

African Wonders: Achieving Justice in South Africa

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Abstract

With the election of black president Nelson Mandela in 1994, the end of South Africa's brutish and violent apartheid arrived simultaneously with the start of a new and uncertain transitional era. This paper investigates the question, "Which type of justice is most applicable in achieving justice in post-apartheid South Africa?" I argue that a strict restorative approach that grants amnesties and tries to reconcile perpetrators with victims impedes the realization of peace and security. To truly achieve justice, a synergy between traditional Hobbesian retributive justice - which centralizes punishment - and restorative justice must be accomplished.

There is no one in the world like Madiba. He is a sign of God.¹

Eighteen years after the end of apartheid and the election of a former state terrorist as president, South Africans talk about their nation with words of hope, despair, pride, disappointment, and amazement. Charged with a hurtful and heavy history, South Africa was confronted with the enormous task of creating a new democratic state. This moment implied the end of an era of institutionalized hatred, discrimination and racism, systematic inequality, injustice, and marginalization; it marked the end of ingrained, alienating perceptions of the world, the other, and the self. But at the

¹ Words of Zulu Taxi driver Lucky in Johannesburg

same time, it was the starting point of a new era in which the state and its people had to re-identify themselves, the other, their nation, and their beliefs.

This two-sided character of South Africa's transitional period, which the country has been going through since 1994, became a clear and visible reality when I was living in the Western Cape. I realized, at both personal and academic levels, that the issues of the past were a daily challenge for people today. The notion that seemed to be at the center of all concerns (and at the center of confusion) was justice. Atrocities committed by the state that had once been legally justified became labeled as crimes against humanity. Unjust laws against blacks were replaced by so-called empowerment laws and affirmative action policies. So-called perpetrators immediately received amnesty, while victims are still waiting for a house to sleep in. "What is the meaning of justice?" is an open question left unanswered for many. All that is clear is that the excessive, extraordinary, and systematic violence that typifies South Africa's apartheid history demands that the new "Rainbow Nation" effectively deals with its past in order to achieve justice and to provide a peaceful and stable future.

In this paper, I will consider the question: Which approach is most applicable to post-apartheid South Africa in order to achieve justice? There are two perspectives that deal with South Africa's past in seemingly opposite ways. First, it might be desirable to harshly punish the people who committed the worst imaginable offenses in order to condemn the atrocities, to re-establish the rule of law, and to bring accountability back into society. On the other hand, it can be advantageous to transform the idea of accountability from being a legal term that justifies incarceration to one that emphasizes reconciliation; in the case of South Africa, by allowing perpetrators that confess directly to the victim and provide full disclosure with the guarantee of not being punished for it. In this type of justice, truth must be the prevailing and magical word.

In order to answer my primary research question, this paper will explore the issue of justice in relation to post-apartheid South Africa. I will further explicate these two types of justice, retributive and restorative justice, as they are described and promoted by Thomas Hobbes and Desmond Tutu, respectively. I shall analyze the applicability of these perspectives to South African society on the basis of their concept of man, their conception of victims and perpetrators, and their perception of the individual and the community that frames definitions of justice. I argue that the applicability of justice is challenged by a lot of underlying questions, which complicate a useful implementation of the types of justice. I will then consider the situation in South Africa to determine the impacts of these conceptual perspectives for achieving justice in post-apartheid South Africa. I argue that, due to the transitional period that South Africa is going through, restorative justice might seem the most sufficient type of justice. However, this approach in itself will have a counterproductive effect and might be doomed to destroy a peaceful and stable future. Additionally, in order to give voice to the diverse people of South Africa, sections will be introduced by quotes from various people from different regions, tribes, and races of South Africa.

Restorative Justice

*South Africans are the best Africans you can find on the continent. They are the most forgiving, and if you want to know why, it is because of Madiba.*²

Restorative justice originally emerged as a reaction to classic models of criminal justice. The main characteristic of this perspective is that it focuses on the future instead of harshly centering the past. Lawyer Menkel-Meadow (2007) states that “in the most idealized form, there are four R’s of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other

² Xhosa Taxi driver in Cape Town

and to their shared community” (p. 102). This implies that the acts of punishment, revenge, or penance become useless unless they serve to constitute one of the R’s. Other acts might be more sufficient in realizing this goal, such as apologies, restitution, and acknowledgements of harm and injury (Menkel-Meadow, 2007). Instead of the incarceration of the perpetrator, face-to-face meetings between victims and perpetrators are a common tool in creating understanding which may lead to positive outcomes such as reconciliation (Allais, 2012).

Archbishop Desmond Mpilo Tutu’s view of restorative justice may be used as a guideline for understanding the aims, conceptions, and limitations of this perspective in relation to South Africa. Tutu, who was the chairman of the South African Truth and Reconciliation Commission, is a strong advocate of restorative justice. He argues that the opposing retributive justice, which emphasizes a punitive chief goal, lacks consideration for the real victims and perpetrators of human rights abuse. What is most important for achieving justice, according to Tutu (1999), is the “healing of breaches, the redressing of imbalances, the restoration of broken relationships and the seeking to rehabilitate both the victim and the perpetrator” (p. 55). The three central aims of restorative justice are healing, forgiveness and reconciliation (Tutu, 1999).

Truth and Reconciliation Commission (TRC)

*We a rainbow nation? It is going to be hard.
The solution to South Africa’s unity in diversity is if everyone called
themselves Africans or South Africans, no matter what color of your skin.³*

The tool for restorative justice in South Africa was the Truth and Reconciliation Commission (TRC), according to Tutu (1999). The commission’s goal was “the pursuit of national unity, the well-being

³ Frans, an Afrikaner from Johannesburg.

of all South African citizens and peace which requires reconciliation between the people of South Africa and the reconstruction of society” (Tutu, 1999, p. 45). The broad notion of reconciliation, which can take various forms, is specified by the commission with the words “peaceful co-existence” (Tutu, 1999, p. 45). Tutu (1999) uses a religious connotation of reconciliation, which connects reconciliation to forgiveness, which means that reconciliation from this perspective is about more than mere tolerance; it comes closer to a warm-hearted embrace of others (Gibson, 2004). The Commission’s duties entailed the granting of amnesty to perpetrators who applied for it and met the conditions that the act was politically motivated and the perpetrator made full disclosure of the offense. The means also needed to be proportional to the objective, and the atrocity in question had to be committed during the period 1960-1994 (Gibson, 2004). Eventually the Commission held hundreds of hearings, interviewed thousands of victims of apartheid, granted amnesty to nearly a thousand human rights violators, and produced a massive five-volume “Final Report” in which the historic record of South Africa’s past was officially established (Gibson, 2004).

The “truth” in the TRC can be defined as acknowledgement; the objective of such truth commissions is to “establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a period of history” (Hayner, 2002, p. 28). The silence that surrounded crimes for years can be ended “by official and public recognition of past abuses” (Hayner, 2002, p. 25). This means that truth in this sense does not imply the finding of new facts, but rather the move from a state of denial of unspoken facts to the acknowledgement of spoken truths. Truth is not a shift from ignorance to knowledge, but from denial to recognition. The way in which retributive justice attributes to or brings about healing, forgiveness, and reconciliation is related to truth as acknowledgement. Letting victims tell their stories in their own words and receive all information about the death of their loved ones results in the “truth of wounded memories,” which is a “healing truth” (Tutu, 1999, p. 26).

For this reason, restorative justice is embodied in the TRC because it aims to promote healing, forgiveness, and reconciliation.

Victim and Perpetrator

Restorative justice is based on the assumption that a distinction can be made between a victim and a perpetrator. The TRC “recognized those who were victims of gross human rights abuses (that is, victims of politically motivated physical violence), while perpetrators were those who recognized themselves as such and came forward willingly (Van der Merwe and Lamb, 2009). The “carrot,” or benefit of coming forward, was the possible granting of amnesty; the “stick,” or enforcement mechanism, was the possible prosecution when you did not come forward. Tutu recognizes some of the difficulties related to drawing such a clear distinction, including areas of neglect in the official definition. He argues that without exaggeration, “every person who was not white was to some extent a victim” and agrees that South Africa can be called a “nation of victims,” thereby also adding the supporters of apartheid to the category of victims (Van der Merwe and Lamb, 2009, p. 103). In this sense, every South African can be called a victim. The reason for this is connected to the notion of Ubuntu, which is explained further below. The status of perpetrator cannot be ascribed to all South Africans and can, in the eyes of Tutu, not even be attributed to one South African. He argues that a differentiation has to be made between the wrongdoing and the wrongdoer. In order for them to be held responsible and to allocate accountability, they must never be considered as demons, monsters, or evil beings, but rather as moral agents who committed unbearable acts (Van der Merwe and Lamb, 2009, p. 83).

The TRC, which aimed at reconstructing society and promoting reconciliation, was supposed to be victim-centered. The truth based on acknowledgements serves victims first of all. Telling the truth and creating public awareness of suffering can provide a healing effect for victims (Hayner, 2002).

Additionally, the victims are served by the creation of a reparations program with a list of beneficiaries, as well as the official establishment their loved ones' legal statuses as a result of the revealed truth (Tutu, 1999). Tutu (1999) states:

Our nation sought to rehabilitate and affirm the dignity and personhood of those who for so long had been silenced, had been turned into anonymous, marginalized ones. They would remember and in remembering would be acknowledged to be persons with an inalienable personhood (p. 29).

These promising words imply a magical power of truth, which is thought to be able to set individuals, communities, and the nation free. When truth starts healing a broken heart, space is opened up to forgive the other and to close the door to the past; not to forget, "but to allow it not to imprison us" (Singh et al., 2004). When the souls of individual and communities are healed, the restorative justice perspective claims that the nation can start being restored, rebuilt, and rehabilitated.

Individual and Community

The concept of Ubuntu must be explained in order to understand why Tutu believes a perpetrator is also a victim, why reconciliation is a necessary ambition, and why forgiveness is possible. Ubuntu can be seen as an African weltanschauung that "speaks of the very essence of being human" (Singh et al., 2004). It means that "a person is a person through other persons" because we all belong in the same "bundle of life" in which we participate, share, and become human (Singh et al., 2004). This implies that a person cannot be seen as an external, autonomous individual but must be considered an inherent part of the community; these community ties allow an individual to acquire their humanity. For this reason, the well-being of the community becomes the *Summum Bonum*, or the supreme good, and the well-being of the individual must be seen according to its place in society. The guilt, shame, pain, anger, or grief of one person is the grief, anger, pain, shame, or guilt of the community.

Ubuntu explains why a perpetrator and a victim are one and the same. Because one's humanity is inextricably bound up with others, that which humiliates or diminishes the victim will inevitably alienate the personhood of the perpetrator at the same time. In this sense, the perpetrator becomes a victim by the victimization of the other; "a law-breaking individual thus transforms his or her group into a lawbreaking group," since each member of the community is linked to each other, be they victims or perpetrators (Murithi, 2006, p. 29). Next to this, Ubuntu makes forgiveness a reachable goal. Tutu (1999) states that "to forgive is not to be altruistic; it is the best form of self-interest" (p. 31). Whereas granting forgiveness might be seen as an unrealistic ideal of inhumane emotions that go against the natural self-centered human drives, Tutu argues the opposite. Since repressing the other oppresses you and the unendurable guilt of the other is your unbearable guilt, forgiving the other may set both souls free. From this perspective, caring for the other is always in your own interest and is not an exclusive blessing for the altruistic spiritual people.

Lastly, Ubuntu shows the importance of the endeavor to achieve reconciliation. Because of Ubuntu, social harmony is a great good; the communal life and the maintenance of positive relationships within society is a collective task in which everyone is involved. For this reason, the identity of a person is connected to the identity of the others and the identity of the group is established by the identity of the individuals (Murithi, 2006, p. 29). The disturbance of the relationship between the victim, perpetrator, and the community is one in which everyone shares responsibility. In order for all individuals to rehabilitate their human dignity and humanity, the social harmony is of great significance. Reconciliation, for that reason, is not a luxury ascribed to some ideal, utopian community, but is an essential characteristic for all communities in order to acknowledge humanity and include all individuals.

Retributive Justice

*It is not nice to kill someone when they are still alive, but these people do bad things and need to be told they will die.*⁴

Retributive justice, which is considered to be opposite to restorative justice, is defined by the Cambridge Dictionary of Philosophy as concerning “when and why punishment is justified” (Audi, 1999, p. 456). According to this definition, the core of retributive justice is the use of punishment. The justification can differ widely; a retributive justification sees punishment as an intrinsic good regarding the moral desert of the offender and does not need to achieve another consequence in order for the punishment to be just. Hobbes (1996) centralizes the use of punishment in his conception of justice, and a just punishment needs to achieve future deterrence. He argues:

A punishment is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience (p. 205).

Punishment therefore needs to be used when someone disobeys the law in order to secure the respect and conformation of the society to prevent future criminal acts. Justice in this sense is about the establishment of blame, the past, and the imposition of pain to punish and deter crime.

Punishment is further explicated by Hobbes (1996), who states that “neither private revenges nor injuries of private men can be called punishment, since they don’t proceed from public authority (p. 205). He distinguishes five just forms of punishment. First, a corporal punishment which ranges from inflicting wounds to causing the perpetrator’s death. Second, the deprivation of money, land, or other goods, which is called a pecuniary punishment. Third, the punishment of ignominy, which entails the

⁴ Chicao, a Zulu inhabitant of Soweto, talking about burglars who break into houses and need to be killed in order to deter future crime.

forced dispossession of honorable titles, offices, or badges. Fourth, the denial of liberty by imprisonment. Fifth, the banishment or exile of an offender (Hobbes, 1996). These punishments all serve the end of “encouraging men to serve the commonwealth or deterring them to doing disservice to the same” (Hobbes, 1996, p. 220). For this reason, punishment does not aim at taking revenge but at correction of the involved perpetrator or the society by his example. Crimes that have a direct and immense impact on the public can therefore be seen as the severest crimes that deserve the severest punishments.

Individual and Community

Punishment from a retributive perspective seems to be about the individual who will be prosecuted and punished for his offenses, but the impact on the community must also be considered. How Hobbes views the relationship between the individual and the community is closely related to his theory of the State of Nature and the Commonwealth. Whereas Tutu’s consideration of human nature is aligned with the notion of Ubuntu, Hobbes sees the essential characteristic of human beings related to self-preservation. The individual is concerned with “attaining whatever he holds to be his or her personal and individual good” (Hobbes, 1996, p. 84). When individuals are to act unconstrained, their essence becomes clearly visible; they are “competitive, acquisitive, possessive, restless, individualistic, self-concerned, and insatiable in our demands for whatever we see in isolation as our own good” (Gaskin, 1996, p. xx). From this perspective, individuals are foremost concerned with their own survival and occupied with achieving goals in their own self-interest.

The condition in which the individual, his essence, and his relationship towards the other becomes evident in what Hobbes calls the State of Nature. This situation where “men live without a common power to keep them all in awe” and society can devolve into a war of “every man against every

man,” and can therefore be called State of War (Hobbes, 1996, p. 84). In this context, his famous quote is powerful: “the life of man is solitary, poor, nasty, and brutish and short” (Hobbes, 1996, p. 84). If the human essence was to reign freely, the need for pursuing personal goals would clash with that of the other. The fear of death would inevitably lead to conflict, destruction, and total chaos. Therefore, a political force is needed to create a community in which the individual wills are guided by that of the sovereign. For that reason, Hobbes argues that to ensure peace and stability all people should (and should want to) surrender themselves to an authority.

Hobbes’ conception of a community can be seen as the situation in which the people agree with a common power set up to enforce the rules of the society: the Commonwealth. In other words: It is the situation in which individuals give up the right “to do whatever he or she wants at any given moment to a sovereign power in a civil society” (Gaskin, 1996, p. xx). In order to be liberated from fear, the plurality of individual wills is reduced to one clear voice which envisions attaining common peace and safety. When the people agree to be protected and thereby be absolutely governed by this power, they give their consent to the covenant that requires the individual judgments, opinions, and endeavors to be turned into one collective, externally determined will. The human nature that strives to secure self-preservation struggles in the State of Nature where all individuals act as wolves towards each other. The individuality of the people gets lost in the community where self-preservation is arranged by a sovereign power that embodies safety and stability.

Victim and perpetrator

In the State of Nature, all individuals can be seen as victims and perpetrators. Everyone is able to fight and kill the other in order to survive, and is therefore in danger of suffering the same fate. In the Commonwealth, where all people are governed by the sovereign who is the lawmaker and whose laws

need to be obeyed, Hobbes gives a new description of who is a victim and who a perpetrator. He states that justice and injustice are “qualities that relate to men in society, not in solitude” (Hobbes, 1996, p. 85). In the State of Nature, good and evil are a matter of individual. In society, however, justice is a result of the civil law, which is a product of the sovereign rule. Therefore, “where there is no common power, there is no law” (Hobbes, 1996, p. 85). When someone disobeys the law, the state considers him a perpetrator and will punish him because “punishment is a known consequence of the violations of the laws in every commonwealth” (Hobbes, 1996, p. 208). A perpetrator according to Hobbes, therefore, is someone who deliberately decides to violate the law and thereby commits a crime against the state.

When individuals in a society decide not to speak according to their communal voice, but rather to act on behalf of the decision they regard as the best, they are seen as rebels. Hobbes believes that the result of such behavior is “anarchy and civil war” (Audi, 1999, p. 389). When people choose to behave as individuals and deny the sovereign power, they are seen as enemies of the state. They must therefore surrender themselves to whatever punishment the authority considers sufficient. The authority itself can never commit a crime since “the representative of the commonwealth is not punishable for he is the one to punish” (Audi, 1999, p. 207). Because only injustice can properly be punished and the sovereign cannot be punished, a political leader cannot commit unjust acts. It firstly becomes clear that, in Hobbes’ theory, the perpetrators are the ones disobeying the law. Secondly, the victim is not the individual who is disadvantaged by committed crimes, but rather it is the state against whom the offender rebelled. Thirdly, the state itself can never be the perpetrator.

The case of South Africa

Everything changed in 1994; crime rates went down because of neglacing.⁵

This section looks in-depth at the situation in South Africa to consider whether Tutu's form of restorative justice or Hobbes' form of retributive justice is more applicable to this case study. After considering South Africa's unique history, I argue that the TRC's restorative approach possesses retributive elements, and is therefore not a polar opposite of the retributive justice approach. From that starting point, I will consider how Hobbes' theory can be applied to South Africa. Lastly, I will outline the limitations, challenges, and advantages of the different philosophical perspectives for achieving justice in post-apartheid South Africa.

Post-apartheid South Africa is a divided country going through a transitional period marred by a history of excessive violence, hurt, and injustice. The interim government had to promise the old apartheid authorities amnesty for their committed atrocities in order to secure a peace agreement (Simcock, 2011). Ultimately 7,000 amnesty applications were made, the jails were full of freedom fighters or former state rebels, and the judiciary system was apartheid-biased (Graybill & Lanegran, 2004). Today, South Africa faces a "crisis of crime" (Altbeker, 2007). It can be argued that South Africa's crime problems need to be considered in discussions of justice because these problems are unique in their volume and levels of extraordinary violence. Murder rates are exceptionally high (50 people are killed every day, or 19,000 people a year) and so are armed robbery and rape rates. It has been said that South Africa has an "unhealthy addiction to violence" (Altbeker, 2007, p. 48). Security specialist Altbeker (2007) mentions apartheid, poverty, inequality, drug problems, and immigrants as causes of this.

⁵ Chico talks about the common township punishment of putting a tire around someone's neck and setting it on fire.

However, he notes that these explanations cannot clarify the visible South African “violent energy” and its “criminal culture” (Altbeker, 2007, p. 57).

Altbeker (2007) argues that South Africa’s mindset towards violence and crime is close to toleration, legitimization, and even acceptance. Violence is therefore a cultural phenomenon, from this perspective. The behavior of institutions and people that surrounds us shapes our values and moral awareness, Altbeker (2007) writes (p. 160). The values of citizens become shaped by these experiences with crime and violence. South Africa’s crisis of crime may result in a normalized standard of violence, and perhaps cultural values that encourage a violent mindset; Ariely (2012) uses the term “herding” to describe this mindset. He argues that morality can be formed by “believing something is good or bad on the basis of the behavior of others” (Ariely, 2012, p. 36). Those who become so familiarized with violence around them may experience changes in their moral values as a result.

TRC as a retributive approach

With the establishment of the TRC and their Committee on Reparations and Rehabilitation (CRR), it appeared that a restorative approach was favored in post-apartheid South Africa. The CRR stated that “without adequate reparation and rehabilitation measures, there can be no healing or reconciliation” and the TRC aimed at realizing national unity and reconciliation (Colvin, 2008, p. 193). The central foci were not past atrocities, punishment, future deterrence, or the transgression and obedience of the law, but rather the emphasis was on the future – including the well-being of the victims, the healing process, and the reunification of communities. That said, I argue that the applied transitional justice approach does not primarily have to be seen as opposed to a retributive form of justice. Features that portray retributive justice are visible in the restorative approach, such as: the involvement of punishment, the perpetrator orientation, and the influential and substantial role of the

state. First, with the granting of amnesties and the actions of the TRC, justice was not about incarceration or another form of punishment that Hobbes mentions, but it did involve a form of sanctioning. Perpetrators executing community service, being confronted with their victim, or confessing in front of millions of people and being publicly shamed can be seen as harsh and impressive forms of punishment. (Note that Hobbes would argue that this form of punishment is not just, since it is not a sanction decided by the public authority but rather by individuals who have decisive and authoritative conceptions of good and bad.)

It can be argued that the supposedly victim-centered TRC focused more on the perpetrator and the state, and that the victim was somewhat peripheral to the process. This is because perpetrators were granted amnesty immediately, while victims had to wait years for reparations, may have felt pressured to forgive, and therefore experienced a lack of recognition. The TRC might have also been more about legitimizing the state itself than healing the community. White communities were not interested in the TRC as much as black communities, and those most responsible did not engage in the process. The state, however, needed amnesties for there to be peace and free elections. For these reasons, the TRC and Tutu's restorative justice approach contains some characteristics that fit into a retributive paradigm.

Victim and perpetrator

The question who is a victim and who is a perpetrator in South Africa is a complicated matter, in Hobbes' eyes, since his theory needs to be applied to a lively reality. His theory of retributive justice is embedded in his theory of the Commonwealth, which can be seen as a worthy utopian ideal that might not be reachable in society. The new democracy of South Africa cannot be seen as Hobbes' ideal Commonwealth, since the government is democratic and the Leviathan is an absolute authority. Second,

not all individuals surrendered themselves willingly to the sovereign in order to be protected and safe, since many white people felt endangered by the new regime and felt safeguarded by the old apartheid state. In order to consider the applicability of retributive justice in South Africa, we must determine its pros and cons for achieving justice as if this society did meet the conditions of the Commonwealth. By disregarding the fact that South Africa is not the utopia, the influence and consequences of retributive justice can be assessed. For this task, the post-apartheid state is the legitimate Commonwealth, where all individuals have consented to the public authority, which aims at providing peace and safety for all.

Against retributive justice and for restorative justice

In this section, arguments are presented against the retributive justice perspective and for the use of restorative justice. First of all, the apartheid atrocities cannot be seen as crimes and there can be no legal prosecution of the murderers of the repressive regime. Hobbes states that “no law made after a fact done can make it a crime” (Colvin, 2008, p. 195), which implies that the new regime can never hold the old regime responsible for their atrocities; those acts were legal according at the time and cannot become illegal afterwards with the introduction of new laws. For this reason, and because of the circumstances of the transitional period, a form of justice that includes amnesty might be desirable.

Regardless of this important constraint, there are more reasons why retributive justice would be unable to achieve justice in Post-apartheid South Africa and why restorative justice would be. One argument against retributive justice in the post-apartheid period is closely related to the “justice versus peace” debate. The threat of prosecutions might impede the process of ending a violent conflict and completing peace negotiations. The assurance that the state employees or security forces that committed violations of human rights will not legally be held accountable might be the only condition by which they will surrender and agree to a peaceful transition, which was the case in South Africa.

Choosing not to impose harsh treatment was the only way to get the truth out and to condemn the wrongdoing (Allais, 2012). With the threat of prosecutions, there would not have been peace and the truth would not have been told. Furthermore, the punishment and incarceration of perpetrators would have been a difficult achievement.

The status of the criminal justice system in post-apartheid South Africa also impeded its applicability. First, the judiciary system had a bad reputation in the black communities due to its cruel implementation and it was, therefore, not the right tool for creating trust in the state and convincing people of the rightfulness of the laws (Tutu, 1999). When a judicial system is untrustworthy, the public might call for institutional reform instead of the execution of its current regulations. Next to this, the state did not have the resources to deal with all the perpetrators sufficiently, since they were numerous, prosecution was too expensive, and there was a lack of evidence (Tutu, 1999). It is hard to establish strong legal cases with enough proof when the state is a major perpetrator who will hide or destroy all evidence. Lastly, the judiciary system could have been counterproductive in achieving justice since the truth in court can be traumatizing for the victim, since it victimizes the victim for a second time. This victimization process may be seen as unjust in itself (Tutu, 1999).

Against restorative justice and for retributive justice

There are, however, also some counterarguments that favor a retributive approach in achieving justice in South Africa. First, it can be argued that it is ethically intolerable to let the perpetrator choose his destiny. Within the TRC, an offender can choose whether he would like to be granted amnesty, which goes against an intuitive sense of morality. Hobbes states that an offender needs to be subjected to the punishment that the authority designed for him, which seems more just than providing a perpetrator a right to deciding his own future. Second, while a courtroom might victimize a victim twice,

the same can be said about granting amnesty. When the murderer of your child goes free, you feel unacknowledged in your hurt and pain may be intensified. Third, an amnesty might be favorable in the circumstance of a political transition, but it is not “a feature of a workable criminal justice system,” since the obedience to the law then appears to be trivial and unnecessary (Allais, 2012, p. 338). Crime-ridden South Africa needs to have a strong, harsh, and clear punitive judiciary system that contributes to the change of mindset and moral rejection of violence.

A big challenge related to the restorative approach has to do with its victim-perpetrator conception. When restorative justice tries to achieve the goal of rehabilitating relationships between victims and perpetrators, it has to assume that a clear differentiation between the two categories can be made. This might be a false assumption for several reasons, which might contradict and even counteract its aim of being victim-centered and perpetrator-sensitive. There is a clear inconsistency in Tutu’s approach, where he acknowledges the difficulty in identifying victims and distinguishing them from perpetrators, but at the same time supports and promotes the TRC and their methods. The TRC “recognized only those who were victims of gross human rights abuses (that is, victims of politically motivated physical violence)” as victims (Van der Merwe & Lamb, 2009, p. 22). The first difficulty with this definition is mentioned by Tutu himself; because of Ubuntu and the interconnectedness of people, the victims would be centered in the process and the entire nation would be recognized as victims. The belief that identification is possible using specific criteria is opposed to Tutu’s statement that all South African citizens are victims and that a clear differentiation between victim and perpetrator is impossible.

Next to this incongruity, there are more complexities related to the TRC’s differentiation of victims. Their differentiation clearly excludes a lot of suffering people, even without the notion of Ubuntu. Black people who formed their identity around the conviction of them being inferior, marginalized, excluded, and worthless may themselves (and their next generations) suffer from this

negative self-image. This structural victimization, which might disadvantage a large part of the population for centuries, is not officially recognized by the state. While the TRC aims at freeing victims from their unacknowledged harm, it further intensifies a lack of recognition when only a specific type of victim can justly call themselves victims. With a clear definition of victims, the TRC may victimize some people who are unable to be categorized as victims but nonetheless bear the scars of the apartheid era. When inner healing and forgiveness are seen as necessary conditions for reconciliation, strict definitions of victimhood may impede that process. It can also easily be forgotten that a person who committed gross human rights abuses could be a victim at the same time. A perpetrator can become a victim during a conflict, since a lot of injustice can be done to combatants (including rapes and unjust war council decisions) (Theidon, 2007), and even after a conflict an ex-combatant can be traumatized for life and unable to forgive himself. A perpetrator can become a victim when communities refuse to let former combatants reintegrate into society (Theidon, 2007). Lastly, trials and truth commissions can turn the perpetrators into victims of stigmatization, especially if the process is politically or racially biased (Van der Merwe & Lamb, 2009). While the TRC aims at promoting reconciliation between victims and perpetrators, the differentiation between the two might impede this process. Perpetrators may dissociate themselves from a reconciliation process when they feel that their characterization does not do justice to their personal circumstances. A further division was created by the reparation program. Victims can experience a lack of recognition by the hierarchy stemming from the Urgent Interim Reparations, which may result in the delay of payments and demobilization grants for ex-combatants being higher than the reparations grants (Van der Merwe & Lamb, 2009).

The restorative approach can also be challenged because of complication related to conceptualizing the truth. There are three intrinsic complications in its conception of truth: multiplicity (the multiple types of truth such as narrative, historical, social, etc.), subjectivity (which information will or will not be included), and mutual incompatibility (clashing perceptions) (Daly, 2008). This explains

why a historic record can hardly ever be completely objective and why not all parties to the conflict will agree with it. The different parties might have incompatible perceptions of the past, or they may consider important information to be left out of the report. Truth defined as acknowledgement becomes problematic in this light. Furthermore, it is questionable whether truth is healing and wounded memories of victims can be rehabilitated. What about the haunting memory of the perpetrator? It might be the case that a perpetrator is forgiven by the community, but that he is unable to forgive himself. Maybe guilt, shame, and self-hatred can better be resolved by penitence than by solely confessing atrocities.

Individual and community

Tutu's and Hobbes' conceptions of justice are strongly determined by their perceptions of the human nature. Tutu believes in the notion of Ubuntu, which highlights the good in all people, the desire to belong in good relationships, and the interconnection of the well-being of everyone. For this reason, reconciliation and healing are goods that are worthy and necessary, since the comfort, welfare, and happiness of the community is dependent on these actions. Lack of reconciliation leads to the denial of human essence for individuals in the community. This implies that the atrocities committed during apartheid have to be explained by ingrained discriminative thoughts, indoctrination of false beliefs, and other external causes that allowed a good person to hurt another. In this light, the bad nature of people is completely ignored, which may lead to the overlooking of another essential human characteristic.

Against restorative justice

Violent crime is a part of South African society, and this issue cannot be overlooked. This problem shows another essential part of human beings that is highlighted by Hobbes (1996). Next to

being compassionate, people are also competitive, possessive, individualistic, and self-concerned. Human beings' natural urge is self-preservation and, under certain circumstances, some are more than willing to turn to violence. The atrocities committed during apartheid might also be an effect of this aspect of human nature, as highlighted by Hobbes (1996). For this reason, security and peace might indeed be the *Summum Bonum* (supreme good) and the first and most essential need for people wanting protection from harm. The true aim of justice should, therefore, be first and foremost about providing peace and not necessarily about creating reconciliation and restored relationships. Reconciliation might not be desirable per se, since it represents much more than the basic need for protection.

Besides reconciliation not being a necessary condition for the achievement of justice, reconciliation might even counteract justice in some ways. The demand for reconciliation can pressure individuals to deny their own identity. First, a victim whose identity is bound up with loss may feel like they are denying a part of themselves by forgiving perpetrators. Even though clinging to the past might create an unhealthy self image, pushing someone to move forward might intensify negative emotions regarding others. Second, even if Ubuntu is indeed an essential human characteristic, there might be a boundary which challenges reconciliation and causes it to be counterproductive. Ubuntu might be more influential in the lives of South Africa's black communities, for instance, than in its white communities. White South Africans who descend from European ancestors might have a more Western and individualistic mindset than black South Africans. For this reason, the African worldview of interconnected beings might be less significant in the formation of the identity than Tutu (1999) makes us believe.

I would also like to argue that Ubuntu is restricted to separate communities, but not to the entire bundle of life and the nation as a whole. The Xhosa community, for example, differentiates itself

from the Zulu community and English South Africans do not like to be taken for Afrikaners. This resonates with Sartre's idea that identities are formed by the negation of what they are not (Niekerk, 2012). Bridging disturbed relationships, uniting all communities, and creating mutual trust might be too demanding for South African citizens. In fact, it can even go against human nature, which confirms itself by rejecting and differentiating itself from the other. For this reason, peace and security might be desirable, but an aim for a deeper form of reconciliation might intensify tensions between people since it goes against the natural affirmation of the self.

Against retributive justice

Even though Ubuntu overlooks the human desire for self-preservation, it should not be assumed that Hobbes' (1996) view of humanity is the best or most applicable in achieving justice. While people strive to be safe, the Hobbes' (1996) perspective can also be used with negative consequences, such as the rationalization of harmful dictatorships. His view may imply that citizens have to subjugate themselves to oppressive regimes even if they believe they are illegitimate. From this perspective, Hobbes' (1996) theory could be used to legitimize South Africa's apartheid state. In fact, the horrendous apartheid policies were sometimes defended as a way to protect the people against a communist threat. The world was aware that the apartheid state did not provide safety and peace for all its citizens, but instead was deliberately removing or oppressing large groups of people in society for the sake of upholding their own power and privileges. However, it could be claimed as a just regime according to one interpretation of Hobbes' (1996) theoretical perspective.

Furthermore, struggles for freedom and democracy during South Africa's apartheid illustrated that there is more to being human than being safe, secure, and protected. A lot of people put their lives on the line by fighting to end the subordination of non-whites. When people are structurally and

institutionally humiliated for centuries, there is a human urge and need for acknowledgement that can become stronger than the wish for self-preservation. Philosopher Camus (2010) said that “protesting is saying yes to yourself and your inner dignity and worth and saying no to the other who is repressive and denying your dignity” (p. 15). The recognition of a person can make the goods of freedom, dignity, and economic justice and equality more important than the value of preserving one’s life. For this reason, it is important to note that the human being is a competitive, self-interested being, but that the acknowledgement of these characteristics alone is not enough to safeguard a peaceful society. A person’s human dignity needs to be acknowledged for there to be a stable and nonviolent Commonwealth.

Conclusion

*There is no racism here. Segregation is a result of cultural differences.*⁶

With the peaceful election and of the first black, democratically elected president, the world talked about the wonder of post-apartheid South Africa. The country did not turn to talk of civil war, but rather spoke in words of hope, truth, reconciliation, and forgiveness. What could have been a bloodbath became a new start for the shattered country, with an opportunity to become a shining and proud “rainbow nation”. The TRC, which is internationally regarded as a successful and exceptional tool in implementing a restorative form of justice, was established in order to rebuild South Africa. It did, however, imply the release of prisoners and the granting of amnesty for cold-blooded murderers, which is seen by some as countering justice. It is arguable how far this tool was truly restorative and whether it was a better approach than a retributive one.

⁶ Pete, an Afrikaner living in Stellenbosch.

In this paper, I considered the question: Which type of justice is most applicable to post-apartheid South Africa? I first noted that restorative justice focuses on the future, the needs of victims, and the promotion of healing, forgiveness, and reconciliation. The truth, which is about rendering acknowledgement, is the magical process that helps victims letting go of the haunting powers of the past and is meant to establish an official public record. The man most aligned with restorative justice is Tutu (1999), who is strongly influenced by the notion of Ubuntu, which implies that everyone belongs in the same bundle of life and becomes human through other people. The good in people is emphasized by this approach, which is due to the interconnection of all individuals in a community.

Retributive justice, as defined by Hobbes (1996), centralizes punishment for individuals who willingly disobeys the laws of the Commonwealth. The Commonwealth is the society in which all individuals surrender their personal will and preferences to the rule of the sovereign. People choose to live a protected life, since their human nature drives them to pursue individualistic goals that may clash with others and result in conflict, fear, and a brutal death. In the Commonwealth, individuals ought to obey the law that is designed by the authority or they consent to being punished. The offenses are not made against a certain victim, but always against the state by impeding its authority. Punishment, therefore, needs to reestablish the rule of law and obedience to it.

The TRC that was established in South Africa was characterized by the ideals of South Africa's transitional period; the country suffers from the excessive use and acceptance of violence, while the reconciliation approach is framed convincingly as being restorative. It is debatable whether some characteristics of retributive justice can be ascribed to the TRC. The public and full disclosure of crimes can be seen as a form of punishment, the centering of the victim is challenged by the granting of amnesty and the lack of reparations, and the focus on communities is controversial. The TRC, therefore, does not necessarily have to be regarded as opposed to a retributive form of justice.

When the concepts of victim and perpetrator are regarded in relation to South Africa, there are limitations to both approaches. The granting of amnesties, which is an inherent part of the restorative definition of justice (Tutu, 1999), goes against the moral conception of justice since perpetrators can choose their own destiny and the feelings of the victims are disregarded. Next to this, it does not contribute to the dissolution of crime in South Africa. Severe punishment and incarceration of apartheid perpetrators is challenged as well, since punishment was lawfully illegal according to the norms of retributive justice. Many present-day crimes were legalized by the law at that time, and past acts cannot become a transgression of law when the law changes. Furthermore, the retributive approach would have impeded peace and security, with which it is primarily concerned, since the threat of prosecution would have thwarted the incentive for peace agreements. Lastly, a retributive approach was challenged by the status of the legal system in post-apartheid South Africa and its transitional circumstances. Strong judiciary cases were impossible since evidence was being hidden, there were too many cases, and it would have cost precious money.

The TRC, which seems like a more favorable approach because it circumvents the threat of prosecutions, cannot completely live up to its promises of healing, forgiveness, and reconciliation in all cases. A major challenge is its clear differentiation between victims and perpetrators. It is controversial because it contradicts Tutu's (1999) belief that all people can be regarded as victims. This separation impedes national unity because perpetrators can become alienated from the process of reconciliation because of their stigmatization and the disregard of their possible victimhood. Because victims can be excluded from official registration, unacknowledged hurt can become intensified and a hierarchy is created within the reparation program. All of this creates divisions, tensions, and new differences between South Africans that cause reluctance towards the process of reconciliation.

When it comes to conceptions of man, the individual, and his community, both theories of justice limit themselves by not taking each other's views into consideration and therefore hindering the realization of their own goals. Tutu's (1999) notion of Ubuntu might be useful in understanding parts of the South African mindset and may help to explain some of the TRC's success stories, including the willingness of victims to forgive and reconcile. However, Ubuntu might not be an infinite power which links all people together; it is constrained by a more Western, individualistic, Hobbessian concept of man that drives people to commit evil deeds and to pursue egoistic goals. The single-minded focus on Ubuntu might go against reconciliation, since it demands too much of people and aims to bridge differences that should naturally not be bridged, but rather respected. The narrow focus on the need for protection and self-preservation neglects the fact that being human implies more than this characteristic, and the realization of a safe state requires the recognition of dignity.

South Africa is a fascinating country with a unique history, constitution of people, current political situation, and cultural mindset. It shows us that the achievement of justice is not simple; it brings forth complicated issues related to the individual, community, victim, and perpetrator. All in all, it can be concluded that South Africa's transitional period demanded a special form of justice that considered these special features. A retributive approach, which focused merely on the punishment of transgressors of the law, would not have been applicable to the case of South Africa in order to achieve justice. A restorative approach, however, does not have to be seen as an opposition to Hobbes' (1996) theory; it can be seen as a modernized implementation of some of its characterizations. The ideal of the restorative approach might not be desirable and might not do justice to South Africa because the universal humanity recognized in all people does not respect cultural particularism and diversity. Justice in South Africa requires a conception of humanity that combines both the individual and the community, and combines restorative and retributive perspective for achieving justice.

*If there are dreams about a beautiful South Africa, there are also roads that lead to their goal.*⁷

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⁷ Nelson Mandela

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