

# Deliberative Republican Hybridity Through Restorative Justice

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## Propositional overview

This article draws on Pettit<sup>1</sup> to consider an institutional turn for restorative justice that is republican. Pettit's republicanism defends non-domination as a normative foundation for governance institutions. In the liberal tradition, interference is the antonym of freedom; for Pettit's republicanism, domination is. Domination is a kind of power that gives some actors a capacity for arbitrary interference in the lives of others. Under conditions of domination, capacity to interfere is unregulated by controls that require interference to track equal concern for the interests of those who are dominated. The republican project is therefore conceived as liberating citizens from the spectre of the arbitrary power of those who might dominate them. Non-domination requires institutionally structured freedom as independence. Contestation, "contestatory democracy", is critical in Pettit's thought about how to accomplish non-domination. Building on that republican tradition, eight propositions are advanced in this article:

A good democracy is both a representative electoral democracy and a contestatory democracy.

Separated powers that each check abuse of power by other separated powers are pivotal to a republican architecture.

Deliberative democracy is not something that can engage citizens on a broad front with lawmaking or executive government, and not something citizens want on a broad front.

It is the judicial and educational branches of governance that are best able to provide citizens meaningful opportunities to be deliberatively democratic through restorative justice.

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1 - Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997; *On the People's Terms: a Republican Theory and Model of Democracy*, Cambridge: Cambridge University Press, 2012; *Just Freedom: a Moral Compass for a Complex World*, New York: WW Norton, 2014.

Democracy needs a strategy for building democracy from primary groups out—families, school classes, workgroups, protesting—and from children up. Restorative justice can help build that kind of democracy.

A justice system that helps rebuild democracy from the bottom up can be less punitive at the same time as it is more cost-effective in preventing crime and other important harms, such as suicide.

It follows that in addition to being a hybrid of representative and contestatory democracy, a republic must also be a responsive, evidence-based hybrid of deliberative and contestatory democracy.

Because domination is becoming more innovative into new architectures of democracy destruction, democracies must step up not only contestation but also innovative republican hybridity.

### **The history of democracy**

A common thread between Philip Pettit's republican thought and John Keane's *The Life and Death of Democracy*<sup>2</sup> is that the history of democracy has witnessed two major transformations. These are a move from what Keane calls "assembly democracy" in places like Syria-Mesopotamia and then Athens, to "representative democracy" that privileges the institutional centrality of elections, then to what Keane calls "monitory democracy". Monitory democracy has a great deal in common with Pettit's "contestatory democracy" and David Levi-Faur's<sup>3</sup> "regulatory capitalism". I embrace all three lenses for seeing the second tectonic shift. A particularly interesting aspect of Pettit's historical lens is the way he draws on scholars like Quentin Skinner to see the seeds of contestatory democracy in conceptions of freedom as non-domination. These were formed in the crucible of slavery and early struggles against it—freedom as the condition of not being a slave to arbitrary power.

What I am interested in here, however, is what Keane and Pettit have in common. Not only do they both detect these two large shifts in the structure of democratic institutions, they commend both as humbling power, as do I. The deliberative democracy of assemblies and moots may have worked to do most of the governance of small-scale societies, but became a less practical ideal at the center of the British, American, German and French empires, or even the Portuguese or Dutch empires that ruled Brazil and Indonesia. Communist and anarchist versions of the "withering away of the state" proved a danger to freedom as non-domination. While representative democracy was a positive shift, population growth made elected representatives progressively more remote from and distrusted by electors. Electoral democracy grew and spread across the globe, but so did sophistication in how to buy votes. Paul

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2 - John Keane, *The Life and Death of Democracy*, New York: Simon and Schuster, 2009.

3 - David Levi-Faur's, "The Global diffusion of regulatory capitalism", *The Annals of the American Academy of Political Social Science*, vol. 598, 2005, p. 12.

Collier<sup>4</sup> is one of many authors who has demonstrated the diversity of ways in which domination has become more innovative into new architectures of democracy destruction—from corrupting election commissioners to selling off the resources of a country to corporations that provide the funds to buy votes. Representatives became less effectively accountable to electors, increasingly accountable to media barons and corporate funders who shift vast sums into off-shore accounts and foreign investments of political leaders. Innovation in financial engineering and electoral engineering are the most important features of contemporary architectures of domination. Hence, the second tectonic shift involved advocacy of progressively richer separations of powers that were needed to restore non-dominating accountability, to secure freedom as non-domination, particularly to secure citizens against dominating executive governments, their public and secret police, their militaries, and the masters of their universe on Wall Street.

This is not to suggest that contestatory or monitory democracy is working well. Notwithstanding a proliferation of checks and balances, today the United States, Australia, Israel or the newly republicanized Libya and Iraq hardly qualify as democracies because they tolerate long-term incarceration without trial, medieval practices of torture, degradation of people they label as terrorists, and extra-judicial assassination of political enemies on a weekly basis. Democracy is in certain profoundly central ways a lost cause in the societies in which we live, even more so in the peripheries of the Arab, African, Asian and Pacific empires that Western societies still dominate via an extractive capitalism of non-contestatory institutions.<sup>5</sup> The democracies we recently planted in the old Western colonies of Libya and Iraq are just the latest triumphs. Even in the face of democracy's failures, Pettit and Keane are probably right that the proliferation of checks and balances of contestatory democracy remains the right political struggle for salvaging the democracy project. The old Western model of the separation of powers between an executive, a judiciary and a legislature is insufficient to do that work. Contemporary struggles for contestatory democracy must draw upon a much more plural vision of checks and balances.

Consider Guantanamo Bay. I pick on the United States only because all readers know its history; my own country's practices of indefinite detention without trial on the say-so of Australia's secret police are even less democratically accountable than those of the United States. Who knows whether he meant it, but the United States has a President who won office promising to close Guantanamo Bay. My inclination is to suspect that the story of why Guantanamo Bay was not closed by the executive and legislative branches is one of the domination of its secret police. I suspect it is the same story of erosion of democracy we saw when the current British Prime Minister, David Cameron, met with family members of Northern Ireland lawyer, Patrick

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4 - Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places*, New York: Harper, 2009.

5 - Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, New York: Crown Business, 2012.

Finucane, who was representing a number of IRA leaders at the time he was murdered after being “outed” by a minister in a speech in the British parliament and what the family believes was a green light for the murder from the British Cabinet. A prosecution was launched against a Northern Ireland police officer for supplying one of the guns used by a loyalist paramilitary member in the murder, but the case collapsed after the defendant said he had passed all information on the matter to his Special Branch handlers. This prosecution had followed one of several earlier non-judicial enquiries that concluded there was unspecified government involvement in the murder. Cameron said if it were up to him, he would give the family the independent judicial inquiry into the alleged state-orchestrated murder of their loved one in the presence of his wife (also wounded) and children as they sat at their family dinner table. Then, nodding toward a secret police agent in the room, Cameron said *they* would not let him do it (Peacebuilding Compared interviews, Belfast, 2014). It is because of the central republican idea of the king no longer being above the law that these matters are of such grave concern to republicans.<sup>6</sup> Perhaps more disturbing with cases like Guantanamo Bay or Patrick Finucane is that the judicial branch of governance is so profoundly irrelevant to defending the heartland of the rule of law that is implicated in these criminal cases. Even so, greater independence of the judiciary from this and other kinds of domination in criminal cases is rightly identified by Nicola Lacey<sup>7</sup> and Philip Pettit as an important front in the battle for democracy.

Grass roots contestation of detention without trial, or of the shift from this to assassination by drones dispatched by the CIA, seems the most fertile form of contestation. A virtue of Keane’s monitory democracy<sup>8</sup> is the pluralization of contestation beyond national publics appealing to national legislatures, executives and judiciaries. Grass roots contestation of Guantanamo Bay can come from citizens of many countries, especially countries such as my own which have had its citizens detained in Guantanamo Bay without trial, at least one of whom was found to be innocent of any crime. An Australian like Julian Assange can form an organization like Wikileaks that exposes such matters. Then when Western executive and judicial branches attack him, activist Australian lawyers like Jennifer Robinson and Geoffrey Robertson can make the case that the Swedish and British legal establishments are not to be trusted to act with independence and integrity with regard to US intelligence strategies for extraditing Assange to the United States. These advocates have argued that Swedish justice should avail itself of the opportunity to interrogate Assange as

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6 - This is the point that stands regardless of whether this is a case of politicians using the secret police to justify what they wish to do for their own reasons or politicians being reluctant to anger their secret police without a powerful political reason for doing so. In the case of Prime Minister Cameron and the Finucane case, the latter seems plausible because both the murder and its cover-up was not the work of his government, but of regimes from decades past. Though as one reviewer pointed out, there is no way of being sure.

7 - Nicola Lacey, *The Prisoners’ Dilemma Political Economy and Punishment in Contemporary Democracies*, The Hamlyn Lectures, Cambridge: Cambridge University Press, 2008.

8 - John Keane, *The Life and Death of Democracy*, *op. cit.*

much as it wishes inside the Ecuadorian Embassy in London and then agree to his participation in a trial in Sweden by video link should they find the evidence to justify a criminal prosecution.

Pluralization and innovative hybridity in humbling power are the recurrent themes of this paper. Activism beyond national boundaries, particularly in cyberspace, is the incubus of the most critical forms of contestatory democracy in contemporary conditions of executive-judicial democracies with agendas of domination. Global civil society contestation is also the main game in contesting the power of the Fourth Estate in the age of former Australian and now US citizen Rupert Murdoch. This means contesting a media market that has become less a market in virtues like investigative journalism, more a market in vices<sup>9</sup> like phone tapping, check-book journalism, paparazzi and “war on terror”, “war on drugs” and “war on crime” cheerleading. In capturing the intermediation of political communication, the buying and selling of it, media barons like Murdoch corrupted it, in Australia, then in Britain and America, into something very different from the close communication between citizens and their elected representatives imagined by the founders of republics.

## Turning East

A strength of Keane’s work<sup>10</sup> is that it focuses on some of the most important innovations in democracy as coming from the East rather than the West. A widespread weakness of Western political philosophy is that it makes special efforts to cut itself off from learnings from the East and South. I have been guilty of that myself: being modest in saying that my analysis is only relevant to “Western democracies”, when the honest account is that I am too slothful to apply myself to learning about non-Western examples of the phenomenon theorized. Western philosophy, Keane points out, has a factually inaccurate narrative about democracy as something born in Europe in ancient times. On the key question for contestatory democrats of how to pluralize the tripartite separation of executive, legislature and judiciary, we might attend to the failures and successes of non-Western constitutional experiments with fourth branches such as a regulatory branch that can be elected for a single term to oversee impeachment in the three core branches, an anti-corruption commission to expose corrupt judges and central bankers, an audit office, a human rights commission, an election commission, ombudsman, a commission to regulate the media, regulation of NGOs, investigation of alleged murderers of “Patrick Finucanes” by cabinets, oversight of the secret police and more.<sup>11</sup> The kind of regulatory branch (“control yuan”) that we see in Sun Yat Sen’s Constitutional vision in his former Chinese republic, and still in the Constitution of Taiwan,

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9 - John Braithwaite, *Markets in Vice, Markets in Virtue*, Sydney: Federation Press, 2005.

10 - John Keane, *The Life and Death of Democracy*, *op. cit.*

11 - John Braithwaite, *Regulatory Capitalism. How it Works, Ideas for Making it Work Better*. Cheltenham: Edward Elgar, pp. 25-29.

is just one path to invigorating the independence of media regulators, anti-corruption commissions and other checks and balances.

One notable democratic institutional innovation that attracts almost no interest from Western political philosophy is the Panchayat (assembly of elders) reforms for village self-government that Rajiv Gandhi pushed to become the 73<sup>rd</sup> Amendment to the Indian Constitution in 1993. These reforms bogged down after his death. Sonia Gandhi pushed to reenergize the Panchayat reform of Mahatma Gandhi's "village republicanism" in the twenty-first century. Keane<sup>12</sup> discusses this as an important development in the history of democracy. Another Westerner who has been focused on the importance of diagnosing the strengths and weaknesses of the modern reforms to ancient Panchayat traditions in India is UNDP Administrator and former New Zealand Prime Minister, Helen Clark. UNDP interest arises because the Sonia Gandhi push to shift Panchayat power from corrupt local government apparatchiks further down to very local village assemblies of the district-block-village hierarchy of Panchayats has been associated with village-level Panchayats taking control of the largest anti-poverty program the world has seen. It operates in 778,000 Indian villages. This is the Mahatma Gandhi National Rural Employment Guarantee Act. It is a "right to work" reform that seeks to guarantee 100 days of publicly funded work every year, mostly on water conservation projects in rural areas, to the poorest people of India. As one would hope for an innovation of contestatory democracy, it has been exposed to critiques of its corruption by the Indian government's own Comptroller and Auditor General and media (*Times of India* 2013),<sup>13</sup> social audits by Indian state governments, as well as critical analyses by Indian researchers and colleagues from my university.<sup>14</sup>

There is reason for some democratic hope for the village Panchayats, as opposed to the higher-level Panchayats that have also been riddled with corruption and maladministration in Nepal, Pakistan and Bangladesh. Hope for the village-level Panchayats persists notwithstanding formidable problems revealed by audit contestation. The hope is that the checks and balances that the audit society can occasionally deliver can be complemented with taking India back to the checks that assembly democracy can deliver in a village. Actually, the village Panchayats have the potential to become a rich hybrid of assembly democracy, representative democracy and monitory democracy. The Indian Constitution requires one third of elected Panchayat voting members to be women and proportional representation of scheduled castes such as "untouchables". This has elevated more than a million women to become elected representatives for the first time. Probably that has contributed to an outcome for the Mahatma Gandhi National Rural Employment Guarantee Act

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12 - John Keane, *The Life and Death of Democracy*, *op. cit.*, xxx, pp. 627-628.

13 - "CAG finds holes in enforcing MNREGA", *The Times of India*, retrieved 23 November 2013.

14 - Shylashri Shankar, *Can Social Audits Count?* ASARC Working Paper 2010/09, Crawford School: Australian National University, 2010; Hari Nagarajan, Raghendra Jha and Kailash C. Pradhan, *The Role of Bribes in Rural Governance: The Case of India*, ASARC Working Paper 2013/03, Crawford School: Australian National University, 2013.

of 54% of the days worked going to women and 39% to scheduled (lowest) castes or *adivasi* (“tribal peoples”) in 2013.<sup>15</sup> 50 million households (a quarter of all rural Indian households) have been helped. While there clearly continues to be a lot of corruption in the program,<sup>16</sup> this of course is also true of the more colonial democratic inheritances such as common law courts, elections, parliaments and police forces—and in large ways, particularly with even larger corruption for the police.<sup>17</sup> Elected village assemblies are not a remote form of representative democracy; one chats with one’s elected member on a daily basis in the village. In addition, those elected must deliberatively account to the whole village in a kind of assembly democracy. Like Helen Clark, I take some heart from an anti-poverty program that has helped more poor people than any before it, that helps women and empowers women more than other anti-poverty programs and that is overwhelmingly going to extremely disadvantaged people. Western republicans must be drawn to consider the implications of the fact that it involves a new hybrid of deliberative, electoral and contestatory democracy.

Like the UNDP, I also have hopes for the Community Empowerment Programs initially trialed by the World Bank in Indonesia from 1998 and now rolling out to dozens of developing countries. These provide a village-level development budget to be spent by a village assembly at least a third of which must be women in most programs, as a condition of getting the cash. In Poso, Indonesia—site of a Muslim-Christian war that killed thousands up to 2006, a terrorist training camp for the Bali bombers—I was inspired by the training in deliberative democracy offered to village assemblies as part of UNDP, World Bank and World Vision support for the Kecamatan (sub-district) Development Program. Villagers were invited in this training to vision alternative futures for how they might use their village development budget. “If we used it to build a bridge across the river there, we could develop new fields on the other side; the bridge could open up some new markets for our agriculture.”<sup>18</sup>

As I travel from one conflict zone to another for my Peacebuilding Compared project, I see places where this kind of village empowerment with control over its own development budget has worked badly, such as Timor-Leste,<sup>19</sup> but other least likely cases<sup>20</sup> for testing its implicit democratic theory

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15 - Mahatma Gandhi, *National Rural Employment Guarantee Act, 2005*, Report to the People, accessed 28 August 2014: [http://nrega.nic.in/netnrega/writereaddata/Circulars/Report\\_People\\_Eng\\_jan\\_2014.pdf](http://nrega.nic.in/netnrega/writereaddata/Circulars/Report_People_Eng_jan_2014.pdf)

16 - Sandy Gordon, *India’s Rise as an Asian Power*, Washington: Georgetown University Press, 2014.

17 - *Ibid.*, note 34, chapter 1.

18 - Peacebuilding Compared Interviews, Indonesia, 2007: <http://regnet.anu.edu.au/research/research-projects/details/534/peacebuilding-compared-project>

19 - John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny*, Canberra: ANU Press, 2012, pp. 119-127; 240-251.

20 - Harry Eckstein, “Case study and theory in political science”, In Fred J. Greenstein and Nelson W. Polsby (eds.), *Handbook of Political Science*, vol. 7, no. 79, 1975, p. 138.

like Aceh during and after its civil war and tsunami,<sup>21</sup> Afghanistan where 10.5 million people were reached with surprisingly low levels of corruption as a result of villages being required to put in some of their own money according to Princeton's Innovations for Successful Societies (2013) program,<sup>22</sup> and even some hope in the least likely place of all for a democracy innovation to work, the Democratic Republic of Congo.

### **Local deliberative democracy of restorative justice**

Part of Mahatma Gandhi's vision for village Panchayats as a deliberative corrective to metropolitan representative democracy in village societies was that Panchayats would take on the functions of courts of law and state police in the villages. This happened with many village Panchayats, though only a small proportion of them. The contemporary research agenda of some of India's most distinguished criminologists, such as M.Z. Khan,<sup>23</sup> and a focus in my own South Asian fieldwork, is to study how justice works in villages where Panchayats have seized justice back from the police and courts through village-level restorative justice. These Indian criminologists are interested in reviving ancient Indian *nyaya panchayats* (village courts), hybridized with learnings from the global social movement for evidence-based restorative justice.

In Punjab province of Pakistan, there are also village *panchayats* that run a kind of restorative justice. Even more interesting have been *jirgas* in the Pakistan provinces bordering Afghanistan that compete not only with the law courts of the Pakistan state, but also with the Sharia courts offered by the Taliban. In spaces where ordinary people live in constant fear of violence, winning the competition for hearts and minds by offering them a form of justice that they feel protects them is politically critical. One way the Pakistan Taliban seeks to compete is by sending suicide bombers to the deliberative justice meetings of the *jirgas*. Assassination campaigns have eliminated 700 traditional *maliks* responsible for convening *jirgas*. A response by the Pakistan police has been to establish hybrid state-traditional restorative justice *Musla-hathi* (reconciliation) Committees inside the heavily fortified walls of police stations. After observing more than 100 of these deliberatively democratic institutions of criminal justice, Braithwaite and Gohar<sup>24</sup> concluded that they are

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21 - John Braithwaite, Michael Cookson, Valerie Braithwaite and Leah Dunn, *Anomie and Violence: Non-truth and Reconciliation in Indonesian Peacebuilding*, Canberra: ANU Press, 2010, pp. 380-425.

22 - Rushda Majeed, *Innovations for Successful Societies, Building Trust in Government: Afghanistan's National Solidarity Program, 2002-2013*, Princeton: Princeton University, 2013.

23 - M. Z. Khan and Kamlesh Sharma, *Profile of a Nyana Panchayat*, Delhi: National, 1982; S. Latha and R. Thilagaraj, "Restorative justice in India", *Asian Journal of Criminology*, vol. 8, 2013, 309-319.

24 - John Braithwaite and Ali Gohar, "Restorative justice, policing and insurgency: Learning from Pakistan", *Law & Society Review*, vol. 48, no. 3, 2014, pp. 531-561.



succeeding in interrupting many cycles of revenge killing, particularly through their handling of murder cases.

All these South Asian hybridity innovations can and should be criticized for gender inequality. Yet the key question is which hybrids contribute most to pushing back entrenched gender inequalities? Panchayats that resolve village legal conflicts may be dominated by traditional male village leaders, yet the percentage of judges who are female in Indian state courts is much lower than with Panchayats. With *jirgas*, innovations with women's *jirgas* in which "whi-tehairs" replace "whitebeards", have both promise and limits.<sup>25</sup> The more fundamental point about *jirgas* is that they can make a contribution to preventing the Taliban from seizing local power, an outcome that is decisively against women's interests.<sup>26</sup> Finally, data from Australia suggest that restorative justice as a form of deliberation can structurally benefit women: in criminal cases randomly assigned to courts women speak for a lower percentage of the time and report more discrimination on the basis of age, income, race or sex than in cases randomly assigned to restorative justice.<sup>27</sup>

While it seems implausible that village-level deliberatively democratic governance of development budgets can be transplanted to metropolitan governance of economic development in the East or West, we know this transplantation can occur with restorative justice. Indeed, I have argued that in the country that has most successfully mainstreamed restorative justice for youth (though not adult) offenders, New Zealand, the innovation took hold more quickly and successfully in metropolitan Auckland than in provincial towns and rural areas. We can observe restorative justice programs that reduce crime in the megalopolis, be it London<sup>28</sup> or Shanghai.<sup>29</sup> This when North Atlantic critics retorted, as we started to tell the story of the restorative innovations in the Antipodes, that these were relevant only to the sheep-loving peoples of the Canterbury plains and Wagga Wagga.

Communitarian criminal justice innovations normally do work badly in Western cities, or they only work well in the parts of such cities where they are least needed. Police-initiated neighborhood watch schemes, for example, work in affluent middle class suburbs, but in high crime neighborhoods few

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25 - John Braithwaite and Ali Wardak, "Crime and war in Afghanistan: Part I: The Hobbesian solution", *British Journal of Criminology*, vol. 53, 2013, pp. 179-196. Ali Wardak and John Braithwaite, "Crime and war in Afghanistan: Part II: A Jeffersonian alternative?", *British Journal of Criminology*, vol. 53, 2013, pp. 197-214.

26 - John Braithwaite and Ali Gohar, "Restorative justice, policing and insurgency...", *op. cit.*

27 - John Braithwaite, *Restorative Justice & Responsive Regulation*, Oxford: Oxford University Press, 2002, pp. 152-153.

28 - Heather Strang *et al.*, "Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: Effects on offender recidivism and victim satisfaction. A systematic review", *Campbell Systematic Reviews*, vol. 9, no. 12, Oslo: Campbell Collaboration, 2013.

29 - Hong Lu, "Community policing-rhetoric or reality? The contemporary Chinese community-based policing system in Shanghai", PhD Dissertation, Arizona State University 1998; Hong Lu, "Bang Jiao and reintegrative shaming in China's urban neighbourhoods", *International Journal of Comparative and Applied Criminal Justice*, vol. 23, no. 1, pp. 115-125.

attend and they collapse quickly. The new empirical experience is, however, that people who never attend a neighborhood watch meeting will attend a restorative justice conference.<sup>30</sup> One reason is that restorative justice is an individual-centered communitarianism. We are invited to attend because a victim of crime whom we know well asks us to attend to support them through the ordeal of meeting the person who victimized them. Or the young man next door asks if we would support him because he sees us as one of the few adults in the area whom he trusts, who might speak up for him. People are honored by this kind of approach, sometimes deeply so. Hence, they join the deliberative process to decide what is to be done about the crime.

Ordinary people are jaded and cynical about engaging with their representatives in the legislative and executive branches of government. It is in the judicial branch where democratic engagement can be rejuvenated.<sup>31</sup> This is also because people care deeply about what will happen to their daughter when they get into trouble with the police. Given the opportunity, they tend to be active in their engagement with deliberation about what should be done with her. Ask the same people if they would participate in a community forum on economic or environmental policy with their member of parliament and they would rather do something else.

Human beings are not born democratic. They need to learn how to participate in democratic deliberation. Hence, children are the most important group to work with in pursuit of restorative democratic renewal. This means much more than the New Zealand reform of making restorative justice conferences (rather than juvenile courts) the universal first port of call in the state response to serious youth crime. It also means restorative anti-bullying and disciplinary conferences in schools. It means child abuse and neglect decision-making in the form of restorative conferences that give voice to children.<sup>32</sup> It means learning how to do restorative practices inside families, and much more. Criminal justice is important, but not the main game of rebuilding democracy from the children up. At the core of its theory, restorative justice deplors neglecting children, but also rejects doing things “for” children or “to” them, rather it works “with” children in deliberative mode.<sup>33</sup>

Restorative justice for workplace bullying and other work challenges is also important. More abstractly, the priority is to build democracy not top-down from founding fathers, not middle-out from intermediate groups,<sup>34</sup> but

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30 - John Braithwaite, *Restorative Justice & Responsive Regulation*, *op. cit.*

31 - Albert W. Dzur, “Civic implications of restorative justice theory: Citizen participation and criminal justice policy”, *Policy Sciences*, vol. 36, 2004, pp. 279-306; Albert W. Dzur, *Punishment, Participatory Democracy and the Jury*, New York: Oxford University Press, 2012.

32 - Joan Pennell and Gale Burford, “Family group decision making: Protecting children and women”, *Child Welfare*, vol. 79, 2000, pp. 131-158.

33 - What is Restorative Practices?, Bethlehem: International Institute for Restorative Practices, 2012.

34 - Robert Putnam, *Bowling Alone: The Collapse And Survival of American Community*, New York: Simon & Schuster, 2000.

bottom-up from deliberative democracy in primary groups. Jenny Job and Monica Reinhart's AMOS analysis<sup>35</sup> on a sample of 1,999 Australians shows that social capital does ripple out from intermediate groups to a small degree as predicted by Robert Putnam<sup>36</sup> and Theda Skokpol,<sup>37</sup> but the strong path was rippling out from family and work groups. Social capital and democratic competence spread like ripples on a pond from primary groups and then to intermediate groups, bottom-up from primary groups much more than middle-out from intermediate civil society organizations.

A very different kind of primary group that is critical to the constitution of democracy is, according to Rudé in *The Crowd in History* (1964)<sup>38</sup>, at locales like the streets of Paris. Particularly since World War II, nonviolent crowds demanding freedom in the streets has been a more effective vehicle for the overthrow of tyrants than armed revolutionary movements.<sup>39</sup> The crowd in many countries has also been a critical bottom-up check on criminal justice abuses, in the United States particularly with extra-judicial killing of black men believed to be criminals.

Competence at the commanding heights of societies—in cabinet rooms, legislative drafting committees, central bank boardrooms, boardrooms of multinational corporations, in the deliberation of judges in appellate courts—depends on primary group deliberative competence that has been learned in schools and families. Good prime ministers are good because they are adept at empowering contesting voices around the table in meetings. Good judges explore their ideas in contest with the ideas of their colleagues, eschewing a judicial culture of each sitting in separate rooms writing individual judgments. Good democracy in short is a hybrid of the contestatory and deliberative. It actively promotes both a contestatory and a deliberative institutional turn. It is not deliberative top to bottom; it is not deliberative with every citizen. Nor is it so contestatory as to destroy competence in decisive decision-making.<sup>40</sup> A good democracy is deliberative in the way it is built from primary groups out, at key nodes of small group decision-making in families, workplaces and on the streets, and in the way the judicial branch of governance

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35 - Jenny Job and Monika Reinhart, "Trusting the tax office: Does Putnam's thesis relate to tax?", *Australian Journal of Social Issues*, vol. 38, 2003, pp. 307-334.

36 - Robert Putnam, *Bowling Alone...*, *op. cit.*

37 - Theda Skokpol, *Diminished Democracy: From Membership to Management in American Civic Life*, Norman: University of Oklahoma Press, 2003. Skokpol is distinguished from Putnam in that she explains the decline of social capital in American democracy by the decline of mass participation intermediate organizations with millions of members like lodges, Rotary or the Women's Christian Temperance Union and the replacement of participatory social movement politics with NGOs run by professionals with closer links to elites than engagement with a mass base.

38 - George Rudé, *The Crowd in History*, New York: Wiley, 1964.

39 - Erica Chenoweth and Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, New York: Columbia University Press, August 2011.

40 - John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny*, *op. cit.*, pp. 296-305.

and the education system provide broad-based opportunities for participation in matters of deep concern to citizens.

Systematic programs of empirical research are needed to explore the contexts where more deliberative institutions like restorative justice more effectively reduce dominations of various kinds, and where more contestatory institutions like criminal trials are more just and effective. Much has already been done<sup>41</sup> and much more is under way in many parts of the world. Ultimately, institutional designs for hybridity are about hedging. They assume restorative justice will work badly much of the time and so will alternatives to it such as courtroom proceedings. Hence, the key thing for integrating empirical research with normative scholarship is to inform how to cover weaknesses of one failing justice strategy with strengths of another. Programs of empirical research on the impacts on domination of experiments with different mixes of hybridities are needed, and premature specification of templates for mixed governance may not be helpful.

### **Deliberative democracy and evidence-based domination reduction**

One would not be much of a republican if one institutionalized a deliberatively democratic version of republicanism in the judicial branch of governance and killed a lot of people as a result. Happily, restorative justice is associated empirically with modest crime reduction.<sup>42</sup> One would not be much of a republican if this prescription resulted in a penal populism that pumped thousands of extra felons into prisons or execution chambers. As it has turned out, when judges have felt compelled to intervene to overturn decisions of restorative justice conferences, it has rarely been to curb populist punitive excess, but rather to increase punishments decided by restorative justice conferences that courts judged insufficient.<sup>43</sup> Populist punitive excess does at times happen in restorative justice, however, and when it does the courts are critical. So are legal help lines that are integrated into restorative justice programs such as that in New South Wales to assist defendants test whether they might get a more benign outcome by walking away and opting for court.<sup>44</sup>

It helps to understand why restorative justice on average reduces punitiveness by seeing the same factors in operation as when the institution of the jury has proven not to increase punitiveness.<sup>45</sup> Citizens who say in surveys that they

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41 - Heather Strang *et al.*, "Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims...", *op. cit.*

42 - *Ibid.*; John Braithwaite, *Restorative Justice and Responsive Regulation: The Evidence Question*, Canberra: Regulatory Institutions Network SSRN Working Paper, Australian National University, 2014.

43 - John Braithwaite, *Restorative Justice & Responsive Regulation*, *op. cit.*, pp. 146-148.

44 - *Ibid.*

45 - Albert W. Dzur, *Punishment, Participatory Democracy and the Jury*, *op. cit.*

believe in capital punishment for murder mostly say they do not agree with the execution of the particular murderer on whose jury they serve.<sup>46</sup> One reason citizens are on average less punitive on juries and less punitive still in restorative justice conferences than they are in opinion polls is revealed by Doob and Roberts.<sup>47</sup> They show that the more information people have about the contextual details of a crime and the life and loves of the vulnerable human being who stands accused in the dock, the less punitive they become. In this research, people were first shown newspaper stories of particular crimes and then asked what sentence was appropriate. This is the real life context of penal populism: popular engagement with mass media whipping up retributivism. After citizens read the newspaper story, they recommend a more punitive sentence than the judge actually decided in the case. When, however, people were asked to read an edited transcript of the trial, they commended roughly the same severity of sentence as the judge. The penal logic of restorative justice is to give the citizen even more information than a transcript by inviting them to ask (respectfully) whatever questions they wish of the offender, empowering participants with voice in matters that are legally irrelevant. An example is the little boy who says his big sister (the accused) is the kindest person he has ever met, who helps him in truly important ways along life's path. It is these factors that drive what is arguably the largest empirical effect of restorative justice. Restorative justice dramatically reduces the retributive feelings of victims whose case was randomly assigned to restorative justice compared to those randomly assigned to a criminal trial (Strang *et al.*, 2013). This also underpins the effectiveness of restorative justice in the Pakistan police station reconciliation committees in reaching decisions that horrify Western criminal lawyers—like recommending the release of murderers who have served only a few months in prison. Because the early release is a gift of the victim family that underwrites an agreement to interrupt cycles of revenge that endanger peace, judges in North-West Pakistan almost always act on these restorative justice recommendations.<sup>48</sup> Such seeming endorsement by common law judges of “impunity” for murderers shocks Western lawyers even more.

These are contexts where restorative justice reduces both violence and the amount of punishment in the society. It reduces domination from both sources. For republican restorative justice advocates, it is wrong to be the kind of criminologist who evaluates reforms myopically in terms of crime reduction impacts. One reason is that reducing self-harm is a more important evaluation criterion for restorative justice than harm to others. For courts as well, a more important objective than reducing homicide is reducing suicide. This is true

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46 - See also John Braithwaite, *Restorative Justice & Responsive Regulation*, *op. cit.*, pp. 146-148.

47 - Anthony Doob and Julian Roberts, *Sentencing: An Analysis of the Public's View of Sentencing. A Report in the Department of Justice, Canada*, Canada: Department of Justice, 1983. Anthony Doob and Julian Roberts, “Public attitudes towards sentencing in Canada”, In Nigel Walker and Mike Hough (eds.), *Public Attitudes to Sentencing*, Aldershot: Gower, 1988.

48 - John Braithwaite and Ali Gohar, *Restorative Justice, Policing and Insurgency: Learning from Pakistan*, *op. cit.*

even in the United States, with its comparatively high homicide rate and low suicide rate, giving the US a ratio of only 2.5 suicides per homicide. That ratio is 12 in Britain: For example, 70 committed suicide in Britain's prisons in 2013, though people in prison are not the only concern with justice-induced suicide.<sup>49</sup> The criminal justice system is a not insignificant cause of suicide everywhere.<sup>50</sup> Korea, Slovenia and Japan are outliers at the other end of the spectrum, with ratios of more than 30 suicides to each homicide.<sup>51</sup>

In Japan, many murderers receive only a suspended prison sentence because courts often give victims a *de facto* right to claim large quanta of contrition and cash; when they get rituals of apology they view as sincere, victims often successfully suggest that the court waive incarceration. Japan has had rather consistently the lowest homicide rate in the world since World War II.<sup>52</sup> So this leniency hardly caused a murder epidemic. In a society where people experiencing shame are unusually vulnerable to suicide, however, it might prevent much self-harm, which is the bigger problem, not just in Japan.

Republican criminal justice must be of a reintegrative kind that helps offenders and victims to acknowledge and transcend shame.<sup>53</sup> When Braithwaite<sup>54</sup> emphasizes equal concern for the justice claims of all stakeholders, in opposition to equal punishment for equal wrongs, this must include self-harm concerns among affected families. That is one reason I always argue (unsuccessfully) to ANU students that the New Zealand Court of Appeal erred in overturning the recommendation of a restorative justice conference against prison time for an exceptionally violent assault (The Clotworthy case).<sup>55</sup> More than I, most of my students conceive of imprisonment as a good way of symbolizing the system of norms that shapes society—imprisonment as a common sense norm of public morality. The restorative justice recommendation had been accepted in the sentence of a District Court. In the restorative conference the victim wanted to give the gift of forgiveness by keeping the offender out of prison; he wanted to accept from the offender the gift of payment for plastic surgery on his face that was disfigured by the knife attack. The decision of the Court of Appeal in incarcerating the offender meant it was impossible for the

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49 - *Prison Suicide and Homicide*, The Howard League for Penal Reform, <http://www.howardleague.org/prison-suicide/>

50 - Royal Commission into Aboriginal Deaths in Custody, 1991. See the Australian National Archives site for both the Interim and Final report and supporting data: <http://www.naa.gov.au/collection/fact-sheets/fs112.aspx>: retrieved 11 August 2015.

51 - Ratios calculated by the author from the 2014 World Health Organization data for suicide and United Nations Office of Drugs and Crime data for homicide.

52 - John Braithwaite, "Crime in Asia: Toward a better future", *Asian Journal of Criminology*, vol. 9, 2014, pp. 65-75.

53 - John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford: Oxford University Press, 1990; Eliza Ahmed, Nathan Harris, John Braithwaite, and Valerie Braithwaite, *Shame Management Through Reintegration*, Cambridge: Cambridge University Press, 2001.

54 - John Braithwaite, *Restorative Justice & Responsive Regulation*, *op. cit.*

55 - *Ibid.*, p. 147.

offender to use his salary to pay the plastic surgeon. The victim subsequently committed suicide for reasons we do not know. While we do know systematically that imprisonment is an important cause of suicide,<sup>56</sup> we can only speculate on whether it caused the suicide in this case. Penal populism is a concern that judiciaries must have the independence to resist for a great variety of reasons that have been articulated elsewhere.<sup>57</sup> But penal populism is more a concern because of the pressure it puts courts under for tough sentences than because of the pressure it puts on restorative justice conferences.

### **Conclusion: empirically contestatory hybridity**

The critical concern from a republican perspective is that we continue to be empirical social scientists in monitoring real world impacts of different modalities of justice. That is a virtuous tenet of Pettit's republican consequentialism. We are therefore required to give greater funding priority to evaluating whether courts and restorative justice reduce or increase self-harm, for example.

Fertile hybridity between contestatory courts and deliberative restorative conferences, between contestatory democracy and deliberative democracy more broadly, might contribute to tackling many kinds of harms. Likewise the deliberative-representative-monitory hybridity of village Panchayats may deliver new kinds of liberation. It is too early to tell whether Panchayats can advance freedom. Even though *nyana panchayats* (village courts) are ancient institutions, contextually driven contemporary research is needed to assess the impact on domination of democracy hybrids.

Whether realized or not, the Panchayat vision suggests that it is good for a contestatory democracy to be reflexively contestatory. This can mean that the contestatory ideal is itself contested by the democracy of deliberative assemblies and representative democracy. That contestation can clarify contexts where it is best that votes are never taken, where a deliberative model prevails. It can clarify contexts where we do best by non-domination when unelected judges, sentencing commissioners, election commissioners or auditors prevail over electoral majoritarianism. The contestation reveals other contexts where power struggles are best settled by an election. Equally, political contests clarify contexts where it is best for the UN Security Council to prevail from above over all national institutions, or for citizens massed on the streets to prevail from below over national institutions. While each of these contexts for humbling arbitrary power exist, the pursuit of hybridity from the contestation of contestatory democracy itself may be the source of the most fertile institutional turn for salvaging the faltering democratic project. This is because domination in conditions of regulatory capitalism (others would say neoliberalism), where market logics enjoy growing power, especially in politics, is more innovative

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56 - Royal Commission into Aboriginal Deaths in Custody, 1991, *op. cit.*

57 - John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, *op. cit.*

than past forms of domination. That archipelago of domination stretches from an architecture of internet surveillance to assassination drones to financial derivatives and shelters that hide the contours of corporate control. This is why innovation in deliberative-representative-contestatory hybridity seems the way to join the contest to safeguard freedom. This is as true on Wall Street as it is in rural India or Afghanistan, as relevant to regulating corporate crime and war crime as it is with simple rural crimes.

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#### ABSTRACT

##### **Deliberative Republican Hybridity Through Restorative Justice**

Republican theory has primarily been forged by normative work within the discipline of political philosophy and by the historiography of Western governance from Roman times. This contribution seeks to inform the republican tradition with insights from empirical research on criminal justice and restorative justice, primarily from non-Western governance experiments. This empirical experience is used to decentre executive and parliamentary governance as the key sites of democracy constitution. The judicial and educational branches are conceived as the most critical for providing citizens with opportunities to learn to be democratic. This learning is conceived as learning in how to craft innovative new hybridities between deliberative democracy and contestatory democracy. Such innovation is conceived as needed because of innovation with new technologies of domination that threaten republican democracy.



## RÉSUMÉ

### **L'hybridité délibérative républicaine par la justice restaurative**

La théorie républicaine a été, pour la plupart, le produit du travail normatif mené en philosophie politique et des recherches conduites dans l'historiographie de la gouvernance occidentale depuis la période romaine. Cet article tente de contribuer à la tradition républicaine en puisant dans la recherche empirique en matière de justice pénale et de justice restaurative et en mettant l'accent sur des expériences de gouvernance non occidentales. Ces expériences empiriques sont notamment utilisées pour décentrer la gouvernance législative et exécutive comme les lieux par excellence de l'élaboration de la démocratie. Les domaines judiciaire et éducationnel sont encore plus importants lorsqu'il est question de fournir aux citoyens des opportunités pour apprendre à devenir des individus démocratiques. Ce processus d'apprentissage est conçu comme un art d'innover des agencements hybrides entre la démocratie délibérative et celle de contestation. Cette innovation est requise pour répondre à l'émergence de nouvelles technologies de domination qui menacent la démocratie républicaine.

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