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Title	A social restitution model of transitional justice				
Authors	Sharlene Swartz Duncan Scott				
Type of output	Select the appropriate output type from the list below.				
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<b>Submitted by:</b>	07/09/2011				
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## **HSRC Conference – Birchwood Conference Centre, Johannesburg**

### **A Social Restitution Model of Transitional Justice**

Dr Sharlene Swartz and Duncan Scott

Transitional justice is a relatively new field of study, but over the past two decades it's been quite prominent as a way of confronting injustices and sometimes atrocities committed under authoritarian regimes and during international and civil wars. In post-conflict societies truth commissions and trials – sometimes local, sometimes international – have become quite commonplace. Truth finding is a key feature of transitional justice, as is the restoration of dignity and, in some situations, restitution of property. Central to the principles that drive transitional justice mechanisms is the aim of promoting a national environment in which reconciliation and peacebuilding can occur.

Across Africa, Asia and Latin America, more than 40 truth commissions have taken place. These commissions have aimed to mediate between the conflict and post-conflict eras by giving victims the opportunity to speak of their grievances in a formal environment that is nonetheless not a courtroom. Truth commissions confront the past, mediate memories and ideally start the process of individual and collective healing. Commissions weren't originally viewed as instruments of peacebuilding, but over the past two decades their mandate has increasingly come to include reconciliation between parties.

### **Transitional Justice in South Africa**

South Africa's Truth and Reconciliation Committee, which ran between 1996 and 1998, is a perfect example of this emphasis on repairing previously antagonistic relations. The TRC undoubtedly accomplished some of its restorative aims: It did allow victims to speak, the Commission's narrative was one of reconciliation – this was the grand narrative, which was to become the national narrative of forgiveness, providing you repented of your political sins. But the TRC has had its detractors too. So, Mahmood Mamdani argues that the Commission focused on individuals to the detriment of communities. Another contention is that the Commission's focus on human rights abuses sidelined what Lambourne terms 'transformative justice' – 'the psychological, economic and political needs of societies seeking long-term structural changes'. The takeaway point here is that the TRC was inadequate in its reparations to victims of apartheid.

### **Restitution As We Know It**

We are proposing restitution as a novel way by which to acknowledge and address the inequities of the past that have been carried into the present. Before we really get into our suggestion,

though, I'd like to distinguish the legal definition of restitution, which seeks specifically to rectify a case of unjust enrichment at the expense of another by giving up something, or its value in money, to the victim. So we have land restitution in South African. Restitution following international wars sometimes involves restitution of cultural or artistic items. Monetary restitution has also been offered as compensation for injustices in the past. But considering the sorts of injustices suffered by victims, is legal restitution really satisfactory? What is its potential to close gaps between groups? This is what we mean by 'problematizing justice'. I'm not going to dwell on the various challenges to legal restitution, but suffice to say that they invariably fall into either of two categories: 1) Challenges to who receives restitution and 2) who is liable for restitution. In short, we take the view that the past cannot be disconnected from the present. If a person indirectly benefits from past injustices, then they are liable to moral, if not legal, restitution. Chandran Kukathas would argue that a whole generation should not be made to pay for the sins of their forbears. After all, they haven't perpetrated any legal wrong. But if one group continues to benefit from past discriminatory policies while another lacks life chances, we surely cannot ignore the historical contingencies.

### **Alternative Restitution**

It should be acknowledged that we are not the first to attempt to take an alternative approach to restitution. The fields of international relations, psychology and criminology have all previously sought to broaden the scope of restitution. Albert Eglash, a psychologist in the 70s, proposed creative restitution as a constructive way in which to leave a situation better than before an offense was committed. Here we find the beginnings of restitution as a healing mechanism. Elazar Barkan, a professor of international and public affairs, has written a seminal book called *The Guilt of Nations* in which he offers restitution as a theory of international relations. It essentially tracks the interactions between states and what he notes and argues for as 'the rise of international morality'. Restorative justice in fact doesn't build a new theory of restitution, but it is worth mentioning here for its similarities to restitutive justice. John Braithwaite, an Australian criminologist and leading figure in restorative justice studies, argues for a bringing together of protagonists outside of the courtroom. A lot of emphasis is placed on community-led practices.

### **A Sociological Perspective**

A sociological take on restitution has much in common to these other perspectives but places more emphasis on the interactions between people. Iris Marion Young's social connection model is central our thinking. She argues that every person who benefits from processes of structural injustice is to some extent responsible for making amends. Todd Calder, a Canadian, similarly argues for this shared responsibility. A key element of Young's argument is that because processes of structural injustice are absorbed into ways of being, a legal approach of identifying perpetrators is impractical. She calls for a collective approach that is almost certainly going to be voluntary. How does this model comport with efforts to heal post-conflict societies? Well, it provides a way of thinking – a paradigm – that recognises continued inequities, continued

grievances and provides a call to action. And yet post-conflict restitution is always going to involve power differentials. Whether it's economic, political or racial, these are matters that are going to have to be addressed. Here are some of our Restitutionary Projects that we propose as examples and to encourage debate.

### **Restitutionary Projects**

There are seven of them, some of which are interlinked, but for the moment we've kept them separate. 1) Are restitutionary projects going to be led by black South Africans, white South Africans or is it going to be a partnership? At the core of this is the matter of legitimacy – who has the right to speak of restitution? 2) Political projects like land restitution, affirmative action and access to resources such as higher education are different to interpersonal projects, including gender discrimination, gender violence, teenage pregnancy. 3) And where does restitution originate? Considered social action is one prospect. A more violent movement grounded in dissatisfaction is another. 4) Speaks for itself. 5) Material healing in the form of economic reparations has the potential to heal someone emotionally, or psychologically, or even spiritually. But perhaps some other form of restitution could be made that would be more appropriate. 6) Voluntary or mandatory restitution is worth considering in light of Desmond Tutu's recent comments on a 'wealth tax'. 7) Finally, restitution made to individuals and communities will be different, as will restitution made *by* individual, communities or corporate entities such as businesses.

### **Process-oriented Restitution**

A lot of these projects and the questions they pose point to a process-oriented way of addressing continued grievances. Transitional justice has traditionally been goal-oriented in its approach. Trials and truth commissions open doors to reconciliation, but for the most part they are momentary. Legal restitution is pretty similar in that it seeks to find a person or group of people liable for a particular injustice and seeks to correct that by returning property, for example. Social restitution, on the other hand, introduces a new paradigm to transitional justice in that it recognises and tries to alter structural injustices. It takes as its starting point an injustice and looks forward to create partnerships and opportunities. These are processes that are implemented and solidified over time. Because these injustices are diffuse, social restitution seeks to respond by encouraging people to be creative, to accept responsibility for change.

### **Research Agenda**

We have the foundations of a research project here. Country case studies conducted on specific ways in which countries have dealt with issues of restitution will inform and contextualise our research. We also need to investigate differences in social attitudes to restitution: gender, age, race differences. And we need to find out what people understand by restitution.