

The restitution of personhood: An expanded paradigm for social justice and transformation in broken spaces

The restitution of personhood: A theorized framework for social justice action in broken spaces

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ABSTRACT

This paper fundamentally asks what is necessary to fast track social transformation and align peace processes, justice, and reconciliation in South Africa. It offers a theorized framework with which injustice, poverty and inequality might be addressed using a broadened understanding of the notion of ‘restitution’. It does so in order to more closely align reconciliation and transformation, concepts that have created tension in the national dialogue over the past two decades. We argue that ‘restitution’, when viewed beyond the narrow confines of legal remedies or land redistribution strategies, offers a productive framework for just action, especially with regard to address poverty and inequality. The paper provides an overview of the ways in which the term ‘restitution’ has historically been defined and used, and foregrounds the contribution of non-legal scholars such as philosophers, psychologists, political scientists and criminologists in recent years, that extends the concept to include interpersonal reconciliation, conflict resolution, a new international morality (Barkan), forward- and backward-looking restitution for individuals who benefit from injustices (Calder), the suggestion that restitution offers a means of rehabilitation for perpetrators (Eglash) and the ways in which restitution can be transformational (Lambourne). The authors then propose the usefulness of expanding the conventional understanding of restitution from restoring things to the way they were to simply ‘making things right’ and ‘paying back’ for wrongs previously committed in multiple spheres of human experience for past wrongs. They do this through advocating for an expanded conceptualisation of restitution, as the restitution of personhood, that addresses the restoration of dignity, memory, equality, opportunity, means and citizenship amongst those dishonoured by injustice. They also offer five positionalities of actors in this expanded conception, and analyses how individual, civic and government-led (or structural) domains of agency exist through which restitution may occur.

Table of Contents

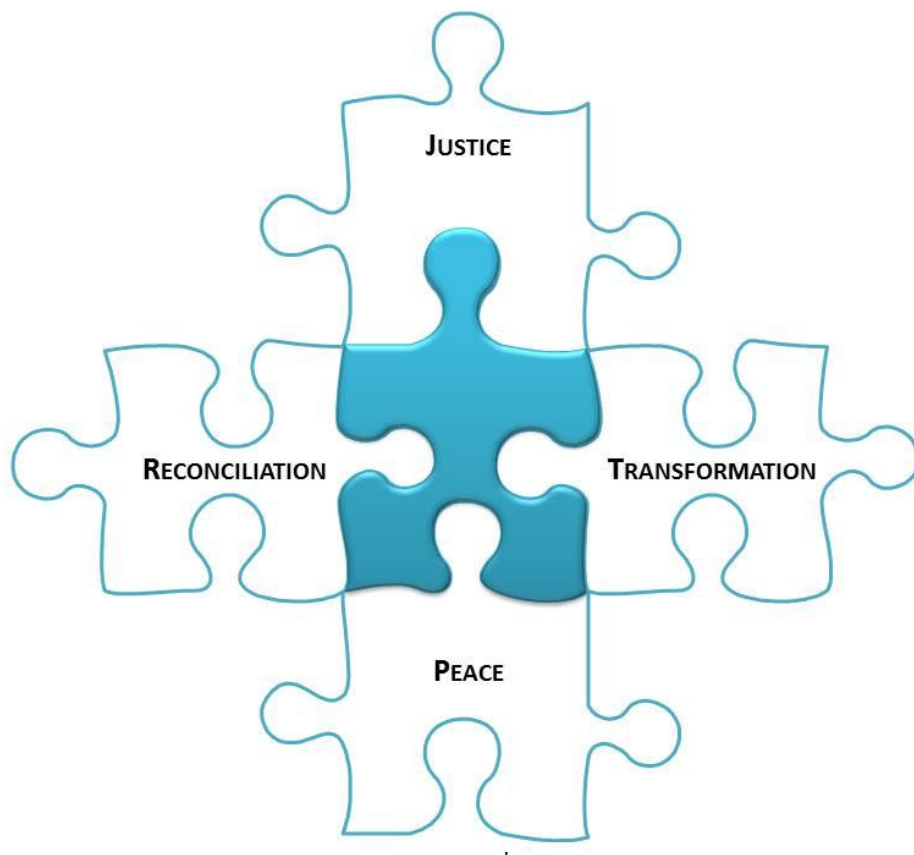
ABSTRACT.....	1
Introduction.....	3
Restitution in legal and historical perspective	4
<i>Domestic-level restitution of property following conflict or authoritarian rule.....</i>	<i>5</i>
<i>Restitution in international law</i>	<i>6</i>
Contemporary and interdisciplinary scholarship on restitution.....	6
<i>Shared responsibility and social connection</i>	<i>7</i>
<i>Backward-looking and forward-looking restitution</i>	<i>8</i>
The restitution of personhood: An expanded conceptualization.....	9
<i>The elements of the restitution of personhood</i>	<i>10</i>
<i>Domains of agency in the restitution of personhood</i>	<i>13</i>
<i>Positionalities in the restituion of personhood</i>	<i>15</i>
Conclusion	17
<i>Complex intersections and further questions.....</i>	<i>17</i>
<i>Summary</i>	<i>18</i>
References.....	19

Introduction

Though government and legal programmes such as penalty payments, land redistribution and affirmative action are important in bringing about social transformation in spaces fragmented by injustice-fomented inequality, the participation of civil society, communities and individuals is vital in buttressing top-down initiatives (Brewer, 2010; Hancock, 2008). Worryingly, however, in recent years a body of literature has grown regarding the perceived incompatibility of reconciliation – the healing of conflict – and transformation – the reduction in inequality – in South Africa (Matthews, 2010). Ultimately this paper presents the thesis that the notion of restitution, broadly applied, offers a motivational paradigm through which poverty and inequality induced and exacerbated by past injustices may be practically addressed. Included in such a conceptualisation is a discussion of the relationship between justice, transformation, reconciliation and peace building processes.

The tension between popular understandings of reconciliation and transformation (see Matthews, 2010) is evidence that relating justice, transformation, reconciliation and peace building processes alone is not sufficient to address the deeper, multi-faceted elements of what needs to occur to address poverty and inequality in a sustainable way. Metaphors are frequently helpful in understanding interrelationships between concepts. In depicting how peace building processes, transformation, justice and reconciliation may be related, a puzzle (see Figure 1) shows no evident hierarchical relationship but makes the point that all are equally necessary in order for the picture to be complete. In this case, a puzzle metaphor also offers the opportunity to refer to restitution as the ‘missing piece’ in a process through which justice, reconciliation, transformation and peace are achieved.

Figure 1 The relationship between restitution of personhood and peace, justice, transformation and reconciliation



With its bedrock in jurisprudence, the idea of restitution appears most frequently in the literature as a strictly legal concept. Yet work done by philosophers, psychologists, political scientists and criminologists has theorised forms of restitution with foundations in diverse academic traditions. The drive for a more broad-based conception of the term includes mechanisms of voluntary state reparations following international conflict (Barkan, 2000; Butt, 2009), an emphasis on social and historical justice that describes forward- and backward-looking restitution for people who suffer individual and structural injustices (e.g., Calder, 2010; Wenar, 2006; Young, 2006), and the suggestion that restitution offers a means of rehabilitation for perpetrators (Eglash, 1958, 1977).

This paper reviews the legal definitions of restitution as a natural point of departure for a study of alternative forms of restitution. It argues that a broader notion of restitution has the potential to promote the aims of justice and widen its interpersonal ambit to include individual, social and structural dimensions. Ultimately, by explicating and then building on these mainstream and alternative perspectives, the paper offers a new conceptual model for understanding restitution as a process towards effecting justice in a context where harm has occurred. This model distinguishes elements of restitution that take into account the socio-economic inequalities, lack of dignity and citizenship deficit caused by injustice and addresses the complicated relationship between peace, transformation, reconciliation and justice. At its heart is an effort to shift focus from purely government-led, legal and political remedies to highlight the many possibilities that exist at the individual, social and structural levels. We term these three types of action the domains of agency and also introduce the possibility that five positionalities exist in the restitution of personhood. The rationale with regard to distinguishing the positionalities is that personal situated-ness should be taken into account when considering the type of restitutive action individuals should make or receive.

Restitution in legal and historical perspective

Since the practice, understanding and theorising of post-conflict restitution measures has long resided in the legal domain, a review of the literature bares a rich historical and contemporary collection of (often contested) definitions and case studies. Birks (1985) describes restitution as an act of restoration that 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. In the legal context of resolving an instance of unjust enrichment, compensatory and gain-stripping remedies are distinguished. According to Doyle and Wright (2001), the former recompenses the victim for the wrong committed by giving up the unjustly got object; the latter, often termed “restitutionary damages”, “strip[s] the defendant of any profit or gain made through the commission of a wrong”, as no person should benefit from unlawful enrichment (p. 2). To a large degree, restitutionary damages can be understood as an underpinning aspect of the view that an individual can only rightly be said to have been fully recompensed for an illegal act against them “when he or she is as well off as he or she would be if the act had not been carried out” (Meyer, 2006, p. 408).

But the focus on unjust enrichment is only one strand of legal restitution. Criminal restitution claims have been made on the basis of psychological harm and economic losses caused to the victims of, for example, children who have been abused and/or depicted in child pornography. Proponents of restitution for victims of child pornography argue primarily that offenders should provide compensation for medical treatment – physical or psychological – necessitated by the incident, attorney’s fees and for future losses in income (Boe, 2010; DiBari, 2011; Jacques, 2011). Restitution claims for child pornography are noticeable for the way they implicate not only offenders who *produce* the material and are directly involved in harming the victims, but also those who *possess* pornographic images “thus perpetuating the

existence of the images and creating an economic incentive for creating and distributing the materials” (Boe, 2010, p. 207).

Within criminal restitution cases it is often unclear whether restitutionary sentences are intended primarily to punish the offender or to compensate the victim (DiBari, 2011). In considering the multiple applications of criminal restitution in US courts, DiBari (2011) is no doubt correct to state that it “achieves multiple purposes” (p. 309), to punish the offender *and* recompense the victim for their losses. However, there is a third possibility, which is that restitution is intended to rehabilitate the offender in addition to compensating the victim. Prominent in this regard is the ordering of juveniles to make restitution for their offenses (see Fields, 2003; Schneider, Griffith, & Schneider, 1982). Often referred to as restorative justice, juvenile restitution programmes commonly comprise apologies to victims and community service placements. As Fields (2003) notes of young offenders, “If used as a substitute for incarceration [restitution] can have the effect of being less stigmatising. It can affirm the offender’s self-worth and, ultimately, it has the potential to better facilitate the reintegration into society” (p. 46). Indeed, research indicates that youth completing restitution programmes are less likely to reoffend (Calhoun & Pelech, 2010; Schneider et al., 1982).

Domestic-level restitution of property following conflict or authoritarian rule

Supplementing the focus on restitution as a paradigm of criminal justice, restitution processes inform a large body of literature on transitional justice mechanisms. Transitional justice itself is a “conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel, 2007, p. 69). In societies where conflict and/or repressive regimes have caused widespread displacement or the forced removal of individuals, legislated restitution programmes have played a prominent role in returning the land and/or private property in question. Though the theme of unjust enrichment can be detected as an underlying animator, restitution perceived from a transitional justice perspective primarily redresses the violation of individuals’ civil, political and property rights. The United Nations (UN) document *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (2005), a wide-reaching policy document in post-conflict property restitution, encapsulates this rights-based approach in its 23 Principles.

Land restitution is seen as fulfilling a substantive role in returning property to individuals who were unjustly dispossessed and a symbolic one with respect to nation building projects (Fay & James, 2009). Substantively, through restitution individuals whose right to property and non-discrimination was violated regain their property. In that “land dispossession invokes a history of conquest and exploitation” (C. Walker, 2005, p. 808), the restitution of land and property also stands as an overarching symbol of transformation (Puttergill, Bomela, Grobbelaar, & Moguerane, 2011; C. Walker, 2005), particularly in societies in which structures of colonialism ensured indigenous populations’ claims to land were stifled for several generations. The documented successes of post-conflict programmes describe restitution as a “means of promoting refugee return” (Williams, 2005, p. 446) and as bringing emotional satisfaction to regaining family property (Hans & Stjernstrom, 2008).

Studies into the dynamics of land and property restitution programmes addressing the legacies of historical injustice and conflict also illustrate the complexities involved in making property restitution to legally designated groups. Noticeably, official restitution programmes can give rise to communities of interest within eligible groups, communities that include some and exclude others (Beyers, 2007; Bourassa & Strong, 2000; Everingham & Jannecke, 2006; C. Walker, 2005).

National-level restitution programmes that redress either historical or contemporary acts of dispossession remedy acts of domestic injustice. With respect to international crimes, the International Law Commission (ILC) lists restitution in kind as the first legal remedy in its *Articles on Responsibility of States for Internationally Wrongful Acts* and describes it as restoring “the situation which existed before the wrongful act was committed” (2001). Article 34 states that “reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”.

Despite the primacy placed on restitution in kind by the ILC, there is some evidence that it is often an impracticable remedy (Gray, 1999). Gray’s (1999) statement regarding “the rarity of the award of this remedy in practice and its unsuitability for many types of breach of international law” (p. 418) seeks to underline the supposed dislocation between practice and the theory that “reparation must insofar as possible eradicate the consequences of the illegal act” (Shelton, 2002, p. 835).

Notably, Articles 36 and 37 of the ILC Articles delineate material compensation and satisfaction for injustices respectively as alternative forms of reparation to be adopted if restitution cannot be enacted. Moreover, Article 37 states that satisfaction, which may involve “an expression of regret, a formal apology or another appropriate modality” should only be resorted to in the case that restitution and compensation cannot be made. Apologies are thus distinguished from restitution, though they may form part of the reparation process. The primacy of restitution in the Articles does suggest a certain rigidity about the guiding framework. Indeed, commentators have suggested that this focus may constrain the application of the Articles (Gray, 1999). Within the literature on the ILC’s Articles, claims of inflexibility are supported by assertions that the scope of the Articles might have been broadened to state that “the rules on state responsibility apply to breaches of obligations toward nonstate actors as well as toward states; have given more importance and detail to satisfaction as a remedy, especially considering the role of symbolic reparations” (Shelton, 2002, p. 837). This is an especially salient argument when considering the range of reparation mechanisms, including apologies and other symbolic measures, employed by states in the past 20 years to remedy historical injustices (see Barkan, 2000).

Contemporary and interdisciplinary scholarship on restitution

Complementing the legal literature on restitution, non-legal research on restitution and its applications in society has in recent years burgeoned as a voluntary moral response to injustice. It has focused primarily on responsibility for injustices rather than strict liability (see Barkan, 2000; Calder, 2010; Young, 2006). This approach characterises studies describing the imperative of redressing international wrongs, intergenerational responsibility for historical injustices, and the indirect implication of individuals in diffuse injustices. As a whole, this literature addresses the individual, social and structural factors that have in the past, and should in the future, motivate acts of restitution.

From the standpoint of international relations between states and political communities, we pay attention to work done by the US-based Elazar Barkan on international morality. A historian by training, Barkan formulates a theory of restitution with a focus on international morality. Though Barkan (2000) recognises that in a legal context restitution is separate from and distinct to other forms of reparations, he purposefully employs the term “more comprehensively to include the entire spectrum of attempts to rectify historical injustices” (Barkan, 2000, p. xix). Restitution, he states, “refers to the integrated picture that this mosaic

creates and is thus not only a legal category but also a cultural concept” (Ibid). By clustering different concepts under one term, he is able to encapsulate an idea of a more morally conscious world, one in which, he asserts, a trend has emerged whereby governments are morally compelled to acknowledge and make amends, either substantively or symbolically, for international or domestic historical injustices. His research describes a political moral economy of restitution whose lifeblood is voluntarism.

Barkan’s work highlights responses to corporate guilt, shame, responsibility and efforts at public reconciliation. Historical injustices perpetrated against a group (or groups) of people, acts of genocide and war are all instances in which shared accountability and responsibility following the atrocities can be invoked, especially where the effects of the perpetrations remain evident. Within literature on paying restitution for historical injustices, shared responsibility and collective moral guilt are topics that have been extensively discussed (Booth, 1999; Butt, 2006; see Butt, 2012; Hill, 2002; for a critical discussion of who should pay restitution see Kukathas, 2006). The most prominent argument made for responsibility for past wrongs is that community political identity is consistent across generations (Buckley-Zistel, 2009; MacIntyre, 1981/2003). Thus Booth (1999), an American political scientist, asserts “we are our past as well as our future” (p. 259) and that historical events compel a contemporary person to be “the bearer of responsibility for the past and a custodian for the future” (p. 249). Booth’s encompassing philosophy clearly complements the literature advocating for group-based restitutive processes as it foregrounds the continuity of political identities and the enduring effects of wrongs committed by prior generations.

Shared responsibility and social connection

Alongside the attention paid to the continuity of political identities, political science and philosophy literature also emphasise how individuals who indirectly perpetuate socioeconomic inequalities and the ill treatment of others become responsible for paying restitution to victims of injustice. The most prominent arguments for restitution based on collective responsibility for benefiting at the expense of others emphasise the individual’s role in supporting processes of structural injustice (Calder, 2010; Young, 2004, 2006). Both Young’s “social connection model” and Calder’s notion of “shared responsibility” for global injustices have at their heart the recognition that any sort of structural injustice has its foundations in the insinuation of that political or economic system into everyday events and common sense thinking. As with structural violence, the “gradual, imperceptible, and diffused” (Opatow, 2001, p. 151) nature of structural injustice, often embedded in global systems, inevitably leads individuals to become party to injustice without purposefully participating in the fundamental iniquities of these processes. According to the authors, however, even those people who cannot avoid the benefits of structural injustice still have a moral responsibility to repay unjust gains. Thus Calder (2010) uses the example of a Western, middle-class woman, Janis, who through lack of interest in global affairs and ignorance of her globally networked existence, persistently perpetrates acts of injustice: “In sum, Janis tacitly supports structural injustices suffered by sweatshop workers living in developing countries through her actions, omissions, and attitudes. For this reason she shares responsibility for these injustices” (p. 268). As Calder notes, Janis would be liable for moral, not legal, restitution; she has, after all, not done anything unlawful.

In sum, Calder and Young focus on individuals’ often unwitting implication in global injustice to highlight how *individual* actions are inextricably linked to *structural* factors. In her argument, Young (2006) explicitly attends to the trap of personal resignation in the face of a seeming leviathan of inequity. Instead of isolating individual liability which “derives from legal reasoning employed to establish guilt or fault for a harm” (Young, 2006, p. 116),

she focuses on the responsibility of the individual to act as part of a group to rectify injustice. In the context of grand-scale, institutionalised injustice, Young contends that isolating individuals is impractical, if not impossible. She states that “under a social connection model, agents share responsibility with others who are differently situated, with whom they usually must cooperate in order to effect change” (Ibid., p. 130). This is an analysis that highlights the imbrication of the individual, social and structural factors that inevitably underlie domestic and global injustice.

Backward-looking and forward-looking restitution

Literature that outlines a wide-reaching moral responsibility for harms places particular emphasis on distinguishing between backward- and forward-looking restitution. The liability approach is primarily described as backward-looking in that sentenced restitution tends to focus on responding to a specific harm and restoring that situation to its original state. Cases are circumscribed in both a temporal and substantive sense (Calder, 2010; Wenar, 2006; Young, 2006). In contrast, theory on forward-looking restitution resonates with Booth’s notion that individuals are bearers of the past as well as custodians of the future. Forward-looking restitution is Janus-faced in that it looks to the past as a point of departure for remedying injustice but primarily considers the future in formulating a response (Brooks, 2008). This perspective tends to come to the fore in studies considering the nature of structural injustice *viz.* “an ongoing set of processes that ... is likely to continue producing harms unless there are interventions in it” (Young, 2006, p. 122). In short, forward-looking restitution emphasises processes of change.

Theories on backward- and forward-looking perspectives aim to distinguish the nature of restitution. Similarly, the body of literature on whether restitution should punish the perpetrator, compensate the victim or restore one or both parties has added to the project of defining restitution. Theories of criminal justice systems that seek to replace retributive sentences with restitution claim that the latter focuses on the rights of the victim, rather than the punishment of the perpetrator (Barnett, 1977). For advocates of a purely restitutive paradigm, criminal justice systems which consider restitution alongside more traditional retributive sentences do not go far enough.

Parallel to research into purely victim-focused restitution, other commentators propose restitution as a form of justice that focuses on rehabilitating perpetrators. Eglash (1958), an American psychologist, refers to “creative restitution” as a model of justice that offers perpetrators the possibility of improving their “self-control and judgement” (p. 622). He contends that “restitution is a voluntary, creative, life-long task, it is a growth process” (p. 621). He suggests that creative restitution, which he also terms “guided restitution” (Eglash, 1977, p. 93), need not only occur between individuals, but that it can be a group practice too.

The contemporary notion of restorative justice comes closest to Eglash’s creative restitution, though it is perhaps not as offender-oriented as the former. The tenets of restorative justice encompass “restoring victims, restoring offenders, and restoring communities as a result of participation of a plurality of stakeholders” (Braithwaite, 1999, p. 1). Proponents of restorative justice often suggest an overhaul of the justice system and the possibility to address most forms of crime in a restorative way. However, as a restitutive mode of justice, it has found its way into the criminal justice system mainly in the form of sentencing juvenile delinquents to community service. Nevertheless, there are examples of the mainstreaming of reparative justice; the Vermont reparative probation programme is one such example (see Humphrey, Burford, & Huey, 2006 for a comprehensive discussion of the merits of reparative probation in criminal cases with respect to the Vermont programme). Optimistic analyses of restorative justice procedures suggest they reduce crime more effectively and are less costly than extant criminal justice practices (Braithwaite, 1999) and

that a majority of victims who participate in restorative conferences are satisfied with the reparations decided upon, more so than in traditional justice procedures (Ibid.).

In sum, the literature on reconceptualised understandings of restitution has focused on a variety of moral aspects of making things right for injustices that fall beyond the purview of traditional legal practices. On the whole, it converges with the jurisprudence of restitution in recognising that no person should benefit from an injustice done to another – it addresses the notion of unjust enrichment. Whereas the legal literature on restitution focuses extensively on returning a situation to the way it was before the injustice was committed, alternative theories of restitution place more emphasis on recognising one’s implication in (sometimes diffuse) wrongs and voluntarily “making things right”. The theory of these reconceptualised understandings of restitution is on the whole not prescriptive; as a body of literature it provides a blueprint for building a model of restitution that is able to integrate innovative extra-legal concepts with mainstream applications of restitution in criminal and transitional justice practices. In this vein, the following section of this paper offers the beginnings of an expanded conceptualisation of restitution that defines it in terms of paying back for past wrongs committed and making things right for past injustices. It proposes six elements of restitution and links these to personhood, a notion which encapsulates the autonomous individual with inherent rights, the relational person and “the person as a component of a collective unit” (McCarthy, 2012, p. 79). Following that, it discusses the links between the restitution of personhood, justice, peace, transformation and reconciliation following conflict. Situated as we are in South Africa, we take the historical and contemporary realities of the country as our touchstone for applying this model. However, we do not perceive the points we make to be limited to the exigencies of any single country.

The restitution of personhood: An expanded conceptualization

Taking into account the legal and historical uses of the notion of restitution, as well as more recent and interdisciplinary scholarship, we now offer an expanded conceptualisation of restitution – which we term ‘the restitution of personhood’ and provide elements of this conceptualisations, domains in which it might be enacted, and the range of actors who might be involved. Throughout our explication, we are conscious of the call made by Archbishop Emeritus Desmond Tutu, at the conclusion of South Africa’s Truth and Reconciliation Commission, for “a social dynamic that includes redressing the suffering of victims... [to] meet the ideal of restorative justice” (Truth and Reconciliation Commission, 1998, Volume 1, p. 131). This social – as opposed to government-led – dynamic has never fully emerged in South Africa, and inequality along Apartheid lines continues to grow, with the beneficiaries and architects of Apartheid still enjoying one of the highest standards of living in the world (see van der Berg, 2010).

Such a renewed conceptualisation of restitution requires a subtle shift in definition. Restitution in its simplest definition means ‘making right’ and ‘paying back’ for wrongs previously committed, symbolically or materially. This is a departure from the more formal definition, that of “restoring to the state it was before” – an aim seldom achievable in contexts of injustice. This is especially so if much time has passed since the injustice was committed or if the relationship in which the parties found themselves were not desirable in the first place, e.g. colonialism. The second subtle shift is restitution concerns expanding its scope to philosophical, emotional, theological, psychological, physical and economic elements, in addition to only financial reparations (often the outcome of cases of legal restitution). Such a widened definition is needed since, in many situations of injustice, what was lost cannot be remedied through financial compensation alone. For this reason, making things right and paying back should include financial, psychological and emotional redress.

This would allow for a more relational interaction between those dishonoured by injustice and those complicit with it.

The elements of the restitution of personhood

Recognising that restitution should attend to multiple factors evokes Braithwaite’s assertion that any restorative process must comprise “restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support” (Braithwaite, 1999, p. 6). Taking these multiple “dimensions of restoration” (Ibid.) as a point of departure, restitution more broadly defined may be said to encompass or have as its aim the restoration or restitution of personhood. Personhood relates to individual and collective politics of belonging. Though the notion of personhood is contested in philosophy and law, it arguably comprises of “judgements about personal identity, moral responsibility, and the proper relationship both among individuals and between individuals and community” (Wingo, 2006, n.p.). The notion of personhood also has uniquely African conceptions. In speaking of the African philosophy of *ubuntu*, personhood is described and defined in terms of social connectedness and harmony (Metz & Gaie, 2010). In a national project of restitution and justice, such a definition is particularly appropriate since it places emphasis not only on the individual, but also on social and structural levels (or domains of agency as we describe later). How can we restore each other’s humanity (or personhood) alone? Such restoration is only possible at all three levels. Individuals need healing in order to relate as whole human beings socially. Furthermore no social or individual healing is possible if an environment is not conducive to such restoration.

Looking at the extent of human experience, and viewing personhood from a rights perspective, personhood could be defined as including both natural and non-natural rights. Included in the former are the notions of dignity, equality, and opportunity, while non-natural rights might include memory, means and citizenship. These six elements of what we describe as the restitution of personhood are depicted in Figure 1 below.

Figure 2 The six elements of restitution of personhood



In each of the six elements depicted, individuals, civil society and institutions (including government) are able to contribute concrete and strategic action towards the ends of social and economic justice. We discuss some of these examples in the descriptions of the six elements of restitution below.

Dignity. All people have a right to honour and dignity. Both the first sentence of the preamble to, and the first article of, the Universal Declaration of Human Rights (1948) speak of the dignity of human beings: “All human beings are born free and equal in dignity and rights” and “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (UN General Assembly, 1948). The remainder of the declaration speaks to all the possible ways in which this dignity can be assaulted.

Without exception, injustice denies people each of the rights found in the declaration. Simply put, injustice dishonours individuals and groups of people. In addition, besides stripping people of, inter alia, rights to health, education, life, shelter, education, enjoyment of culture, love and marriage, ownership and work, it frequently adds insult to injury. There is a rich literature describing the negative psychological effects of racism as a form of oppression, ranging from mental disorders (Szymanski & Stewart, 2010) to “learned helplessness” (Pierre, Mahalik, & Woodland, 2002, p. 33). At a social level, efforts to counter these effects and address the restitution of dignity include the Black Consciousness Movement in South Africa, Black theology in Latin America, and the Civil Rights movement in the USA. In contemporary society, structural efforts include constitutional democracies that place human dignity as central to citizenship. At the individual level, the restitution of dignity might include sincere apologies, asking for forgiveness and building friendships across lines of previous enmity – on the terms of those dishonoured rather than on the presumption of those who were complicit in the dishonour.

Memory. It has been widely argued in post-conflict literature that exposing atrocities, human rights violations and untruths crafted by injustice are vital to social and political change (Minow, 2000; Moon, 2009; M. U. Walker, 2010). Arguably, truth recovery or memory projects are a critical element in restitution. The telling of stories forcibly silenced, the acknowledgment of pain and suffering, and the interrogation of features of civil life normalised by architects and perpetrators of injustice form part of these memory projects. At a structural level, in 2008 the Spanish parliament passed the Law of Historical Memory that aimed to end ‘amnesia’ about Spain’s civil war. It condemned the Francoist regime, made it illegal to hold political events at Franco’s burial place or display Francoist symbols, recognised victims of violence, rejected laws passed and declared findings of military tribunals under Franco null and void (Encarnación, 2007). It offered state help to trace remains of those killed, and allowed those forcibly exiled under Franco’s rule to return. In sum, it aimed to end Spain’s legacy of a history rewritten during the course of the 36-year dictatorship. At a civic/social level, Northern Ireland’s Ardoyne memory recovery project or South Africa’s healing of memories workshop held by the Anglican Church are examples of memory recovery projects. At an individual level, a commitment to reading and understanding a country’s history of dispossession and injustice would be an attempt at restitution for the obscuring of memory.

Equality. Equality encompasses political, legal and social elements. It is especially pursued with regards to race, gender, class, sexual orientation and geographical origin. One of the most profound examples of the restitution of equality on a structural level happened in South

Africa, following the demise of Apartheid. A number of statutes were rewritten, overturning centuries of legislation that enforced inequality. Key among these were the repeal of laws such as The Prohibition of Mixed Marriages Act, No. 55 of 1949; the Immorality Act, No. 21 of 1950 that prohibited sexual intercourse and marriage between people of different races; The Bantu Education Act, No. 47 of 1953 that had allowed for different qualities of education to be given to children according to their racial categorisation; The Extension of University Education Act, No. 34 of 1959 that excluded black people from white universities and created separate universities for various race groups; the Group Areas Act, No. 41 of 1950 that limited various race groups to particular areas, and forced black people into ‘homelands’ or self-governing Bantustans; the Suppression of Communism Act, No. 44 of 1950 that denied black people the right to mobilise politically; the Native Labour Act, No. 49 of 1953 that reserved certain jobs for whites only; the Reservation of Separate Amenities Act, No. 19 of 1954 that reserved parks, buses, beaches, benches, toilets and other public facilities for whites only; and the Separate Representation of Voters Act, No. 46 of 1951 (amended 1956) that struck black voters, who had never been given the vote in the interior provinces, off the Cape voters’ roll. However, legislative equality is by no means a guarantee of lived equality. Justice must not only have been done but must have been felt and experienced as Braithwaite describes. Restitutive action for the loss of equality, at an individual level, might therefore be addressed through refusing privilege when offered on the basis of skin colour or educational level. At a social level or community level, projects such as Equal Education and physically reintegrating churches segregated by Apartheid (in South Africa), and the use of *Gacaca* courts in Rwanda to help people experience justice serve as examples.

Opportunity. From a rights perspective, the restitution of personhood must include restoring people’s ability to access opportunity, along with “restoring a sense of empowerment... [and] social support” (Braithwaite, 1999, p. 6). The South African Employment Equity Act of 1998 is a pertinent example of efforts to restore opportunity to individuals on a structural level. Detractors of restitution frequently argue against entitlement or hand-outs, and that people “should work for what they have”, usually followed by “as I did” (Matthews, 2010). Few proponents of these views stop to recognise the insidious way in which Apartheid, and the Job Reservation Act, stripped people of the access to opportunity – that would allow them to work for what they now want. A similar, and more contemporary argument, concerns the current state of education in South Africa. Poor quality, low retention and inferior outcomes deprive people of access to opportunity. Children from township schools invariably fair poorer at university than those from the privileged education system (suburban or private) (Bhana et al., 2011). The restitution of personhood must include returning access to opportunity to all who desire it.

Broad-based black economic empowerment is an example of the restitution of opportunity at a structural level; corporate social investment in education an example at a social or civic level; and reading to disadvantaged children on a regular basis an act of the restitution of opportunity at the individual level.

Means. The restitution of means is one perhaps most spoken of in restitution discourses. Financial compensation for property loss, reparations, punitive payment and land redistribution and return are all familiar concepts. We term it ‘means’ rather than ‘land’ or ‘wealth’ partly to place emphasis on its instrumental rather than absolute value, and to reframe it as a non-punitive measure. Seeking the restitution of means aims to facilitate access to a decent standard of living for those dishonoured by injustice, and to opportunities dependent on means including “a sense of security” (Braithwaite, 1999, p.6). Strong examples of structural restitution of means exist in land restitution (in South Africa through

the formal land claims court, in Canada with First Nations land compensation). On a civic level, the so called ‘land grabs’ in Zimbabwe is a, decidedly disputed and violent, social initiative. Commercial banks providing loans to those deemed ‘non-creditworthy’ due to being undocumented or lacking credit history as a result of Apartheid impoverishment are further examples of the restitution of means. On an individual level, numerous examples exist of how personal wealth, gained ostensibly by legitimate means yet only possibly through repressive laws (job reservation, land act, affirmative education for whites etc.), might be redistributed. One might make a personal choice for biological children not to be sole inheritors of personal property but instead to divide property between biological children and others who were dispossessed by injustice. Another might be the intentional investment in education for children of domestic employees at the same level as those of one’s own family members.

Citizenship. Swartz, Hamilton Harding and DeLannoy (2012) ask a series of critical questions about what it means “to belong in a society that has suffered debilitating and dehumanising racial subjugation, actively excluding people from citizenship, and how poverty serves to perpetuate this exclusion” (p. 27). To be a citizen and belong to a nation requires that each person access and experience a conglomeration of rights and responsibilities (Braithwaite’s notion of “deliberative democracy” (1999, p. 6). Indisputably Apartheid (and injustice in general) removes these rights from individuals and groups. Black people were dehumanised, subjugated, deprived of participation in governance, deprived of the means to earn a living, own land, move freely or marry as they chose. These rights have been legally (and therefore structurally) restored. However, at both social and individual levels, brutalizing practices of racism, sexism, hetero-sexism (or homophobia), and the marginalisation of youth (see Swartz et al., 2012 for a comprehensive discussion) still exist along with degrading personal and social labour practices. These need to be addressed if the full restitution of citizenship is to be achieved. Besides the examples already cited in this section, the restitution of citizenship at an individual level might include frank discussion with those previously dishonoured by injustice of the physical and psychological effects of conflict and poverty on succeeding generations so that self-hatred and self-blame is avoided.

Domains of agency in the restitution of personhood

This brief review of the six elements of restitution has touched on some examples of acts of restitution across the individual, social and structural domains of agency. Table 1, below, summarises the examples presented so far, and provides further examples of restitution in practice in each domain. The examples are mainly (due to the locatedness of the authors), focused on the South African context, but also include examples from elsewhere.

Table 1 Examples of restitution divided by individual, social or structural action, and with an indication of the element of restitution it incorporates

EXAMPLES OF RESTITUTION		
Individual	Social	Structural
<ul style="list-style-type: none"> Refusing privilege based on whiteness [equality] 	<ul style="list-style-type: none"> Bank loans for the non-creditable with government as guarantor [means, dignity] 	<ul style="list-style-type: none"> Legislation for Maori fishing rights – New Zealand [opportunity]
<ul style="list-style-type: none"> Commemorating public holidays with respect 	<ul style="list-style-type: none"> Commemorating the 1913 Land Act - SA [memory] 	<ul style="list-style-type: none"> Housing subsidy for those earning under R13,000pa – SA

[dignity, citizenship]		[means, dignity]
<ul style="list-style-type: none"> • Apologies between individuals [dignity] 	<ul style="list-style-type: none"> • Community development partnerships, e.g. Solms-Delta Project, SA [dignity, means] 	<ul style="list-style-type: none"> • Youth employment subsidy – SA [opportunity, means]
<ul style="list-style-type: none"> • Voluntary limitation to children’s inheritance [means] 	<ul style="list-style-type: none"> • Physically reintegrating racially divided churches [equality, citizenship] 	<ul style="list-style-type: none"> • Broad-based black economic empowerment – SA [opportunity, equality, means]
<ul style="list-style-type: none"> • Company share (re)distribution [means] 	<ul style="list-style-type: none"> • Community processes, e.g. Worcester Hope and Reconciliation Initiative - SA [dignity, memory] 	<ul style="list-style-type: none"> • Affirmative action – SA, USA, Malaysia [opportunity, equality, means]
<ul style="list-style-type: none"> • Reading and knowing in detail the history of one’s country [citizenship, memory] 	<ul style="list-style-type: none"> • <i>Gacaca</i> courts – Rwanda [dignity, citizenship, equality] 	<ul style="list-style-type: none"> • National Health Insurance - SA [means, dignity]
<ul style="list-style-type: none"> • Building friendships across lines of former enmity [dignity, equality] 	<ul style="list-style-type: none"> • Corporate social responsibility/investment [dignity, opportunity] 	<ul style="list-style-type: none"> • ‘Wealth tax’ - SA [means]
<ul style="list-style-type: none"> • Reading to children in impoverished communities [opportunity] 	<ul style="list-style-type: none"> • National museums/centres of remembrance [memory] 	<ul style="list-style-type: none"> • New constitution [citizenship, equality, dignity]
<ul style="list-style-type: none"> • Redistribution of personal wealth [means] 	<ul style="list-style-type: none"> • Ardoyne Commemoration Project – Northern Ireland¹ [memory] 	<ul style="list-style-type: none"> • Punitive action against BBEE ‘fronters’ - SA [opportunity, means]
<ul style="list-style-type: none"> • Learn at least one indigenous language [citizenship] 	<ul style="list-style-type: none"> • Teaching about Black Consciousness – SA [equality, dignity] 	<ul style="list-style-type: none"> • Universal suffrage – SA [citizenship]
<ul style="list-style-type: none"> • Restitution of land/property [means] 	<ul style="list-style-type: none"> • Healing of Memories workshop – SA [memory, dignity] 	<ul style="list-style-type: none"> • Law of Historical Memory – Spain, 1997 [memory]
<ul style="list-style-type: none"> • Cross-racial adoption [opportunity] 	<ul style="list-style-type: none"> • Community Relations Unit – Northern Ireland² [citizenship] 	<ul style="list-style-type: none"> • Solidarity tax at reunification - Germany, 1992 [means, opportunity]
<ul style="list-style-type: none"> • Asking for forgiveness [dignity, equality] 	<ul style="list-style-type: none"> • Community surety for loans [opportunity, means] 	<ul style="list-style-type: none"> • New law dealing with San and Khoi heritage – SA [dignity, memory]

This summary of examples of restitution is by no means exhaustive – we acknowledge that numerous restitution processes have been instituted in many countries that were embroiled in domestic or international conflict. Nevertheless, the instances listed here provide insight into two types of restitutive processes. The first, linked mainly to structural and, to a lesser degree, social examples, is restitution-in-practice. That is, legislated restitution or instances of group-based restitution which has already begun or been completed. The second type, mainly

¹ A civil society/community-level truth recovery project in Ardoyne, Belfast, that collected oral testimonies to those killed in that community during the Troubles, and published as *Ardoyne: The Untold Truth* (Aiken, 2010).

² A 2005 government initiative funded through district councils, to address division in communities by building “cross-community contact and mutual understanding” (Aiken, 2010, p. 183), via community-led projects.

tied to individual actions, are voluntary acts tentatively suggested as future possibilities. Some, such as building friendships across former lines of enmity, learning an indigenous language and asking for forgiveness, have been mooted within the public sphere, sometimes promoted by civic movements or political figures. However, other actions falling into this type of restitutive action have not yet gained traction within public discourse or individual imagination. These actions have nonetheless been included in this summary of examples because they have emerged as suggestions to rectifying the past and, at their heart, resonate with the various tenets of the alternative understandings of restitution espoused by Calder, Eglash and Young.

Positionalities in the restitution of personhood

A key question that a broader conceptualisation of restitution raises is how personal situatedness or positionalities of actors must be taken into account when addressing (or seeking to implement) restitution along the lines described in this section. Here conventional terminology of perpetrator and victim, or even perpetrator, victim and bystander (Bar-On, 2001; Latané & Darley, 1970; Lerner, 1975; Staub, 1989, 1996) is inadequate. Instead, drawing on conventional definitions, work by Karl Jaspers (1979) and contemporary South African examples, we propose that at least five positionalities are needed in order to locate actors in real world injustice. Table 2 provides these suggested positions (architect, implementer, dishonoured, beneficiary, and inheritor) and describes them in relation to both injustice and resistance to injustice in a further effort to move away from the inadequacy of terms such as victim, perpetrator or bystander.

Table 2 The five possible positions of actors in restitution processes

Architect of injustice, e.g. government ministers Verwoerd, Vorster, Vlok	Architect	Architect of resistance to injustice, e.g. Mandela, Casrils, Sisulu, Zuma,
Implementer of injustice, e.g. apartheid foot soldier, security police members, ‘madams’	Implementer	Implementer of resistance to injustice, e.g. MK foot soldiers, Mass action participant, members of township civic committees
Dishonoured by complicity, e.g. white worker whose job was ‘reserved’, Apartheid informer	Dishonoured	Dishonoured by systems, structures and actions, e.g. most black, coloured and Indian people
Beneficiary of injustice, e.g. white people in general, possibly Bantustan leaders	Beneficiary	Beneficiary of resistance e.g. Black consciousness, children of activists, BBBEE beneficiaries
Inheritor of benefit, e.g. social capital and wealth of white South African youth	Inheritor	Inheritor of dishonour, e.g. impoverished black youth with poor quality education and low levels of social and cultural capital

- *Architects*: Those who designed the policies and created the environment in which injustice might occur, and those who carry “political guilt...[by legitimating] perpetrators in their roles” (Buckley-Zistel, 2009, p. 9).
- *Implementers*: Those who might be termed perpetrators of injustice, or activists against injustice.

- *Beneficiaries*: These are those often termed bystanders, those who bear “the moral guilt of those who did not act but looked on” (Buckley-Zistel, 2009, p. 9), and who may have benefitted from doing nothing, either financially or from escaping the violence and disruption that activists endured.
- *Dishonoured*: Those dishonoured by injustice (usually called the victim), or dishonoured by dehumanising complicity in violence, or being the recipient of unwarranted benefit.
- *Inheritors*: Those born after the proximal injustice had ended but who experience its consequences, inheriting wither the dishonour or the benefit (and in some cases both simultaneously).

These positionalities posit that whether one was an architect of injustice or of resistance to injustice, a foot soldier of implementation or resistance, dishonoured by its structures, actions or consequences, or by complicity in its systems, or a beneficiary or later inheritor of its outcomes must matter.

Moreover, the intention behind widening these possible positionalities is to offer a more fluid way of locating actors – one that addresses nuances, beyond simple ‘race’ classifications so, for example, ‘white’ activists who were both architects and implementers of resistance, and ‘black’ informers complicit with the implementation of injustice might be distinguished (or be able to position themselves). Similarly, those who were ‘coloured’ and ‘Indian’/‘Asian’ South Africans and who received limited privileges (along with dishonour), and Bantustan leaders who enriched themselves during Apartheid rule while simultaneously being able to exert little resistance to their puppet rule, might be able to focus on their response to a call for restitution in the South African context. Furthermore, while it is useful to speak of the majority of black South Africans excluded from citizenship and opportunity (amongst other things) as having been dishonoured by Apartheid, but it may also be helpful to think of conscripted soldiers as having been dishonoured by Apartheid in their complicity in brutal bombings and violent policing in townships. While we refer mainly to white South Africa has been the beneficiaries of injustice in that they still enjoy high standards of living and are for the most part inoculated against the rampant poverty facing the majority of black South Africans, there are also young black South Africa’s who now benefit from a legacy of injustice through BBBEEE. While it is debatable as to the usefulness of these latter distinctions, offering a wider range of positionalities serves to broaden the debate and diffuse simple accusations of guilt and accusation. Such an approach can be aligned with Young’s social responsibility model which is particularly useful in post-conflict setting in which “disagreements over the question of guilt, one-sided accusations ... often have the result that the finding of justice by means of penal jurisdiction further hardens the conflict lines” (Buckley-Zistel, 2009, p. 9). In the context of a country such as South Africa, which is still deeply divided along racial lines corresponding to the legacy of apartheid, this approach is able to present to individuals their accountability for the past without isolating individuals with the attendant possibility of alienating them from a national process of reconciliation *qua* restitution. It also invokes McIntyre’s (1981/2003) notion of continuums of community.

While we have not provided an extensive set of examples of how each actor located in differing positions might be challenged to act across various domains of agency, nor how positionalities might affect action with regard to the specific element of the restitution of personhood being addressed, these positionalities serve an important purpose. They serve as a theorised framework for restitutive action.

Conclusion

The argument just articulated, that restitution of personhood might act as an integral piece in bringing about justice, reconciliation, transformation and sustained peace finds resonance in Lambourne's assertion that transitional justice mechanisms implemented following conflict are seldom sufficient to satisfy victims that justice has been done (Lambourne, 2009). She argues for "transformation" of historical structures borne of the entirety of events ahead of "a focus on 'transition' as an interim process that links the past and the future" (Ibid., p. 28). She asserts that "a model of transformative justice that supports sustainable peacebuilding would ... attend to the psychological, economic and political needs of societies seeking long-term changes" (Ibid., p. 30). Her focus on transformation mines a rich seam of post-conflict literature that emphasises that justice and reconciliation are not ends in themselves, but play complementary roles in meeting human needs following conflict (Lambourne, 2004). Overall, the notion of restitution of personhood which we offer here articulates well with extant post-conflict literature that emphasises the need to satisfy human needs. It offers something new in providing a motivational rationale for why ordinary people should become involved in processes of justice and reconciliation.

Complex intersections and further questions

In the reconceptualisation of restitution which we offer in this paper there are a number of ways in which the practice of restitution is complex. First, it is clear that the six elements described above intersect with each other, frequently. Without memory, there can be little will to make restitution for the loss of dignity, or little will to find ways of restoring means and opportunity. Without dignity citizenship remains precarious. Without equality, opportunity is in jeopardy and so on. We thus therefore do not choose to make restitution in only one area, without addressing all equally. Furthermore it may be argued, as many do, that restitution has occurred on the structural level – governments past and present have negotiated and resolved, lawyers and judges have litigated and ruled, and our constitution levels the playing fields for once and for all. What needs to be addressed is the question of when have we sufficiently 'paid back' or 'made right'?

Second, there are numerous ways in which individual and civic action overlap and intersect, as do civic and structural action. Also intersecting is the way in which multiple elements of restitution may be addressed by a single action. So for example, corporate social responsibility might address means, opportunity and dignity if done well, and commemorating public holidays by individuals, both dignity and citizenship. Of course, it is also possible that a single action might exclude elements and principles of restitution, and jeopardise its efficacy by doing so, if not carefully implemented. To wit, redistributing wealth can become devoid of any aim of restoring personhood if done in a manner suggestive of *noblesse oblige* or as a charitable gesture lacking any further instrumental or symbolic intentions.

Third, it is clear that the legal undergirding of the notion of restitution is almost always present in acts of restitution, and intersects with contemporary notions of restitution. So for example, restitution has the potential to be a transformational (see Lambourne's argument), rather than a static, form of justice. Taken together these elements or domains of restitution may be considered to look both backwards and forwards, as Calder describes. It looks back to right the wrongs of the past – through action at multiple levels – individual, social and structural. Then it looks forward towards the gains to be made from a programme – or national project – of restitution. Furthermore, it is a project predicated on a moral (as Barkan

describes) rather than legal or coercive basis. The restitution of personhood cannot, therefore, be legislated or punished if left unattended.

Summary

This paper has examined legal literature to distinguish between restitution and compensation. We noted how “in restitution the ideal is to restore things to the state they were prior to the justice being committed – a wider and more complex aim [than material compensation]” (Swartz, 2011, p. 412). In order to investigate how these wider aims might be addressed, we explored the international morality, psychological, philosophical and criminological literature on restitution. Barkan, who proposes a theory of restitution founded on what he perceives as a rise in international morality and the recognition of corporate injuries perpetrated by groups of people or states, includes some of the most notable elements of justice in his broad-based theory of restitution.

Furthermore, the specific notions of backward- and forward-looking restitution proposed by Calder and Young are useful for the ways in which they suggest opportunities for individuals to recognise and respond to their role – direct or indirect – in perpetuating injustices. Though Calder does not go so far as to outline how restitution is to be made, his emphasis on the interpersonal aspects of restitution resonates with the deliberative models proposed by Barkan and Eglash, both of whom recognise the need for interaction and discussion between victims and perpetrators (or, as described in this paper, architects, beneficiaries, foot soldiers of injustice implementation, those dishonoured by injustice, and those who inherit its sequelae).

Finally, this paper has offered a reconceptualised view of restitution that takes as its starting point the acknowledgment that restitution – restoring things to how they were prior to the injustice being committed – is for the most part not an achievable aim. Rather it has advocated that the fundamental aim of restitution is to “pay back” and “make right” – and that all parties are required to contribute to this aim, if it is to be achieved. By describing six elements of restitution, this paper has sought to elucidate the opportunities that exist for practitioners to recognise and draw on the idea of restitution, beyond the restoration of private property, to incorporate it into transformational processes. It proposes that the goal of restitution is not merely legal or financial, but psychological and philosophical, and can be enacted individually, socially and structurally. That its ultimate aim is the restoration of personhood, or restitution for the loss of personhood, without which no transformation, reconciliation, peace or justice is possible. These six elements, in the restitution of personhood, include the restitution of dignity, of opportunity, of means, of memory, of equality and of citizenship, and provide a framework for action.

Such a framework, based on an extensive reading of current literature, and populated with examples need to be researched, expanded, and the roles of actors explicated. What actions might neighbours, politicians, lawyers, workers, children and CEOs take – to pay back and make things right in our country, and globally. Such a project, restitution defined broadly and from the perspective of multiple actors, it would seem has potential as a comprehensive basis for social transformation, and ultimately, as a mechanism to end to poverty and inequality.

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