing the resentment and legitimate claims of victims and survivors. Few are ready to deny the moral right of victims to receive reparations; a survey of international human rights instruments37 provides a legal case for favouring reparations.
The International Covenant on Civil and Political Rights declares the right of victims to reparations. Their right to compensation is reiterated in the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the final report of the special rapporteur, Mr M. Cherif Bassiouni to the UN Economic and Social Council affirms 'the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.' In South Africa, the founding Act of the South African TRC requires reparations to be paid to victims and survivors of gross violations of human rights. The South African Constitutional Court, asked to rule on the constitutionality of the amnesty process, held that the TRC was justified in granting amnesty on the grounds that the founding Act allows for reparations – although clearly, as suggested elsewhere in this book, there is no definitive interpretation of this ruling on the nature or form that reparations need to take.

The shape, form and extent of reparations remain a matter of concern in any programme of restoration. The recommendations of the TRC are extensive in this regard, ranging from individual monetary payment and personal counselling to institutional reform and memorialisation. The manner in which such recommendations are responded to by government and the process of prioritising state expenditure towards this end is perhaps as important as the decisions themselves. Faced with a range of restorative challenges, victims, survivors, perpetrators, other citizens and the state are obliged to find one another, inevitably in compromise, through democratic debate and structured decision-making – relationship-building is a priority in any restorative justice programme. To resort to an earlier definition, this involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance. This is necessarily a difficult process, involving contested terrain and the need to balance competing claims. To contribute to the long-term restorative process, the debate needs to be taken beyond a focus on victims of gross violations of human rights, as outlined in the TRC legislation, to a more systematic view of victimage and its redress. Above all, it involves participation in the restorative process by victims and all South Africans, with what Amartya Sen refers to as a 'multiplicity of variables in terms of which equality can be judged'. The formula and practice of restoration with which South Africans are prepared to live can be realised only through a process of participation by South Africans themselves in facing the socio-political as well as the social-psychological realities of the nation.
C. Relationship Building

Restoration is not easy. The question is not essentially what needs to be done. It is how to foster the will to form new restorative relationships. These in turn would enable people to redress resentment, bring about economic restitution, and forge lasting political structures for a more just and equitable future. There cannot be reconciliation without development and reconstruction, and yet there cannot be the latter without the restoration of relationships, which forms the basis of political stability.

The process necessarily begins with a meeting of antagonists. Without serious debate, no relationship can be formed or maintained. And yet civil and respectful debate on how to deal with the issues that divide the nation is scarcely a hallmark of South African politics. We need to learn to speak to one another after generations of rebuke and confrontation. This requires a quality of conversation that goes beyond castigating one another as well as ignoring one another. It goes beyond talking past one another, beyond argumentative conversation and beyond repeating what has been heard a thousand times. It requires ‘new’ words, creative thinking and what some would regard as an impossible dream. It involves imagination, engaged dialogue and listening at a new level of intensity. It involves empathy and a genuine desire to understand what someone else is saying. It involves thoughtful, imaginative and heartfelt talking – carefully chosen words, designed to enable the listener to understand. It involves a quality of talk that Adam Kahane calls ‘deep conversation’. Only this kind of engaged debate and eternal vigilance will do as a basis for building a national consensus on how to address the issues that threaten and have the capacity to destroy the gains of the past decade. Only this ‘deep conversation’ can lead to the kind of united action that will take to build a lasting democracy.

In a memorable passage from his autobiography, Nelson Mandela recalls observing the court of the Thembu regent, especially the role of the regent himself, to whom his father was a counsellor.

Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among speakers, but everyone was heard: chief and subject, warrior and medicine man, shopkeeper and farmer; landlord and labourer. People spoke without interruption and meetings lasted many hours. The foundation of self-government was that all men were free to voice their opinions and were equal in their values as citizens.

I was astonished by the vehemence – and candour – with which people criticised the regent. He was not above criticism – in fact, he was often the principle target of it. But no matter how serious the charge, the regent simply
Modern democracies have neither the time nor the staying-power of the Thembu court. The very notion of democracy, whose source can be traced back to the ancient Greek agora, the place of assembly or marketplace of ideas, is undermined to the extent that differing ideas are not heard and talked through, in pursuit of a way forward – which more often than not involves a proximate or imperfect solution to a problem. Restoration is a process that can be achieved only through this kind of democracy. In deeply divided societies, it is unobtainable without it.

This notion of democracy, at its best, is the most modest and practical form of government – it is also the essence of restoration, self-reliance and nation-building. Not least in transitional societies, deeply divided by the past, it seeks tentative solutions aimed at social reconstruction, without suggesting that these are binding for all time. Such solutions need, however, to be the next logical and practical step to overcome a point of impasse, if not political collapse. The solutions are rarely ultimate and usually less than ideal. Restorative justice, like any other form of justice, is necessarily aimed at enduring peace and social harmony. It seeks to entrench democracy as the modus operandi for addressing problems that are likely to be around for some time to come.

South Africa’s Unfinished Transition

The TRC never could restore the nation. Full truth recovery, justice and reconciliation were always agenda items beyond immediate realisation. The commission was but one transitional measure designed to facilitate these ends. The related mechanisms included a new Constitution, a Bill of Rights, the integration of liberation armies and the established South African security forces, and a series of sunset clauses designed to facilitate change from the past to the future. Not least, the Land Commission was established to create a process with which to tackle the daunting task of land redistribution. The mandates of these processes suggest that the perceived need for recon-
conciliation and restoration was never fully integrated. The TRC was essentially tasked to uncover truth and to reconcile, while the Land Commission was tasked to create a mechanism for land restoration.

The TRC in turn was confronted with the classic dilemma facing all truth commissions, involving the demand for *justice and truth* on the one hand and the need for *reconciliation* on the other. While the TRC recognised the need to balance these demands, its process was primarily aimed (especially in its early stages) at truth recovery rather than reconciliation and restoration. Arguably, it was in the wake of attacks from all sides of the political spectrum, including legal action and threatened legal action, that the TRC began to grapple increasingly with issues of national reconciliation on a basis of compromise. Significant shifts included a willingness by the TRC to soften its approach to truth-seeking and justice in the interests of non-confrontation, as evidenced in its hesitant response to the refusal of former President P. W. Botha to appear before it; acceptance of the court ruling requiring it to delete its findings against former President F. W. de Klerk; and the failure to legally pursue IFP (Inkatha Freedom Party) leader Mangosuthu Buthelezi for refusing to appear a second time before the TRC.

There is also some evidence to suggest that the attempt by the ANC to stop the release of the 1998 report set the stage for further compromises by the TRC regarding its findings, with some of those responsible for the final report (2002) feeling the need to compromise its findings on the IFP in the interest of national reconciliation. As South Africans move beyond the euphoria of early transition to face the harsh realities of non-delivery at the level of poverty and other forms of non-freedom, the focus of politics (necessarily) increasingly shifts according to the nature and shape of restoration. The dialectic between reconciliation and material restoration is likely to become ever more acute in the years ahead.

Within this dialectic—there remain huge restorative challenges. These include the nature and extent of reparations to victims and survivors of apartheid. Government has repeatedly stated that all black South Africans are victims of apartheid, meaning that reparations need to reach beyond those found to be victims by the TRC. The stability of the nation depends significantly on the appeasement and loyalty of the poor and the capacity of the state to meet their most basic needs, which range from housing, health care and education to job creation and the restoration of dignity. Those defined as victims by the TRC are at the same time demanding the payment of reparations of their own. Any resolution of this tension by government can only (and will only) be partial.

Equally important is the question whether to pursue perpetrators who
were denied amnesty or alleged perpetrators who failed to apply for amnesty. Other essays in the book address these concerns. Suffice it to say, the furor created around the presidential pardon of 33 prisoners, most of whom were denied amnesty by the TRC, raises several issues associated with classic restorative justice theory – not least the rehabilitation of offenders as a basis for re-entry into society. Jeremy Sarkin’s essay documents the legitimacy and constitutionality of the presidential pardon. He has further suggested that some type of amnesty or an extensive set of pardons will probably be granted in the wake of the final report of the TRC.47 Frederik van Zyl Slabbert, in turn, argues that Mbeki’s government will sooner rather than later find a means of circumventing the amnesty terms of the TRC.48 If this happens, we shall have to face the legal implications that it raises for human rights. A further question concerns the nature and extent of restorative measures that need to be put in place to ensure that, in the words of the late Chief Justice Ismail Mahomed, victims and perpetrators “become active, full and creative members of the new order.”49 The media debate as discussed in an essay by S’iso Ngesi on the arrest of Dumisani Ncamazana, one of the 33 persons who received a presidential pardon, raises several issues concerning the need to equip prisoners to re-enter society. The fact that the charges against Ncamazana for allegedly murdering 35-year-old shopkeeper Martin Whitaker within two weeks of being pardoned by President Mbeki were later withdrawn does not distract from the legitimacy of the recognised need for restorative measures to be put in place to deal with the release of offenders, both before and after their release. Section 84(2)(j) of the 1996 Constitution allows the President to pardon or otherwise release prisoners, either conditionally or unconditionally. This clearly makes provision for post-prison supervision that was, in the case of the 33 pardons, not prescribed. The 1959 Correctional Services Act that is still operative in South Africa is totally inadequate on requiring restorative measures for convicted prisoners; while the 1998 Act, which makes more extensive allowances for such measures, is not yet operative.

In his essay, Xolela Manguqo suggests that criminal violence is of more immediate concern to South Africans than political violence.50 Antoinette Louw, in her introduction to Lukas Muntingh’s After Prison: The Case for Offender Reintegration, suggests that most attention on South Africa’s high crime rates focuses on improving policing, prosecution and conviction rates. She continues: ‘The one dimension that is seldom discussed and researched ... is the problem of repeat offending, or recidivism.’ Although conclusive figures on recidivism are hard to come by, she argues that ‘the consensus is that the vast majority of offenders in the country’s prisons have prior con-
iction.\textsuperscript{51} Muntingh in the late 1990s conservatively estimated a recidivism rate of 53 per cent.\textsuperscript{52} Suggestions are that it has since drastically increased, while the prison population from 1998 to 1999 increased by 11 per cent.\textsuperscript{53}

**Restoration and Transition**

A litmus test for a programme of restorative justice is: will it create a national will to address issues of unfinished business in a manner that, in the words of the South African Interim Constitution, transcends ‘hatred, fear, guilt and revenge’ in pursuit of \textit{ubuntu}?\textsuperscript{54} These issues range from poverty, the healing of memory, and the redress of disease and anger to a host of ‘new’ challenges including HIV/AIDS, an escalation in crime, and an economic slowdown. To cover the range, restorative justice must invoke ideals captured in, \textit{inter alia, retributive justice} (as described above), which provides an alternative to unbridled revenge; \textit{deterrent justice}, in seeking to limit atrocities in the future; \textit{compensatory justice} that seeks to involve beneficiaries of the old order to share in programmes of restitution; and \textit{rehabilitative justice} that aims to restore the dignity of victims and survivors as a well as the moral responsibility of perpetrators.

Within the broader programme of transitional justice, restorative justice involves more than jurisprudential and related legal concerns. It involves more than the promotion of certain non-retributive techniques. It also involves political process. It provides an incentive that must permeate every aspect of the nation’s agenda in order to succeed. It has to do with the creation of what former President Mandela called ‘the RDP of the soul’, as we have mentioned.\textsuperscript{55}

Political transition stretches the agenda of good governance at all levels, not least concerning the rule of law and related areas of justice. It is suggested in this essay that balancing the entrenchment of the rule of law and the need to heal a nation torn apart by past atrocities adds extra items to the restorative justice agenda, while challenging certain restorative justice answers to recurring problems of governance. In so doing, it underlines Braithwaite’s suggestion that restorative justice is a decidedly ‘immodest theory’ requiring notions that lie beyond the realm of any justice system to be drawn into the restorative justice debate.\textsuperscript{56} To the extent that transitional justice is about restoration, transformation and healing, the exploration of how its practice and emerging theory intersect with the theory and practice of restorative justice is overdue.
Notes


4 AZAPO and others v President of the Republic of South Africa and others, 1996 (8) BCLR 1015 (CC).

5 AZAPO 1996.


11 Aboobaker Ismael was a commanding officer in uMkhonto we Sizwe, the armed wing of the African National Congress. See Meiring, Piet 1999: Chronicle of the Truth Commission. Vanderbijlpark: Carpe Diem Books, 339-41.

12 Meiring 1999.


16 Survey undertaken by Dr James Gibson. See Institute for Justice and Reconciliation website at http://www.jfrg.org.za - 62 per cent of blacks, 64 of whites, 79 of coloureds and 76 of people of Asian origin indicated their preference for a country of racial diversity.


18 Among South Africans, 91 per cent of blacks, 54 of whites, 64 of coloureds and 90 of Asian origin support the payment of direct compensation to victims by government.

19 Quoted in an interview with Ingrid Uys in Millennium Magazine, May 1996.


21 Zehr, Howard 1995: Changing Lenses. Scottsdale, Penn: Herald Press, 181. For a detailed discussion on the principles of restorative justice, see also Llewellyn, Jennifer


26 In an interview cited by Wilhelm Verwoerd in the Sunday Independent, 6 December 1998.

27 Zehr 1995, 181.


29 Murphy and Hampton 1994, 130.


32 Boraine 2000.


36 See Murphy and Hampton 1994, 162.


38 General Assembly Resolution 2200 A (XXI), 16 December 1966.

39 General Assembly Resolution 40/34, 29 November 1985.


41 AZAPO 1996. In a unanimous ruling, Chief Justice Mañomodh stated that the country ‘has neither the resources nor the skills to reverse fully [the] massive wrongs’ of the past. He argued that ‘the resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly and indirectly been burdened with the heritage of the shame and the pain of our racist past.’ Of the nine justices, only Didcott provided a separate concurring judgment, giving his own reasons for supporting the findings of
The Provocations of Amnestty

the court. He questioned whether the court was in a position to conclude that it was impossible to compensate all victims of apartheid, suggesting that there is no way of assessing the cost involved. Accepting that the Act allows for 'some quid pro quo for the loss' suffered as a result of gross human rights violations, Diedericks conceded that nothing 'more definite, detailed and efficacious could feasibly have been promised at this stage.' His substantial argument was, however, that section 33(2) of the Interim Constitution allowed for amnesty for vicarious liability: It is necessary in this regard to note that section 2, 32(4) of the Interim Constitution allows that no section of the Constitution, including the postamble on amnesty, should be regarded as having less validity than any other part of the Constitution. See Interim Constitution of the Republic of South Africa (Act 200 of 1993), sections 2, 32(4), 33(2).

Zehr 1995, 181.
His manuscript, 'Shaping the Future: How Small Groups of People Can Change the World for the Better', is due for publication later this year. See also Steinberg, Shoshana and Dan Bar-On 2001: An Analysis of the Group Process in Encounters Between Jews and Palestinians Using a Typology for Discourse Classification. Be'er Sheva: Department of Behavioural Sciences, Ben-Gurion University of the Negev, in which a typology of discourse analysis is presented which ranges from ethnocentric and argumentative discourse to the dialogical moment.

Page 261.
Page 325.
AZAPO 1996.
Page 26.
Interim Constitution.
Mandela 1999.
Braithwaire 1998.