Apartheid reparations: In search of an appropriate remedial theory

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1 Introduction

Increasingly, South African civil society groups are mobilising to obtain reparations for the gross human rights violations committed during Apartheid.[1] This movement is in line with the international trend to recognise victims and a right to reparations. Whereas the payment of reparations is not currently a priority to the South African government,[2] Apartheid victims are still calling for reparations that recognise the harm done and the wrongs committed. Although the term 'Apartheid reparations' may not yet be a commonly encountered term in international law or in political discourse, there is growing recognition of the fact that the wrongs committed in the name of Apartheid are wrongs that can be compensated by the payment of financial reparations.[3] However, would the payment of reparations necessarily be in the interest of justice? An aspect of the reparations debate that has not received much attention is the question of what theory of justice will fit the payment of reparations.

The payment of reparations is a matter not only of international law but also a matter of morality.[4] It is often stated that one of the purposes of remedies is to restore a 'moral balance'. As generally understood, remedies serve to rectify wrongs and to correct injustice; but, partly because many societal wrongs go unremedied and partly because wrongs can also be rectified in ways other than the payment of reparations,

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[1]In 2003 the South African government made once-off payments of about R30 000 to 20 000 individuals designated as 'victims' by the Truth and Reconciliation Commission. The ANC government considered this payment as taking care of the issue of reparations.

[2]The most prominent example of the initiative taken by civil society is that of the Khulumani Support Group. The Khulumani Support Group is the driving force behind the current Apartheid reparation litigation in the United States. See *Khulumani v Barclay National Bank* 504 F3d 257.

[3]Apartheid was recognised as a Crime against Humanity by the General Assembly. In 1976 the Security Council described apartheid as a 'crime against humanity'. SC Res 392, UN Doc S/RES/392 (1976) and SC Res 473, UN Doc S/RES/473 (1980). See also SC Res 556 (1984).

[4]Shelton *Remedies in international human rights law* (2005) 10.

it can be argued that 'rectification' in itself does not sufficiently justify and explain the need for reparations. In addition, 'morality' can be too subjective, vague and relative to ground the obligation to pay reparations.[5] In this article the range of remedial theories (from 'traditional' criminal law remedies to more contemporary theories fitting the setting of transitional justice) will be examined. What follows is not a mere list of the classic remedial theories. I will critically assess whether any of these theories (or combination of theories) fits the context of Apartheid reparations. A fitting theory will be a theory that fits the purpose of and the need for the remedy. To an extent a fitting theory would also legitimise the paying of reparations (it should not be assumed that the payment of reparations is inherently good and legitimate). Such a theory should be fair and have a socially transformative effect (or as a minimum requirement not cause further division and inequality).

The literature on remedial theories seems to adopt a criminal law paradigm: many scholars assume a loose analogy between criminal punishment and the payment of reparations, at least as far as the applicability of remedial theories is concerned. I will argue that the virtues or advantages of particular theories in the context of criminal law cannot be successfully transplanted to the context of rectifying state injustice. The discussion of the remedial theories will focus on the suitability of a particular theory in the context of reparation for gross human rights violations and specifically Apartheid.

2 Compensatory Justice

The primary function of compensatory justice (or corrective justice) is to correct injustice. This theory of justice is concerned with placing the harmed party in qualitatively the same position in which he would have been had the unjust harm not occurred.[6] Keshnar writes: 'Compensatory justice is part of a more general system of rights, and it involves the just response to certain rights infringements'.[7] Bringing about compensatory justice involves a comparison between the world in which the harm occurred and the world in which it did not occur. This comparison requires that the injured party exists in the relevantly similar possible world where the unjust harm did not occur. Kershnar writes of the construction of a 'relevant possible world'.[8]

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[5]For Dworkin, the term 'moral position' can function as a term of description, justification and criticism. See Dworkin 'Liberty and moralism' (1977) in Dyzenhaus and Ripstein (eds) *Law and morality* (2001) 332. With regard to the content of 'morality' see Fuller *The morality of law* (1964). I will adopt Fuller's conceptions of the internal morality (as required for an effective legal system) and the external morality of the law – the external values expressing the aims of law such as justice, equity, solidarity, economic efficacy and the protection of individual rights.

[6]Kershnar 'Reparations for slavery and justice' (2002) University of Memphis *LR* 278, 279.

[7]*Ibid*.

[8]Keshnar makes these observations in the context of claims for compensation for slavery. *Ibid*.

Compensatory justice is based on the idea of non-interference of rights. Human rights are 'maximally weighty moral claims'.[9] When rights are violated, the ability of the victim to pursue self-determination is impaired because of an unwarranted act of interference.[10] The task of compensatory justice is to correct the imbalance caused by the interference. Within the framework of rights rectification serves to restore to individuals their capacity to achieve the ends that they personally value.[11]

The most important features of the compensatory justice model are: (i) it is backward-looking in the sense that what is relevant is an act or acts in the past that transpired between the contested parties that violated the parties' rights; (ii) it looks to the injury suffered by the victim and inflicted by the perpetrator and both victim and perpetrator are clearly identifiable; (iii) in effecting a remedy it treats the parties as equals in the sense intended by the idea of 'equality before the law', and (iv) it attempts through compensation to place the victim in the position in which he would have been had the injurious event not occurred. The purpose of compensatory justice is not to engage in social transformation or reordering.[12] The above features are drawn from Aristotle's theory of compensatory justice.[13]

One reason to doubt the applicability of Aristotle's theory in the context of state injustice is that Aristotle's ideal of compensatory justice applies to wrongs done by an individual to an individual and does not find application in the context of a government harming an individual or society harming a group.[14] But Shelton argues that compensatory justice can provide a basis for public law remedies since violations are committed not only against individuals but also against the social order.[15]

Walker attacks the applicability of compensatory justice in the context of state injustice on the basis of the moral baseline argument. She writes that it is a common function of corrective justice that it presumes a standard of moral acceptability for the impact we have on each other through our actions (ie, it sets a *moral baseline*) and that corrective justice responds to correct that impact.[16] However, the legitimacy of baselines becomes problematic in societies in which gross and systemic mistreatment and deprivation of rights take place. In societies where

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[9]Lomasky 'Compensation and the bounds of rights' in Chapman (ed) *Compensatory justice* (1991)
[10]Shelton (n 4) 11.
[11]*Ibid*.
[12]Paul 'Set asides, reparations and compensatory justice' in Chapman (ed) *Compensatory justice* (1991) 103.
[13]Aristotle *The ethics* (trans Thompson) (1955) 148-149. According to this theory, even actions which violate rights which cause no compensable harm (or even brings an economic benefit to the victim) creates a moral imbalance between the victim and the wrongdoer and creates a moral claim.
[14]*Ibid*. Others would argue that this does not mean that the theory of compensatory justice cannot provide a basis for public law remedies of mass-scale human rights violations. Violations of human rights are violations against the individual but also violations against the social order.
[15]Shelton (n 4) 10.
[16]Walker 'Restorative justice and reparations' (2006) 37 *Journal of Social Philosophy* 380.

certain groups are treated as less than human, those belonging to the persecuted group(s) are morally and legally excluded from a standard or a baseline. Since the pre-existing moral baseline may be *faulty* or even *absent*, what we need is a *shared new baseline* which incorporates the principle of equal dignity.[17]

Proponents of compensatory justice assume a measure of proportionality between the harm done and the reparation made, but compensatory justice may not ideally fit the context of state injustice if one considers the nature and gravity of the crimes involved. In the literature on reparations it is regularly stressed that gross human rights violations are incommensurable – compensation can never restore exactly what was lost – it can only provide something equivalent to what has been lost. This does not mean that any attempt to create accountability for grave crimes through legal mechanisms is futile. Although the victims of human rights violations will often emphasise that reparation cannot undo the wrongs committed, compensation may have a rehabilitative effect, alleviate suffering and provide for material needs.

The payment of constitutional damages is often seen as an example of the achievement of compensatory justice. Constitutional damages require an element of 'fault' for which compensation is claimed – a specific 'wrong' to be righted – and it is therefore possible to consider reparations claims as being of a tortious (delictual) nature.[18] The delictual nature of these claims may lead one to conclude that they exemplify Aristotelian 'corrective justice' – which involves the state in righting discrete societal wrongs – the restoration of the prior *status quo* following wrongful interactions between individuals. Although the *Khulumani* case fits into the paradigm of tort law, the model of corrective justice does not fit very well. In the context of the *Khulumani* case it is multinational companies who will be expected to correct the 'wrongs'. It is doubtful whether companies conceive of themselves as righting societal wrongs. It can be argued that damages can be paid for less noble reasons (such as fear of embarrassment) or pragmatic economic reasons. It is also doubtful whether the element of causation is present in the *Khulumani* case – some would dispute the idea that the companies caused the violations suffered by the victims. The problem is magnified by the fact that even if the present South African government would pay reparations (as successor of or proxy for the Apartheid government) the causation element is not satisfied – the ANC government did not cause the harm.

Ellen Frankel Paul points out another deficiency of the compensatory justice model:

> [A]ll reparations share the common feature of extracting compensation for the victims from all taxpayers in the country, mulcting indifferently both those who are completely innocent of any wrongdoing and those who may have committed

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[17] *Id* 381. See also Sharp *Justice and the Maori* (1997) 34.

[18] Cooper-Stephenson 'Theoretical underpinnings for reparations: A constitutional tort perspective' (2003) *Windsor Yearbook of Access to Justice* 8.

> atrocities. Governments create no wealth of their own, and they possess only what they manage to extract from their citizens. There is inevitably some injustice in extracting money from the innocent to compensate the victims, but in instances of such massive rights violations to identifiable victims as the Japanese and the Jews, this exaction seems as justifiable as taxation can ever be.[19]

Paul notes that Aristotle's conception of compensatory justice as repairing the effects of injustices can only serve as a 'rough indicator' of a solution to injustices inflicted by governments against large numbers of victims. Under such a regime victims are everywhere and everyone is a victim. Under the weight of such a history, a theory of compensatory justice can usually not survive.[20] Compensatory justice therefore fits the South African historical context only to a limited extent.[21] Paul argues that an Aristotelian, individualistic theory of compensatory justice collapses under the weight of demands for compensation for rights violations sustained by members of groups who may be long dead and for their descendants.[22]

Compensatory justice can also be said to be too conservative (as argued in a general context by Goodin)[23] to fit the South African context since it aims at restoring the *status quo ante*. This is a formula that is applied, with various degrees of success, in tort law. In the context of South Africa it is very difficult, if not impossible to apply this formula. It requires us to engage in assessing what the *hypothetical* position of black people in South Africa would have been had Apartheid never been implemented. Rombouts observes that a return to the old position (whether *quo ante* or hypothetical) risks reproducing the same negative conditions that led to the violations in the first place.[24] To her it seems crucial *not* to be constrained by the pre-conflict situation. In South Africa a return to such a hypothetical condition is not possible. Since racial discrimination in South Africa and poverty pre-dates Apartheid, probing or speculating what the *status quo ante* would have looked like *had Apartheid not occurred* makes little sense. Reparations should seek a *new* balance or equilibrium.[25] Reparations in this context should rather serve to support and solidify a new, more just society. Paul writes: 'In such extraordinary circumstances the best that can be done in the name of compensatory justice is to cease committing liberty and property infringements and second, to start anew by creating an order of equality before the law'.[26]

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[19]Paul (n 12) 124.
[20]*Id* 27.
[21]Paul makes her remarks in the context of the Soviet Union and the mass scale violations committed by that regime. Paul (n 12) *ibid*.
[22]*Id* 120.
[23]Goodin 'Compensation and redistribution' in John W Chapman (ed) *Compensatory justice* (1991) 143.
[24]Rombouts *Victim organisations and the politics of reparation: A case study on Rwanda* (2004) 46.
[25]*Ibid*.
[26]Paul writes: 'Recreating each person's history and ancestry of brutalization by the regime seems a nearly impossible enterprise, and who is to pay the compensation when virtually everyone is a

James Nickel provides an alternative to the restoration of the *status quo ante*: 'Compensatory justice requires that counterbalancing benefits be provided to those individuals who have been wrongfully injured which will serve to bring them up to the level of wealth and welfare they would now have if they had not been disadvantaged'.[27] This encapsulates a more expansive notion of compensation than Aristotle's theory of simply restoring the victim to the condition he was in before the unjust act'.[28] In the context of South Africa, Nickel's formula would be more satisfactory than the traditional formula.

Compensatory justice assumes the presence of a clear villain and clear victim. The intermingling of perpetrators and victims therefore present a problem.[29] (The Inkatha Freedom Party would be a good example of an organisation that was occasionally accused of collaborating with the National Party under Apartheid, but since most of its members were black, they were also the victims of Apartheid). Paul suggests that compensatory justice can really just provide for the most extreme cases of rights violations: the victims who suffered the most and survived are the first claimants and the rest must, more than likely, be satisfied with a state dedicated to rights-protecting.[30] This again illustrates the limits of compensatory justice.[31]

3 Retribution

The justice achieved by successful reparations claims is primarily about the vindication of the victim and not primarily about the punishment of the perpetrator;[32] but some believe that reparations could fulfill the same societal function as punishment and that reparations could act as a restraint on states not to repeat offences.[33]

Punishment conveys to criminal wrongdoers that they wronged the victim and thus implicitly recognises the victim's plight and punishment honours the victim's

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victim to some degree?' Paul (n 12) 128. Inequality also exists within victim categories – this was recognised by the TRC. The TRC's designation of 20 000 victims was highly controversial.

[27] Nickel 'Preferential policies in hiring and admissions: A jurisprudential approach' in *Gross reverse discrimination* (1977) 327.

[28] Paul (n 12) 103.

[29] Paul writes that under the Soviet regime, perpetrators were themselves often victims. One recent example: General (later President) Jaruzelskin of Poland was deported to a Soviet camp as a child along with his father, who died in the camps. This is the same man who served on the Soviet army and who imposed martial law in 1981. *Id* 137, 138. See also Kaufman *Mad dreams, saving graces: Poland: A nation in conspiracy* (1989) ch 8.

[30] *Ibid*.

[31] See Sunstein 'The limits of compensatory justice' in Chapman (ed) *Compensatory justice* (1991) 281.

[32] Although this could be the case in the context of a criminal court such as the ICC where reparation is paid in addition to the prosecution of a human rights violator.

[33] Soyinka *The burden of memory: The muse of forgiveness* (1999).

moral claims. 'Retribution, like restitution, imposes punishments to negate the wrong and reassert the right. It thus has both symbolic and norm-creating qualities for both the victim and the larger society.'[34]

Criminal punishment is traditionally seen as a more effective form of punishment than expecting perpetrators to pay reparations, with good reason. The principle form of criminal punishment involves depriving an individual of his or her freedom – a form of punishment which is considerably more restrictive than the impoverishing effect of paying damages.

It is also felt that sanctions that are less severe than criminal punishment do not correspond to the severity of gross human rights violations. The kinds of sentences imposed by the *ad hoc* International Criminal Tribunals (such as life imprisonment) are of course much more invasive and freedom-depriving than the ordering of reparations. This is essentially a version of the 'incommensurability' argument – violations as severe as gross human rights violations cannot be punished by ordering damages or reparations. Some argue that the once-and-for-all quality of crimes such as Apartheid makes the criminal law paradigm unsuitable. This objection also applies in the context of the deterrence theory.

Applying the retributive theory of criminal law also raises the problem of establishing identity between crime and perpetrator. The problem with the remedial theory of retribution in the context of Apartheid reparation is clear. Those who are primarily responsible for the wrongs (the Apartheid government) are not those who will be expected to pay the reparations. In carrying out its own particular *Vergangenheitsbewältigung*, South Africa has largely eschewed the concept of retributive justice. The Postamble of the Constitution and the Act establishing the TRC[35] and TRC process provided for the granting of amnesty to perpetrators of politically-motivated crimes from all sides of the political spectrum. Those who received Amnesty were protected not only from criminal prosecution but also from civil suits which deprived victims of any right to damages.[36] South Africa instead chose the route of restorative justice discussed below.

An additional objection to the retribution model is that the 1996 South African Constitution (which protects private property) insulated white South Africans from any costs associated with restitution – the financial burden is placed on the nation as a whole. This is an indication that the South African reparation policy is based on restorative and not punitive justice. Ironically, it imposes a burden even on black South Africans, the co-sufferers under Apartheid.

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[34] See Fletcher 'The place of victims in the theory of retribution' (1999) 3 *Buff Crim LR* 51, 54. He explores the theory that the purpose of punishment is to defeat the wrong.

[35] Promotion of National Unity and Reconciliation Act 34 of 1995.

[36] See Jenkins 'After the dry white season: The dilemmas of reparation and reconstruction in South Africa' (2000) 16 *SAJHR* 416.

4 Deterrence

The theory of deterrence seeks to influence the behavior of potential actors and is assumed to work because actors are assumed to calculate the costs of transgressions against the anticipated benefits. The deterrence theory originated from the theories of utilitarian political theorists such as Jeremy Bentham who focused on the future-related benefits of prosecution.

Since the deterrence theory assumes that the prospect of punishment affects future conduct the question arises how much deterrence is desirable. In the field of damages this will mean that if the 'price' of the violation of rights is high enough and if anticipated damages accurately reflect the true cost of the violations and if the sanction is certain, the 'product' will be priced out of the market.[37] This requires full and accurate compensation for each victim for each rights-violating incident. In the context of Apartheid reparations, the vast scale of violations means that this comprehensive and 'full' form of reparation is not realistically attainable.

There are two major critiques of the deterrence theory: deterrence theorists view people merely as a means to an end (inconsistent with their moral worth as human beings) and deterrence theory treats people as rational calculators who carefully weigh up the costs and benefits of their actions[38] and this does not reflect the reality of the type of decision-making that precedes the commission of serious human rights violations.[39] These critiques apply *a fortiori* in the context of gross human rights violations. Actors who are irrational enough to commit such violations are unlikely to calculate rationally in this way.[40]

Moreover, deterrence is one of the most controversial theories in criminal law. Whereas the literature on deterrence shows a correlation between the certainty of consequences and the reduction of offences, little correlation has been found to exist between the severity of punishment and the reduction of offences.[41] The Statute of the International Criminal Court accepts that there is a role for deterrence

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[37]Shelton (n 4) 14.

[38]More sophisticated deterrence based theorists claim that they do not assert that deterrence works at the level of rational calculation but at a preliminary stage where people are setting up available options. Where people do not think that certain options are available to them they do not set up the calculation of the costs and benefits.

[39]See Wippman 'Atrocities, deterrence and the limits of international justice' (1999) *Fordham International LJ* 473.

[40]Deterrence is often descried as a relationship, one in which both sides employ a broadly compatible rational framework and discourse. The deterrer must have the capability to carry out the threat which has been made. The threatened response, on the other hand, must seem credible to the potential perpetrator. Credibility requires that the deterrer has the will as well as the capability to carry out the threat, and that this can be communicated to and understood by the potential perpetrator, one in which both sides employ a broadly compatible rational framework and discourse.

[41]Shelton (n 4).

in international criminal law.[42] However, because of the relatively small number of people that will be prosecuted by the ICC its deterrent effect will be limited since people do not believe that they are likely to be punished.[43]

Another problem with applying the deterrence theory to the context of reparations, is that violations of the grave nature of Apartheid have a one-of-a-kind or *sui generis* quality. It is unlikely that the perpetrators of Apartheid would be 'repeat offenders'. Akhavan points out that 'measuring the capacity of punishment to prevent criminal conduct is an elusive undertaking, especially when a society is gripped by widespread and habitual violence and an inverted morality has elevated otherwise "deviant" crimes to the highest expression of group loyalty'.[44] The question of the likelihood of recidivism was discussed in the context of the sentencing of Eugene de Kock and other Apartheid-era perpetrators who did not receive amnesty. As Safferling has recognised, the risk of re-offending is relatively low in this kind of catastrophic event since the crimes take place under certain social and political circumstances which tend not to repeat themselves in one generation.[45]

As Akhavan points out, deterrence could be effective in the context of punishing gross human rights violations.[46] The threat of punishment could induce potential perpetrators to change their behaviour. Akhavan also points out that besides the conscious fear of punishment there is another, more subtle dimension to general prevention that operates to prevent the repetition of criminal behaviour. By instilling 'unconscious inhibitions against crime', a condition of 'habitual lawfulness' may develop in society.[47] Andenaes has argued that the expression of social disapproval through the legal process may influence moral self-conceptions so that 'illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught'.[48] The counterargument is that deterrence is only really effective on the level of deliberate political choices, not on the level of chaotic (or systematic) mass violence.[49]

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[42] See para 5 of the Preamble of the ICC Statute.
[43] See Cryer *An introduction to international criminal law and procedure.* The argument is made that the creation of the ICTY did not stop the atrocities in the former Yugoslavia in 1993 and 1995.
[44] Akhavan 'Beyond impunity. Can international criminal justice prevent future atrocities?' (2001) 95 *AJIL* 7.
[45] Safferling 'The justification of punishment in international criminal law' (1999) 4 *Austrian Review of International and European Law* 161.
[46] Akhavan believes that international legitimacy could be a valuable asset for aspiring statesmen. Akhavan (n 44) 12.
[47] *Id* 13.
[48] Andenaes 'The general preventative effects of punishment' (1966) 114 *U Pa LR* 949.
[49] Akhavan (n 44) 10.

In the context of reparations the deterrent value of requiring a government to pay compensation could lie in the consequence of 'shaming'.[50] Akhavan writes that stigmatisation of criminal conduct can have far-reaching consequences.[51] By shaming governments into paying reparations, governments could be deterred from committing the same violations again. The 'shaming' argument does not work in the context of South Africa where the ANC-led government is new to office and who would have to carry out the international law-based responsibility of paying reparations.

5 Distributive Justice

> The possibility of tension between the provision of reparations to all those affected and the achievement of economic growth and reconstruction is self-evident.[52]
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> The land shall be shared among those who work on it.[53]

Distributive justice involves the fair allocation by the state of entitlements generally in society on the ground of merit and need.[54] Slavery reparationists argue that persistent racial inequality is a distributive justice problem and that a measure of redistribution is necessary to close the wealth gap.[55] When a reparations claim is based on the past failure of a government to look after the welfare of a claimant group or on the failure of a government to provide the fair share of community resources to a claimant group, the claim can fit under Aristotelian 'distributive justice'. The danger with viewing reparations or constitutional damages in this way is that one can lose sight of the past 'wrong' which underpins the claim.[56] This means that distributive justice cannot stand alone as the theoretical underpinning for the claim.

Aristotle wrote on 'distributive justice' but he did not address the problem of how to allocate scarce resources.[57] Whereas philosophers have long been

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[50]See the theory of reintegrative shaming as developed by Braithwaite *Crime, shame and reintegration* (1989).
[51]Akhavan (n 44).
[52] Jenkins (n 36) 415.
[53]Freedom Charter 1950 (drafted by ANC).
[54]Cooper-Stephenson (n 18) 5.
[55]Logue 'Reparations as redistribution' (2004) 84 *Boston University LR* 1354. Logue proposes substantial white-to-black redistribution as a form of slavery reparation. *Id* 1373.
[56]Cooper-Stephenson (n 18) 9.
[57]Fleischacker *A short history of distributive justice* (2004) 1. Aristotle *Nichomaneon ethics* vol 2-4; Aristotle contrasted distributive justice with corrective justice which concerns punishment. Aristotle draws two distinctions within the notion of justice: he firstly distinguishes between 'universal justice' and a more 'particular justice'. Within particular justice he distinguishes between distributive justice and corrective justice. Distributive justice calls for honour or political office or money to be apportioned in accordance with merit (NE113a25) while corrective justice calls for wrongdoers to pay damages to their victims in accordance with the extent of the injury they have caused. Aristotle discusses the distinction in accordance with the different ways in which distributive and corrective justice represent a norm of equality. Fleischacker 19.

concerned with the question of the structure of resource allocation and whereas scholars have considered conflicting property claims as a matter of justice, these two questions have not been brought together until the modern era.[58] Until recently justice has not been understood as requiring a distribution of resources that meets everyone's needs. In the Aristotelian sense, distributive justice called for deserving people to be rewarded in accordance with their merits and was seen as bearing primarily on the distribution of political status and was not seen as relevant to all property rights.[59] The ancient principle involves distribution according to merit whereas the modern principle requires distribution independent of merit.[60] Today the phrase distributive justice clearly applies to the distribution of property by the state and for the needy. To believe in distributive justice one needs to see the poor as deserving the same social and economic status as everyone else and one needs to see society as responsible for the condition of the poor and capable of radically changing it.[61]

Distributive justice in its modern sense calls on the state to guarantee that resources are distributed throughout society so that everyone is supplied with a certain level of material means.[62] Debates about distributive justice usually centre on the amount of means to be guaranteed and on the degree to which state intervention is necessary for those means to be distributed. Distributive justice is therefore necessary for any justification of property rights and may even require a rejection of private property rights.[63]

Rawls' 'difference principle' is one of the most famous formulations of egalitarian distributive justice.[64] The principle holds that inequality with respect to 'primary social goods'[65] is permissible only to the extent that it enhances the well-being of the least well off in society. Rawls believes that any inequality of primary social goods that does not satisfy the difference principle should be corrected by government redistribution. Rawls tolerated social and economic inequality only on the conditions: (i) that they are attached to positions open to all under the condition of equality of opportunity, and (ii) if it is of benefit to the poorest. In the US, Rawls' theory is often criticised as giving too much weight to the needs of the least well off, but his concern for the least well off fits to some extent with the ANC's transformation objectives and the emphasis by the Constitutional Court on the realisation of socio-economic rights.

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[58] *Id* 2.
[59] *Id* 5.
[60] *Ibid*.
[61] *Id* 125.
[62] *Id* 4.
[63] *Id* 5.
[64] Rawls *A theory of justice* (1971) 274-280.
[65] This category consists of income and wealth, opportunities and powers, rights and liberties, but excludes such assets as natural talent and health. Rawls *id* 54.

That South Africa is committed to distributive justice (at least in theory) cannot be disputed.[66] This is clear from section 9(2) of the Constitution (also known as the 'Affirmative Action' clause). The clause represents an integral part of the ANC's 'transformation policy'. It reads:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

But the government's commitment to re-distribution is different from a commitment to pay individual reparations. Most collective redistribution policies are violation-blind in the sense that the policies ignore previous wrongs done to specific individuals and focus on improving opportunity for all black people.

Is the theory of distribution incompatible with compensatory justice? Some argue it is. We will rarely be prepared to let wrongs go unrighted merely because the wronged are far richer than those wronging them.[67] Goodin argues that the two theories are not necessarily incompatible. The first reason for wanting compensation is to restore the *status quo ante* that embodied a distribution that was in some sense substantively right.[68] A second set of arguments justifies compensation in terms of the wrongness of the process by which that *antecedent* distribution was upset.[69] Even if we are unsure which outcome is substantively right, we can say that certain ways of altering outcomes are definitely wrong.[70] Righting procedural wrongs may be justifiable independently of any theory of the substantive rightness of the outcomes.[71] Goodin argues that this is exactly what happens in tort law: compensatory damages right wrongs in tort law not in the sense of restoring substantively right distributions but rather in the sense of cancelling the effects of wrongful styles of intervention in others' affairs.[72] What makes the South African distribution process particularly complicated is the fact that the *antecedent* or original distribution of resources was also inequitable and unjust. What one should aim for is upsetting the antecedent distribution in the right way: to create a more equal society.

The *Richtersveld* decision (a recent case on land redistribution in South Africa) is an excellent example of the complexities and pitfalls that accompany redistribution. The facts can briefly be summarised as follows: After a protracted legal dispute, the Richtersveld community, an indigenous community of Khoi Khoi

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[66] See Stacey 'We the people: The relationship between the South African Constitution and the ANC's transformation policies' (November 2003) 30 *Politikon*.
[67] (N 23) 144.
[68] *Id* 146.
[69] *Id* 149.
[70] *Ibid*.
[71] *Id* 150.
[72] *Ibid*.

and San, living in the Northern Cape, has been entitled to claim land restitution under the Restitution of Land Rights Act 22 of 1994.[73] The Richtersveld is a diamond-rich area of the Northern Cape where the Richtersveld community grazed their cattle for many decades. After the initiation of mining operations in the 1920s the members of the Richtersveld community were progressively deprived of their land. In their legal claim, the Richtersveld community relied on the doctrine of aboriginal title as part of the common law of South Africa. In the first decision the Land Claims Court rejected the application of the common law doctrine within South Africa.[74] On Appeal the Supreme Court of Appeal (SCA) decided that it was 'unnecessary to decide whether the doctrine forms part of our common law or whether common law should be developed to recognise Aboriginal rights'.[75] The SCA overturned the decision of the Land Claims Court and ordered that the land (and the mineral rights) be returned to the Richtersveld Community. The Constitutional Court confirmed the decision of the SCA. The Constitutional Court upheld the ruling that the Richtersveld Community had a customary right in the land before annexation. [76]

Barry has questioned the wisdom of redistributing 'for the greater good' (as was done by the judges in this case).[77] Her comments show that not everyone is convinced of the universal desirability of distributive justice. She questions whether *Richtersveld* is as laudable as it seems at first blush. She raises the objection that land restitution (and other forms of restitution) while remedying one injustice, creates a new injustice, to the extent that the innocent are asked to pay for the crimes of the guilty. As Barry points out, the problem is sharpened by the fact that the vast majority of South Africans are themselves victims of Apartheid although a combination of history and current day institutional constraints have dictated that only some are in a position to bring reparations claims.[78] Barry applies this reasoning to the *Richtersveld* case on land restitution. In the *Richtersveld* case the potential for social injustice is heightened given the fact that

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[73] See Hoq 'Land restitution and the doctrine of aboriginal title: *Richtersveld Community v Alexkor Ltd and Another*' (2002) 18 *SAJHR* 421. See also Gilbert 'Historical indigenous peoples' land claims: A comparative and international approach to the common law doctrine on indigenous title' *ICLQ* 56 (2007).

[74] See *The Richtersveld Community v Alexkor Limited and the Government of the Republic of South Africa* Case no 488/2001, Supreme Court of Appeal of South Africa (24 March 2003).

[75] *The Richtersveld Community v Alexkor Limited and the Government of the Republic of South Africa* Case no 488/2001.

[76] Barry 'Now another thing must happen: *Richtersveld* and the dilemmas of land reform in post Apartheid South Africa' (2004) 20 *SAJHR* 375. Intriguingly, the *Richtersveld* case placed the current ANC government in the position of proxy of the Apartheid government. As the defendant, the ANC government was put in the position of having to argue away the effects of colonialism and Apartheid.

[77] *Ibid*.

[78] *Id* 369.

the practical result of the decision is that the South African government lost approximately R84 million generated in annual revenue by the Alexkor mine. This amount of money could arguably have been distributed in a more equitable (and possibly just) way.

Waldron writes that the problem with many critiques of property is that they pit the interests of individual property owners against the interests of society as a whole.[79] The interests of the property-less are left out of the equation. Significantly, he writes:

> The burden of justifying an exclusive entitlement depends (in part) on the impact on others' interests of being excluded from the resources in question and that the impact is likely to vary as circumstances change.[80] Similarly an acquisition which is legitimate in one set of circumstances may not be legitimate in another set of circumstances…[A]n initially legitimate acquisition may become illegitimate or have its legitimacy restricted (as the basis of ongoing entitlement) at a later time on account of a change in circumstances. By exact similar reasoning, it seems possible that an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect in concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens, I shall say that injustice, has been *superseded.*

Waldron's theory can be criticised for not being sensitive to the extreme unjust nature of forced removals and land appropriation in the context of genocide. Nevertheless, his argument is useful in explaining how present need can influence our perspective on the justness of reparations. Barry shares Waldron's views on the importance of considering the current impact of past dispossession. According to Barry an equitable distribution of the wealth of the Richtersveld would have to be shared by the country as a whole. She writes that we are faced with a choice between satisfying some claims completely and not satisfying other claims at all; or satisfying all claims to some degree but none fully. She believes that the fact that the Richtersveld restitution occurs at the expense of redistribution raises moral questions.[81]

This analysis of the *Richtersveld* case illuminates the limitations of distributive justice in the context of reparations claims: the overall justness of paying attention to past wrongs and providing compensation for them must take account of competing claims from presently disadvantaged groups. One needs to balance the claims for past wrongs with claims of merit and need by present and future communities.[82] The dilemmas of distribution inherent in reparations claims must however not lead one to conclude that not paying reparation is somehow 'fairer'. At the same time one should be aware of the problems of

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[79]Waldron 'Property, justification and need' (1993) 6 *Can JL and Jur* 185.
[80]Waldron 'Superseding historical injustice' (1992) 103 *Ethics* 4.
[81]Barry (n 76).
[82]Cooper-Stephenson (n 18) 10.

asymmetrical or over-compensation. Asymmetrical compensation can exacerbate the frustration of the 'poorest of the poor'. It also frustrates the idea of compensatory justice. If reparation awards are made arbitrarily it can undermine respect for the law.[83]

6 Reconciliation and Restorative Justice

> If we move beyond the reflex assumption that justice in a political transition is measured by the number and success of criminal prosecutions, we quickly arrive again at the concept of reparations…[84]

The restorative justice movement is a relatively new movement which offers alternative views on the purposes and aims of punishment and remedies. The movement is gaining rapid ground not only in the field of transitional justice but also in mainstream criminal law[85] and international criminal law. It is a movement that focuses on the needs and experiences of victims. In the aftermath of conflict or state-sponsored oppression involving grave human rights violations the requirements of peace reinforces the demands of justice.[86] Restorative justice has become the theory *de rigeur* of the transitional justice movement.

Restorative justice has both a procedural and substantive component. The procedural component entails that restorative justice brings perpetrators and victims together. On the substantive side, restorative justice programmes emphasise redress and the reintegration of the offender instead of punishing him or her. Redress is associated with apology, remorse, reconciliation, forgiveness and reintegration and what is understood as healing.[87]

Restorative justice is tied to the important concept of recognition. Restorative justice aims to establish the truth of political repression and demands justice for the victims in two ways: through the judicial process and through the availability of psychological services.[88] Compensation can become a symbolic act, signifying vindication and a government's recognition of wrong. In the South African context

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[83] Shelton (n 1) 20.

[84] Asmal 'The Chorley lecture', delivered at the London School of Economics in November 1999, published in (2000) *Modern Law Review* 1.

[85] See Braithwaite 'Setting standards for restorative justice' (2002) 42 *British Journal of Criminology* 563-577; Von Hirsch *et al Restorative justice and criminal justice – competing or reconcilable paradigms?* (2003) .

[86] Shelton (n 4) 14.

[87] See Swart 'Sorry seems to be the hardest word: Apology as form of symbolic reparation' (2008) *SAJHR* 50-70. See also Saffire 'Newswords' *International Herald Tribune* (2009-07-09) who writes that although the word is known for its 'sweetness and light' the word 'reconciliation' has become a political fighting word in the United States.

[88] The Latin American Institute for Mental Health and Human Rights in Santiago, Chile emphasises that individual therapy is not enough, that 'victims need to know that their society as a whole acknowledges what has happened to them'. Becker *et al* 'Therapy with victims of political repression in Chile: The challenge of social reparation' (1990) 40 *Journal of Social Issues* 133, 147-8.

the government's recognition of the victims and of the reparations claims of victims will do much to take away residual anger and frustration.

Restorative justice has been described as the 'guiding conception' of the South African Truth and Reconciliation Commission (TRC).[89] The work of the TRC did much to integrate reconciliation into South Africa's political discourse. The idea of reconciliation fits with the value-laden and religious character of the TRC,[90] but the fact that the work of the TRC failed to result in meaningful financial reparations means that reparations was not seen as *necessary* for reconciliation. The feel-good term 'reconciliation' should also be approached with a healthy measure of skepticism.[91] When used by government to justify the need to let 'bygones be bygones' the term 'reconciliation' can even be manipulative. The rhetoric of reconciliation cannot trick victims out of the need for accountability mechanisms such as punishment and reparation. One should perhaps take a more skeptical view of the notion of the vague and ill-defined notion of reconciliation and ask whether it derives its legitimacy and power from democratic consent.

The reconciliation theory is an unapologetically 'moral' one in the sense that it aims at achieving a moral good. Its adherents see reconciliation as morally superior (or at least more concerned with morality) than theories such as retribution.[92] In Barkan's theory reparation processes are increasingly grounded in moral norms. In his restitution theory he describes reparation as negotiated justice. In his view morality not only plays a role in reparations but also in the reciprocal nature of reparations negotiations.[93] To Barkan, attaining a balance between individualism and communitarianism is the principal challenge of contemporary reparations politics.[94] He presumes a moral commitment to the

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[89]Walker 'Restorative justice and reparations' (2006) 37 *Journal of Social Philosophy*.

[90]The TRC began its hearings in the morning with prayer. Upon the appointment of the TRC commissioners, a special service was held in St George's Cathedral in Cape Town. It can be said that this Christian liturgy was uniquely linked to the history of South Africa. De Gruchy *Reconciliation: Restoring justice* (2002) 147. See also Diedrich 'The TRC's balancing of law, religion and economics in South Africa' (2007) 40 *Verfassung und Recht in Ubersee* 16.

[91]See Lin 'Demythologising restorative justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in context' (2005) 12 *ILSA Journal of International and Comparative Law* 85. According to Lin the metanarrative of restorative justice now accepted by the international community does not account for the less-reconciliatory political realities which drove and continue to define the Commission's legacy. She warns against regarding restorative justice as a panacea.

[92]Walker proposes that 'restoration' should be understood as normative. In his view 'restoration' refers to moving relationship in a direction that is morally adequate. What is special about restorative justice programmes is that they aim not only at morally adequate outcomes but also that the process of achieving the outcome should be morally adequate. Such a process requires respectful forms of encounter, interaction and expression, such as offenders facing and hearing victims directly and victims being able to confront offenders and to seek information directly from offenders. Walker (n 86) 384.

[93]Barkan *The guilt of nations* (2000) 317.

[94]*Id* 309-314.

politics of reparations which exposes his theory to the criticism that he is idealistic.[95] In South Africa, however, this moral commitment (or at least lip service to it) was evident from the 'moralistic' discourse of the TRC.

Barkan's restitution theory and the theory proposed by Habermas both aim at negotiated agreements. Barkan writes of a negotiated morality between individualism and communitarianism. Achieving such a 'negotiated morality' is the challenge of contemporary reparations politics.[96] This idea of reciprocal agreement and recognition is similar to what Habermas described as the aimed outcome of the communicative process. For Habermas the 'unconstrained, unifying, consensus-building force of argumentative speech' is the central experience in human life.[97]

If one adopts a restorative justice view of remedies the danger exists that one may sacrifice the needs of individual victims to the wishes of the majority. To ameliorate this, symbolic reparation and guarantees of non-repetition should be accompanied by reparation payments to individuals.[98] Whereas unity (collectivity) is necessary it must be counterbalanced by recognition of multiplicity, dissociation or contingency and by subsidiary institutions at national, regional and global levels.[99]

7 Conclusion

The remedial theories of compensatory justice, retribution, deterrence, redistribution and reconciliation do not all find successful application in the context of Apartheid reparations. These remedial theories are not mutually exclusive and there is no one perfectly-fitting theory. The theories of deterrence and retribution transfer awkwardly from the context of ordinary criminal law to the context of state criminality. The present South African government has however already expressed a commitment to distributive justice and restorative justice. This means that in the South African context, a *smorgasbord* of remedies will be appropriate. What is needed is a combination of distributive justice, restorative justice and compensatory justice. The tensions within and between the remedial theories should be recognised. Although I call for skepticism in the acceptance of restorative justice as justification or explanation for the payment of reparations, many aspects of restorative justice have already been integrated into the government's reparation and redistribution policies. The rhetoric of restorative justice permeates post-Apartheid legal and political culture. This makes it almost impossible to *think away* the influence of restorative justice from the South African transition. It can be argued that the corrective role of tort law (exemplified by its ingredients of a 'wrong' causing a 'harm' which then entitles a harmed person to

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[95] Rombouts (n 24) 93.
[96] Barkan (n 93) 309-314.
[97] Habermas *The theory of communicative action* (1981) vol 1, 10.
[98] Shelton (n 4) 16.
[99] *Ibid*.

compensation) always functions within a framework of societal obligations and entitlements which exemplify distributive justice.[100] Especially in determining the amount of compensation to be awarded, a reparations claim may turn to considerations of distributive justice. In turn, compensatory justice can be used to temper the possible excesses of distributive justice.

Authors such as Dauenhauer and Wells have argued that corrective justice and distributive justice complement one another.[101] Cooper-Stephenson argues that the liability of governments in reparations settings cannot easily be compartmentalised into either distributive or corrective justice but should be understood as a compound of its (distributively) wrongful failure to allocate its resources fairly and its 'wrongful' (and therefore correctable) conduct with respect to an individual or a group.[102] Understood in this way, the question of reparations requires a government to rectify both the present and the past. The obligation of the present-day South African government to make reparations is primarily one of present-day distributive justice but the obligation is founded (at least in part) on unremedied past injustice.[103]

The obligation to pay reparations is founded equally in morality and in law, but because of the transformative potential of reparations the question of the right remedial theory is a deeply political one. The hopes pinned onto reparations are grand and ambitious – hopes not only for the resources needed to live with more dignity but hopes for a new society.

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[100] Shelton (n 4) 10.
[101] *Id* 11. See Dauenhauer and Wells 'Corrective justice and constitutional torts' (2001) 35 *Ga LR* 903.
[102] Cooper-Stephenson (n 18) 11.
[103] *Id* 13.