



MEDIA RELEASE

Prof. Thuli Madonsela calls for engagement on restitution

“How do you approach restitution in a way that promotes social cohesion rather than undermine the little social cohesion we still have?”

The much-debated issue of restitution will come under the spotlight in October at the Social Justice Summit and International Conference organised by the Council of Social Justice Champions and Prof. Thuli Madonsela from the Centre for Social Justice and Law Trust Chair in Social Justice at Stellenbosch University. This year's conference and summit theme is restitution.

Over two days, national leaders and experts from around the world will meet in Stellenbosch to shed fresh light on an age-old question: How do we remedy past injustices that still shape our lives and how can we level the playing field for all so that true excellence can rise to the fore?

Prof. Madonsela explains that one of the reasons for deciding to focus on restitution is that Stellenbosch University (SU) is one of the few institutions globally that have adopted a restitution statement. The SU restitution statement acknowledges the University's role in past injustices and commits to play a key role in remedying continuities from such injustices. The statement was adopted in 2018 and is part of the university's new vision and strategy. SU Rector and Vice-Chancellor Prof. Wim de Villiers often talks about this, particularly during Social Justice Walks, Prof. Madonsela says.

“When you talk about restitution, it is important to get to grips with what the word means to different people. In its simplest form restitution means to restore a victim of injustice to as close as possible to where they would have been had such injustice not occurred,” Prof. Madonsela says.

At the interdisciplinary International Social Justice Conference on 11 October, experts and academics will explore the philosophical and legal underpinnings of restitution, current trends in restitution debates and possible pragmatic pathways for South Africa and the continent.

At the Social Justice Summit on 12 October, stakeholders from civil society, the government and business leaders will endeavour to make sense of what restitution looks like and what pragmatic approaches can take us there.

The engagement will also consider previous agreements reflected in Summit and Conference Resolutions and Declarations. These include consensus reached in the inaugural summit that the past will continue to poison the present, including social cohesion efforts, until its claims regarding justice are addressed earnestly and decisively.

The main aim of the conference and summit this year is to present restitution as the paradigm through which legacy inequality issues, including redress, can be approached, Prof. Madonsela says.

She explains that the concept of restitution is ingrained in our civil justice system. “When a person has been placed in a deficit position because of somebody's wrongdoing or unjust actions, it is naturally accepted that the remedy must reconstitute the injured party to as close as possible a place as he or she would have been but for the unjust or wrongful actions of another. Though in civil law this truth about justice is commonly accepted, in instances of political or historical injustices, restitution has been a fiercely contested matter. The exceptions include victim redress for historical wrongs such as the holocaust and compensation of former slave owners when slavery was abolished.

“At the International Social Justice Conference and Summit in October, we will grapple with many questions relating to restitution. Who must reconstitute and why? How do you make it just, equitable and fair to all? One of the challenges we have found as a Social Justice Chair, is that people confuse restitution with retribution. The moment you mention restitution, people think oh no, we're going to be punished as wrongdoers for wrongs committed by our ancestors.”

Prof. Madonsela says it is important to remember that, in the South African context, restitution is not just about race dynamics relating to the legacy of the colonial and apartheid injustices. “It is also about gender, disabilities and the discrimination the LGBTQI+ community, as well as certain religious groups, have experienced. Restitution is also not restricted to land and economic injustices. It includes other tangibles such as education, health and community infrastructure. It also includes intangibles such as stigmatization of certain groups and cultures.”

Successful restitution brings about healing and transformation, Prof. Madonsela believes. Healing should be emotional, psychological, economic, social and political.

“We should also ask what areas need to be prioritised when considering restitution. For example, when the average person thinks about restitution, they often think only about land restitution. The second thing that comes to mind for most people is affirmative action in workspaces. But there is so much more to it.” Prof. Madonsela insists.

She has been known to be critical of how affirmative action has been framed in South Africa.

"I think it should have been called 'restitutive action' as Justice Dikgang Moseneke advised in Minister of Finance versus Van Heerden in 2006. If you do not frame it as restitutive action, people see it as an injustice to them or reverse discrimination that they view as a source of their undue suffering. It must be linked to putting a person as close as possible to where they would have been but for the injustice that they suffered directly or through generational disadvantages."

Prof. Madonsela hopes the many dimensions of restitution will be highlighted at the Social Justice Conference and Summit. "We should consider issues such as the stigmatisation of femaleness, blackness and non-heteronormative sexuality. Questions will include - how do you retribute the psyche of a nation? How do you retribute religions and belief systems, cultures and languages that have been regarded as inferior? We want to get a common understanding of what restitution is, why it must be done, where and how it must be implemented and determine who the actors are that should make it happen. The crucial central consideration is: How do you approach restitution in a way that promotes social cohesion rather than undermine the little social cohesion we still have?"

Prof. Madonsela says her concept of restitution is similar to the point of departure she used as Public Protector: "What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If what happened was wrong or unjust - how do we place the victim(s) as close as possible to where they would have been but for the injustice? The formula is easy in writing, in real life it is a complex and possibly messy inquiry," Prof. Madonsela acknowledges.

One way she often uses to illustrate the core principle of restitution in teaching is to get her students to play a rigged Monopoly board game with a pink and blue team. The pink team is allowed to start, but then kicked out of the game and the blue team takes over their properties and assets. The explanation given when they protest is that their team colour, pink, is the justification. Later, when the suspended team is allowed back in the game, it continues on an unequal footing. All the students agree that one team clearly has a disadvantage which limits its chances of winning. The students are then challenged to think of similar situations in real life.

Sometimes meaningful restitution can happen on a personal level when individuals who have been advantaged help those who have been left behind. Prof. Madonsela says she is fortunate to have received a personal kind of restitution early in her life, an act of kindness that radically changed the course of her life. "Except for Dr. Beyers Naude, I never met the people who paid for my education from Grade 11 to my first two degrees. All they knew was that I was disadvantaged. They understood that in an ideal world excellence means playing on a level field so that the best can rise. You cannot speak of excellence or fair play when some do not rise simply because they can't get onto the field. If I did not have the support of benefactors, I would not have been able to enter the game. Since completing my studies, my involvement in certain groups has given me social capital that has given me certain advantages.

"I have certainly benefited from the fruits of democracy over the past two decades and I'm relatively advantaged, which also brought advantages to my children. It then becomes a question of how you use the advantages you have to make sure you bring other people with you. Like Charlotte Maxeke said: 'If you can rise, bring someone with you.' You have to pay it forward. That is why we started a drive to support students with tertiary funding to clear student debt under the #Action4Inclusion initiative at Stellenbosch University. Instead of waiting for big interventions from government, that may or may not happen, we must ask ourselves what we can all do daily to play a positive role to effect change to advance social justice."

Government policies over the past two decades have had an impact to facilitate redress for historical wrongs, but in some instances, they did not have the desired outcome in terms of restitution, Prof. Madonsela says. "Broad-Based Black Economic Empowerment (BBBEE) is a twisted policy that needs to be rethought, though the restitutive concept behind it was not wrong. The policy design has no consideration of overlocking or intersectional inequalities, such as class, among other weaknesses. When I let my students play the rigged Monopoly game, I always tell them that the team colours are not one-dimensional - the blue team has shades of blue and the pink team shades of pink. If you assume everyone in the blue team is advantaged and everyone in the pink team is disadvantaged, you are going to disadvantage some people unfairly through a disparate impact."

These many layers of complexity form part of the challenges in making sense of restitution, Prof. Madonsela says. "The land issue illustrates perfectly how complicated restitution is. Simply returning land to its original owners does not compensate them for the loss of community and commercial exponentiality. A good example is what happened in Sophiatown in Johannesburg and in District Six in Cape Town after the forced removals during apartheid. Can you still say a remedy is restitutive if people have lost their way of living, their traditions, and their whole vibrant ecosystem? What happened to the social capital they lost?"

"I recently spoke to a woman from Zimbabwe who said when people are given land back, but not assisted to regain the social muscle they lost through land dispossession, they are bound not to use the land optimally. That is why we should think about restitution in a broader sense that takes into account all of the systemic impacts of the original injustice.

"Restitution requires a prism that recognises the humanity of everyone. You need to meet everyone where they are. Fortunately, the evolution and plasticity of concepts such as justice and equality, which in South Africa have a substantive meaning, facilitates the necessary transformative constitutionalism approach.

"This opens a legal and social consciousness that honours the spirit of the Constitution, which is about healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights and freedoms where every citizen's life is improved and every person's potential is freed. This is what the constitutional preamble enjoins us to do," Prof. Madonsela says.

We've got to be clear about the fact that every citizen's life is improved and every person's potential is freed when restitution happens, she insists. "You have to look beyond gender and race and disability because someone might be disabled but super wealthy. You cannot have blanket approaches that only consider macro markers of inequality while forgetting about the micro markers of inequality and disadvantage."

With the International Conference and Summit, Prof. Madonsela hopes South Africans can also learn from global discourse trends on restitution. There are fascinating debates going on internationally on restitution relating to colonial era plundering of cultural objects, human remains, art and artefacts. There is also thought-provoking research being done about restitution in the context of slavery and war crimes, Prof. Madonsela says.

"We are hoping that our conference will transcend confined local debates. We want to know what a world that embraces the humanity of everyone looks like. To the extent that others are left behind because of past injustices, how do we place them as close as possible to the centre as they would have been had they never been held back? I keep using the phrase 'as close as possible' because of the complexities that restitution endeavours raise. When I let students play a rigged Monopoly game, the difference is that you can reset a game. Life does not have a reset button. You can never repair all the damage, but we have to look at what is humanly possible without being unfair to other groups in society."

An aspect that needs to be highlighted is the benefits restitution holds for society at large, Prof. Madonsela emphasises. "The past few difficult years of the pandemic have taught us a lot about the efficient use of human resources. Restitution is good for economic growth because it uncovers talent and creates a vibrant climate for innovative and resilient ecosystems. A child in Kayamandi could be the next Albert Einstein or the next Stephen Wamukota, the 9-year-old Kenyan boy who came up with a semi-automatic hand-washing machine that helped prevent the spread of COVID-19. You will never find that exceptional child if there are not some restitutive actions that bring talented children closer to the centre of opportunity."

Another reason to prioritise restitution is that it ensures peace and stability, because as long as there is an injustice somewhere, there cannot be sustainable peace anywhere, Prof. Madonsela says. "After the Second World War, Germany could have fallen back into fascism because millions were left hungry and angry. But the Marshall Plan, also known as the European Recovery Plan, provided aid to help finance rebuilding efforts on the European continent. In the book *Going Big* by Roberth Kuttner, it is said that the restitutive social justice aspects of President Franklin D. Roosevelt's New Deal ensured that America did not fall into the hands of fascists. The New Deal provided ladders of social mobility to those devastated by the First World War and the Great Depression. Economic opportunities, including jobs, were created for millions of people who had experienced setbacks."

Social justice is also a matter of ubuntu, which is about recognising the humanity and equal value of all grounded on shared humanity, Prof. Madonsela believes.

For the past three years, Prof. Madonsela has spearheaded a similar rebuilding initiative in South Africa. The Musa Plan for Social Justice aims to end poverty and break the back of inequality by leveraging the global Sustainable Development Goals (SDG) agenda. The Musa Plan is named in honour of Palesa Musa, who as a 12-year-old child, was arrested during the 1976 student unrest and despite her self-reliance economic efforts, remained poor until recent years.

"Such social justice initiatives aim to advance equality and poverty eradication to improve the quality of life of all citizens and free the potential of every person thus build a united nation based on shared humanity and prosperity. Accordingly, restitution is not just about addressing the past, but just as much about creating a society of equals now and a resilient and sustainable future for all," Prof. Madonsela says.

She invites all South Africans with an interest in social justice and restitution, to attend the Social Justice Summit and International Conference on Restitution in October this year.

More information on Conference and Summit:

Date: The interdisciplinary **3rd Annual International Conference on Social Justice** will be held on **11 October 2022**, followed by the **4th Annual Summit on Social Justice** on **12 October 2022**.

Venue: Both the Conference and Summit will take the form of a hybrid event with the option of attending either online or in-person at Boschendal Conference Centre close to Stellenbosch in the Western Cape. The registration link and programme will be shared closer to the time.

Issued by the office of the Law Trust Chair in Social Justice, Stellenbosch University.
Enquiries: Marna Lourens email: mlourens@sun.ac.za; Tel: +27 (0)21 808 3182
