

# 10 Learning to scale up restorative justice

*John Braithwaite*

## **Introduction**

A limitation of transitional justice with limited years of existence is that many of the worst victims are afraid to come forward, not ready to do so, or too busy rebuilding burnt homes and caring for burnt loved ones during those few years. One option is a permanent Truth Commission that keeps its doors open to victim testimony in perpetuity. Even well-funded truth commissions such as that of Timor-Leste provide the opportunity for some form of restorative justice to only a tiny proportion of the victims who would like it. In the case of Timor-Leste, many individual victims and many villages were asking for the Community Reconciliation Program to come to their village at the time that program ended with the closing of the doors of the Timor-Leste Commission (see discussion below).

The transience of transitional justice is compounded by the failure to invest in management improvement of transitional justice institutions. Transitional justice learns little. It does not monitor continuous improvement in the proportion of victims who are getting a form of justice they value. Transitional justice does not improve in iterated processes of fail fast, learn fast, adapt fast. Instead it fails fast, learns little, claims fast the closure that 'something has been done'. This chapter proposes a remedy to this limitation in the form of a permanent Truth and Reconciliation Commission that keeps its doors open to victim testimony in perpetuity. It is argued that dealing with the harms that have been caused during an extended period of conflict and/or oppression in a manner that does not set time frames might result in a transformation of transitional justice that is more victim focused.

## **Learning through monitoring**

A problem with transitional justice is that it is transitional. In a different way, this is also a theme of Chris Cunneen's contribution to this volume. Particularly in developing countries that suffer wars, but not only there, a core failing of all manner of development and peacebuilding programs is short-termism. Donors like to be seen to be doing something new and innovative. It is less attractive to

pour more support into preventing the shutdown of something that has been performing well. This is sad because we know that few initiatives to support poor people post-conflict work well at first. A long process of local learning and local adaptation is normally required to make a difference. The learning through monitoring approach to transformation that we have reason to think can work (Doff and Sable 1998) is not the norm. Instead donor funding tends to drop in templated programs from somewhere else (that are therefore not locally attuned) and then shut them down after evidence of disappointing results. This happens before the Silicon Valley mantra of ‘fail fast, learn fast, adapt fast’ has had time to work through a sequence of failures that promote growth.

We must be wary of ‘restorative justice’ becoming one of those dropped-in templates that feeds this frenzy of non-learning. That is one reason why it may be preferable to ask which traditions of doing justice locally already have a track record of learning through monitoring within the cultures of that place (Braithwaite 2014). I am yet to encounter a developing country context where practices with considerable restorative character do not already exist. Perhaps there are developing countries that do not have any justice tradition that is a better fit to definitions of restorative justice than some of what passes for it in developed economies; it is just that I have not encountered such a poor country. If that justice institution grounded in local learning is called *Gacaca*, then it is better to discuss it, support it, adapt it through further learning as *Gacaca* rather than as a program that donors call restorative justice, simply because it has restorative qualities (at least in some contexts in the case of Rwanda’s *Gacaca*).

Pathologies of short-termism are everywhere to be found in transitional justice programs that have disappointed their advocates. For many commentators (Braithwaite *et al.* 2012; Kent 2004; Stanley 2009), the prosecutorial Serious Crimes Process of transitional justice in Timor-Leste was a disappointment, but the Community Reconciliation Process was one that showed great promise. Timorese did not describe the Community Reconciliation Process as ‘restorative justice’. It leaned heavily on indigenous *lisan* traditions of justice. It was making mistakes, but was learning from them. Sadly, it closed down in circumstances where many communities were clamouring for the Community Reconciliation Process to come to their village to support its victims and reconcile its returning perpetrators. This was about CAVR (the Timor-Leste Commission for Reception, Truth and Reconciliation) being funded by donors for only a finite number of years. CAVR was one of the better-funded truth commissions the world has seen and it benefitted from some wonderful leadership.<sup>1</sup> Hence, its failure to leave behind a sustainable Community Reconciliation Process goes to the limitation of the very idea of transitional justice.

Not all abrupt terminations of learning through monitoring are a result of transitional institutions being required to close their doors after a few years because they are conceptualised as transitional. The National Peace Council (and its predecessor, the Peace Monitoring Council), which operated in Solomon Islands from 2000 to 2006, like CAVR, had inspiring strengths and indigenous leaders whose network of 80 local mediators initiated a galaxy of local reconciliation and peacebuilding

initiatives largely crafted at the village level. An example was spreading its 'Weapons Free Village Program'. The Council nurtured dispersed peacemaking networks in the villages, encouraging traditional leaders to mediate conflicts (including all-important land disputes) locally, to support the local rebuilding of the legitimacy of the Solomon Islands police, to watch for weapons, to provide an early warning of rekindling hot-spots and to involve schoolteachers and churches in peace education and assisting children recovering from trauma. In other words, a strength of the National Peace Council was that it was participatory, indigenously led and under the thumb of neither the government nor the international peace operation. Those from Honiara and Australia who killed it off had an agenda of more centralised control of, and spin about, the peace process from the capital (Braithwaite *et al.* 2010b: 40–43).

The Australian-led peacekeeping operation was prone to take credit for the successful surrender of weapons as part of the Solomon Islands peace. The fact is that most weapons were handed to the National Peace Council, working with church leaders, before peacekeepers arrived in 2003! Australian funding for the National Peace Council was cut, partly because the Howard government (and the Rudd government at first) was more interested in a prosecutorial approach to transitional justice than a restorative one. But the more fundamental reason the National Peace Council was cut down was that a new Solomon Islands government saw it as an initiative of their predecessors with Commissioners whose political past was not to their liking. The fact that the National Peace Council was succeeding and learning through monitoring therefore increased the political appeal of discrediting and closing it.

## **Transforming transitional justice**

Kerry Clamp's final chapter of this volume is about a transformative vision for restorative justice as a response to mass victimisation. It follows from this chapter so far that one way for transitional justice to become more transformative is for it to become less transitional. In her recent writing, Clamp (2014: 46, 122–123) has also questioned quick closure as a transitional justice objective. Rather, Clamp is attracted to the Nils Christie ideal that it is often better to own and live within a conflict rather than to 'solve' it. The conflict between restorative and prosecutorial justice itself is a good example of one that is best not 'resolved', but continually contested by advocates with different visions of justice.

Nickson and Braithwaite (2013) have made a case for permanent truth and reconciliation commissions that broaden, deepen and lengthen their conception of justice. Restorative justice learnings are the path we see for deepening justice through participatory ownership of it by neglected stakeholders, particularly victims, but not only victims. The way restorative justice can deepen the meaning of justice is by being responsive to the centrality of [affected] communities as stakeholders in justice work. Justice can be broadened so that it includes reparations of diverse kinds that encompass 'symbolic reparation',

sometimes with a tangible quality such as returning bones, as well as 'material reparation', 'justice as a better future' (Shearing and Froestad 2007), apology, memorialisation and much more. Lengthening justice means making transitional justice permanent! This means truth and reconciliation commissions or an archipelago of local and national peace committees as permanent institutions.

Empirically, Ray Nickson's (2013) Ph.D. research was about an expectations gap with transitional justice that he found to be widespread. For example, local villagers speak of their despair, a decade on, when they go to a market and encounter a man still wearing their son's watch on the arm that murdered him. In contexts such as Cambodia and the former Yugoslavia that Nickson studied, and with the 33 wars for which I have done fieldwork so far in *Peacebuilding Compared*, it is exceptionally rare for prosecutorial transitional justice to get down to low-level murders or rapes of single people by officers of low or middling rank. So, in terms of the theme of this book, the problematic is not only about transitional justice being too transitional, but overly concentrated on mass national atrocity, neglectful of local and personal atrocity. Broadening and lengthening justice means that, even if it continues to be the case that the mother who sees that watch on that arm cannot get her day in court, she might get access to a (deeper) form of justice that is restorative. A lot of that kind of deeper justice was done by Timor's Community Reconciliation Process 'on the mat' in the village where victims could insist that at least this man could stop using their son's watch and indeed return it to them. By broadening the conception of justice to encompass participatory empowerment of a demand that a watch be returned, or affirmation of a family request that a village tap be named in honour of a disappeared family member,<sup>2</sup> many more survivors can get some kind of justice. Not a full measure of justice, but a spoonful of justice that has meaning for them.

One problem with the truth and reconciliation commission that runs for just three years is that most of the most damaged victims, especially children but also adults traumatised by rape, will not be ready to disclose things in front of others that they have never before spoken of to anyone. Timing is the essence of justice that restores. This is not just a challenge of whether survivors are ready yet. It is also a problem of victims being ready right now and the justice institution not yet being in place to hear them. An Australian Aboriginal friend of mine recently agreed to testify before the Royal Commission on Child Sexual Abuse. It was her first time telling details of her abuse as a child of the 'stolen generation' who was taken from her parents and institutionalised. She was unable to do anything else in her life as she prepared for the testimony. She was ready to take the big step. Her testimony date was deferred for weeks, then deferred again. Her emotional well-being plummeted shockingly during this period and again after the testimony, though on balance she felt the experience was beneficial for her once she had climbed the mountain of giving it. Most victims of the most terrible atrocities, I speculate, come to a state of readiness for testimony either too early or too late for when a transitory transitional justice institution has its doors open to them. That is something we must fix.

Most of the world's anti-corruption commissions are permanent standing commissions (for good reason). Why cannot truth and reconciliation commissions be permanent? Cost is a reason of course. The cost challenge is not as huge as it seems. One of the few ways developing countries export some services to rich countries is through tourism. The challenge for their national capital, if not their wilderness areas, is that it lacks tourist attractions. In countries that have a history of mass atrocity, the evidence is very clear now that one of the best tourism sites one can build memorialises mass atrocity (Lennon and Foley 2002; Causevic and Lynch 2011). Even when we tourists go to cities that are wealthy and bristling with alternative attractions, usually if we go to Berlin or Cape Town we go to the Holocaust Museum and to Robben Island.

For developing countries, this means westerners can be asked to pay an entrance fee that funds the local staff of a museum that maintains all of the evidentiary artifacts and all the stories of the victims who came forward to the Truth and Reconciliation Commission. And they contribute to the national economy by staying in hotels and dining at restaurants near the museum. The idea of a permanent commission is that, after all the victims and all the perpetrators have died, the commission will remain as little more than a museum, an institution of national collective memory and education of the next generation. One would hope for a museum with rich community outreach to schools and across the generations, as well as one that attracts tourists.

Perhaps the deeper objection than cost is touched upon in Wendy Lambourne's chapter. This is that broad, deep and long justice in respect of mass atrocity is 'too messy'. Political leaders and donors alike tend to prefer institutionalised 'closure', tied up and tidy, transition done. That is why they also too often push for a post-conflict election and withdrawal of peacekeepers that entrenches a new tyranny before the institutions have been put in place to guard against an electorally endorsed tyranny. Just as premature closure through an election can make democracy a cause of war rather than a cause of peace (Collier 2009), so I worry that temporally truncated reconciliation can make transitional justice a cause of war rather than a cause of peace.

Yes, many individual victims do crave closure. Perpetrators certainly crave the kind of closure that lifts a future threat of investigation and prosecution from their heads. Closure can be socially and emotionally a good thing. But, in other contexts, closure is the last thing stakeholders want. Consider again Chris Cunneen's chapter. Do Australian Aboriginal people want a commission to come along, give them closure in a transitional moment when injustices such as theft of their land, stripping their identity, is healed, and an institution of reconciliation that is wound up with white and black Australians then enjoying closure? It is good and fine for individuals to decide that what they want in relation to their abuse is personal closure. Institutionalisation that dictates closure for a society that persists with deep structures of injustice is quite another matter. Dictating what is best for all individuals, with their great diversity of needs, through institutionalised closure is quite another matter. In Lambourne's terms, there is a need to defend the idea that the most productive forms of justice are likely to be

radically plural and therefore messy. Closure here, opening up wounds there, for a project of disinfecting them in the *longue durée*.

In his chapter, Jonathan Doak rightly worries about the risk of ‘victor’s justice’ in transitions. Most transitional justice is victor’s justice. At the Tokyo War Crimes trials, Japanese political and military leaders were convicted of terrible war crimes. But were any of them as terrible as dropping atomic bombs on civilians, or the firebombing of Tokyo for that matter? Yet there are ways that tables of victor’s justice have turned. In the decades after the Second World War, Japan became a more dominant world economic power than it ever was before the war. Its Prime Minister Shinzo Abe and much of his right-wing political constituency use that position of formidable global economic power to assert a kind of war crime denial. This has extended to political pressure from Abe’s supporters even to close a memorial to Korean slave labourers who perished in terrible conditions in Japan during the Second World War.

Because the victor’s justice of the Pacific war crime trials was of such poor quality, a poor transitional platform was laid for the *longue durée* of reconciliation in the Asian theatre. My father was one of the six survivors of a war crime that took 2,400 lives – the Sandakan death march. At least one of the Japanese officers who hung for that mass atrocity was innocent because one or more survivors fabricated testimony against him, as one confessed on his death bed. The haphazard injustice and humiliation of war-time leaders at the gallows leaves some contemporary Japanese political leaders with a distaste for adding to this discomfort by appropriate justice for elderly sex slaves of their wartime military, victims of the rape of Nanjing, and many more. Had a permanent truth and reconciliation commission been established, instead of the kind of selective and shabby prosecutions that were done, the *longue durée* of reconciliation with Japan’s neighbours might today be in better shape. The challenge would be to put that permanent commission beyond the reach of the anti-reconciliation political power of the likes of a Prime Minister Abe. To this challenge we turn in the next section.

### **Architectures of permanence**

A further strength of the Timor-Leste CAVR was that it became part of the country’s separation of powers (Braithwaite *et al.* 2012: 214–250). The seemingly all-powerful Prime Minister of Timor-Leste Xanana Gusmao believed in closure once his government had achieved some quite productive reconciliation with the government of Indonesia. He stalled publication of the CAVR report and sought to silence the Commission in various ways. He failed in the sense that ultimately the Commission won enough support from the parliament and donors to disseminate the report very widely.

As is usual after terrible protracted conflicts, whichever faction prevails to capture the successor state has skeletons in its closet. From Sri Lanka to Solomon Islands to Nepal, so many commitments to truth and reconciliation commissions in peace processes have been delayed and suppressed by executive

governments (often with support from parliamentary opposition leaders who also have skeletons in their closets). Institutional breakthroughs are needed in our thinking about how to lock in the political independence of truth and reconciliation commissions within the separation of powers.

The problem of the independence of truth commissions falling to the domination of executive governments is just one example of the whole range of accountability institutions that are repeatedly dominated and compromised by the executive branch of the state. These include ombudsmen, audit offices, anti-corruption commissions and independent regulatory commissions, especially in sensitive areas such as the media and financial regulation.

In Western democracies and many other societies, domination of the judicial branch by the executive is not as profound, partly because, like the legislative branch, the judicial branch benefits from a long tradition of independence advocacy that dates from Montesquieu (1777) and earlier. More importantly, the independence of the judicial branch is backed by a wealthy and powerful fraction of the ruling class with a class interest in defending that independence – judges themselves, prosecutors, lawyers in private practice, law societies and other professional associations, professors in law schools. An office such as that of the Ombudsman benefits neither from a deeply embedded historical commitment to independence nor from the backing of a politically powerful profession. Nor does a restoratively oriented truth and reconciliation commission enjoy either of those bulwarks. Indeed restorative transitional justice regularly comes under attack from that legal faction of the ruling class who mostly succeed in ensuring that more of the budgets for transitional justice go into the pockets of lawyers than to rebuilding lives of victims.

While Western constitutionalism is rather sewn up by legalists, the Chinese contestation between the legalist and Confucian traditions, or about how to create a hybrid of them, as President Xi Jinping claims to be doing, is a more uncertain historical contest. Restorative justice is very much in the mix with what is being discussed as an option for the future in China. Who could predict if all this will become a step forward or a step backwards for freedom as non-domination?

What is rather more settled and interesting is how Taiwan's (the Republic of China's) Constitution has developed. This framework also applied to mainland China until the Maoists drove the Kuomintang from power. The Taiwan Constitution has five branches of governance ('Yuan') grounded in Sun Yat Sen's principles of republican governance (still revered in the Peoples' Republic). Three of the Taiwan Yuan are branches that all Westphalian states have inherited from the Montesquieu tradition – an executive, a judiciary and a legislature. A fourth is an examinations branch based on the Confucian ideal of protecting all other branches from cronyism by an Examinations Yuan that is independent of other branches of governance. The Examinations Yuan decides who will get jobs in other branches on the basis of beating their competitors in exams. Not such a bad idea for countries with histories of family dynasties running the state or of a legal profession recruited from bestowing articulated clerkships upon young men

who attended an elite private school or the same school as one of the partners of a law firm.

The fifth branch is the one of particular interest to this analysis. This is the Control Yuan. Its job is the regulation of the state, meta governance, the governance of governance (Sorensen 2006) or meta regulation (Parker 2002). The idea of a Control Yuan has a pre-republican history, starting with the office of the Censor (御史; *yù shǐ*) under the Qin and Han dynasties. Later, the Sui and Tang dynasties established the office of the *tái* (臺) who supervised the conduct of civil servants and military officers. Sun Yat Sen's original thinking on the separation of powers had a sixth branch, the Auditing Yuan. However, in 1931 the Auditing Yuan was subsumed as the Ministry of Audit into the Control Yuan, an architecture that remains in Taiwan today.

In addition to supervising what would be called the Auditor-General function in the West, the Control Yuan also deals with impeachment of Ministers, members of parliament, officers of the Examinations Yuan, prosecutors and judges. It supervises the integrity and independence of the other four branches. The Control Yuan Committee on Anti-Corruption is central to this function. There is also a Control Yuan Committee on Human Rights with functions similar to Western human rights commissions. There is a Standing Committee on Judicial Affairs and Prison Administration that performs the functions of judicial self-regulation in the West and the prison ombudsman and prison inspectorate functions that exist in some Western jurisdictions. The Control Yuan also has an oversight Standing Committee for National Defence and Intelligence Affairs. Another Control Yuan standing committee has oversight of procurement by all branches of governance.

Most interesting from a reconciliation perspective, it has a standing committee concerned with ethnic minority affairs. Like white-settler colonies, Taiwan has an indigenous minority who were the original owners of the land before the historically recent Han Chinese invasion. As in white-settler societies such as the United States, Canada, Australia and New Zealand, the judicial branch has a history of defending their ruling class interests by finding that white settlers have legal title over the stolen land. Of course the Control Yuan membership has the same class interest. Yet it does seem a visionary idea in principle to have a branch of governance within a branch that is independent of the judiciary with heavy indigenous representation and with the job of holding the other branches to account in terms of indigenous rights and indigenous reconciliation. One reason it merits consideration in principle is that it is a permanent institution that therefore has the potential to reconcile open wounds of the *longue durée*. This virtue is that it is an institution that can be adapted when it fails, but that will not be shut down at the whim of executive governments, as has happened repeatedly to indigenous rights and reconciliation institutions in Australia, for example.

Thailand is the only country I know to have emulated the Taiwan architecture of a Control Branch or Integrity Branch of governance. The 1997 'People's Constitution' was a radical document in terms of public participation and rights accountability. It was dismantled by the 2006 military coup and the 2007 Constitution



promulgated by the Council for National Security, which made it a crime to criticise the draft constitution (Sapsomboon and Khundee 2007). Members of the fourth branch, the inspection branch of the 1997 Thai Constitution, oversaw impeachment in the other three branches, the election commission, the human rights commission, ombudsman, audit and anti-corruption functions as in the Taiwan Control Yuan. The 1997 Thai Constitution involved the further innovation of that fourth branch being elected from candidates who were not members of political parties and for one term only (as a check against progressive capture by parties that dominate the executive and legislature and stack the judiciary).

There is something attractive about this Sun Yat Sen architecture of a fourth accountability branch of governance comprising many branches. In terms of the issues of this book, for societies where settlers have forced indigenous landowners off their country, there is appeal in one of those branches being elected from indigenous peoples for oversight of the other branches in terms of the *longue durée* of reconciliation of histories of indigenous dispossession and mass atrocity, disproportionate contemporary imprisonment and deaths in custody and indigenous rights more broadly. The next section argues that one potentiality of such an architecture in contrast to extant Western constitutional architectures is that they might incubate the application of modern management techniques of continuous improvement to monitor the scaling up of restorative justice and other forms of social justice to eventually benefit all indigenous victims of injustice, rather than a token few.

For societies that have suffered from civil war, actual genocide, 'creeping genocide' or politicide, there is appeal in establishing a permanent truth and reconciliation commission as a branch within a permanent independent accountability branch. That would give it the backbone to stand up to political parties, to clean out Nazi judiciaries, Soviet carceral archipelagos or Apartheid policing, to stand up to a Ku Klux Klan and to state judiciaries that fail to act against them and to stand up to abuses of power of more subtle kinds.

Freeing transitional justice from the legal shackles that go with institutions such as the International Criminal Court or Royal Commissions to investigate past mass victimisation in Australia, means that reconciliation strategies more grounded in civil society become possible. One of the problems of the South African Truth and Reconciliation Commission is that many victims who offered to testify were not selected for public hearings. Others felt they lived in rural areas that were too remote to get themselves to sites of testimony. Others were not ready at that time. And there were many other reasons that the South African Commission touched in a personal way the circumstances of only a tiny fraction of victims of Apartheid.

One of the creative programs of South African civil society's Institute for Justice and Reconciliation to respond to these limitations has been to engage schools by encouraging their students to create videos of the testimony of their loved ones. A granddaughter might approach a victim who did not want to testify before Archbishop Tutu to enable the collective memory of the family concerning her suffering under Apartheid. The granddaughter's appeal might be

to encourage the grandmother simply to do for her granddaughter what she would not do for Archbishop Tutu if she now felt ready and strong enough to do that much. One possibility from such family reconciliation initiatives (children-up rather than judiciary-down or Commission-down) is that a person who did not wish to disclose the atrocity she suffered as a younger person discovers with her granddaughter in old age that she benefits from telling the story. So much so in some cases that perhaps she might change her mind about the permanent truth and reconciliation commission and then lodge her video on their archive for the collective memory and history of the nation, as well as for the collective memory of future generations of her family. One possibility is that this kind of initiative could be catalysed in civil society by a commission that was in the business of reconciliation for the *longue durée*.

An Interim (transitional) Truth and Reconciliation Commission could be considered to gather testimony for an Interim Report and build consensus toward a mandate for the Permanent Commission which might be constitutionally entrenched. Under this vision, the Permanent Commission could become an integral part of the separation of powers, an extra check and balance in the polity. Hence, if the Interim Commission in a case such as post-apartheid South Africa decided that justice as a better future (Shearing and Foestad 2007) was fundamental to transitional justice, it might recommend to the drafters of the new constitution that the Permanent Commission be mandated to produce five-yearly comprehensive reports evaluating the successes and failures of national institutions in reducing racial inequality, eliminating poverty, and creating educational equality and less brutal security forces.

When I interviewed one of the leading lights of the South African Truth and Reconciliation for Peacebuilding Compared, he said (anonymously according to my ANU Ethics protocol) that perhaps a better idea than making the Truth and Reconciliation Commission a permanent institution would have been to make the South African architecture of local and provincial Peace Committees permanent. He argued that these were effective in preventive peacemaking (for example, by steering routes of funeral marches from rival parties away from each other) as well as for local truth and reconciliation. The Peace Committees were established under the 1991 National Peace Accord. They were shut down in 1994 by the African National Congress precisely because they were a competing check and balance and a bottom-up source of peacebuilding competing with the ruling party's top-down authority.

### **Bottom-up architectures**

The African National Congress was behaving like most governments with a stranglehold on executive government in closing down genuine bottom-up power. Executive governments wanting to keep their hands on most levers of power are only one of the threats to growing transitional justice bottom up. Commodification and professionalisation of development assistance are others. Indeed, almost all the types of 'community empowerment' we see on the ground

in rural areas of poor countries are enfeebled by the commodification of the aid business. Some of the commodification is driven from developed economies where volunteerism has been displaced by development professionalism and NGO advocacy professionals. We see it in Western universities where academics are pressed to capture some of their country's aid budget for the benefit of the university. Progressively in developed economies, we see more of the public's contributions to development being captured by development professionals working for NGOs, by universities, by businesses that specialise in aid, even by the Big Four global accounting firms.

At the receiving end, a commodification dynamic unfolds that mirrors the commodification dynamic of supply of transitional justice and other forms of development assistance from wealthy economies. 'Community empowerment' has become NGO-ised by local development professionals. I have lost count of how many of my friends in developing countries have told me they are going to start a business. Oh, what sort of business, I enquire? 'A human rights NGO', 'a transitional justice NGO', or some such, comes back as the answer. The aid business reinforces old inequalities in new ways, through what rural people in my recent Bangladesh fieldwork with Bina D'Costa referred to as the 'new NGO class'. In societies with caste systems we see this with the healthy push for gender empowerment – the women who get the NGO salaries so often are upper caste and live in cities in comfortable houses with servants. Lower caste women in remote villages are rarely to be found on foreign-funded NGO salaries. They do great work, but as volunteers. This widely dispersed rural volunteerism of the poor seems the right thing to support. How can that support be accomplished in the face of the long march to ever-growing power of justice and development commodification (and of executive governments in the capital)?

How do we encourage that volunteerism away from cities to the rural areas where the most neglected poor are found, where the truth commission does not hold hearings? One notable democratic institutional innovation is the Panchayat (assembly of elders) reforms for village self-government that Rajiv Gandhi pushed to become the 73rd Amendment to the Indian Constitution in 1993. These reforms bogged down after his death. Sonia Gandhi pushed to re-energise Panchayat reform in the twenty-first century. One westerner who has been focused on the importance of diagnosing the strengths and weaknesses of the Indian Panchayat reforms is UNDP Administrator and former New Zealand Prime Minister Helen Clark. UNDP interest arises because the attempt 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 (operating in 778,000 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 (Pettit 1997), 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), social audits by Indian state governments, as well as critical analyses by Indian and foreign researchers (Shankar 2010; Nagaragan *et al.* 2013).

There is more hope for the village Panchayats than for 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 offer in a village. Actually, the village Panchayats have the potential to become a rich hybrid of assembly democracy, representative democracy and monitory democracy (Keane 2009: xxx, 627–628). They are also a strategic site for reflecting on the meaning of community empowerment implied by the relational conception of justice articulated by Ami Harbin and Jennifer Llewellyn's chapter in this volume. The Indian Constitution requires one third of elected Panchayat voting members to be women and proportional representation of scheduled castes such as 'untouchables'. More than a million women have been elevated to become elected representatives for the first time. This probably has contributed to an outcome for the Mahatma Gandhi National Rural Employment Guarantee Act of 54 per cent of the days worked going to women and 39 per cent to scheduled (lowest) castes or *adavasi* ('tribal peoples') in 2013 (Mahatma Gandhi 2014). Fifty million households (a quarter of all rural Indian households) have been helped. While there clearly continues to be corruption in the program, it is hard to see it as captured by corrupt upper caste men to the degree that so much of Indian governance is corrupted. Elected village assemblies are not a remote form of representative democracy; Rupert Murdoch shows no interest in taking over the intermediation of Panchayat political communication; 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. We can take some heart from an anti-poverty program that has helped more poor people than any before it and that is overwhelmingly going to extremely disadvantaged people. It involves a new hybrid of deliberative, electoral and contestatory democracy taking root in the world's largest democracy with the world's largest number of poor people.

As with the UNDP, I also have hopes for the Community Empowerment Programs initially trialled 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 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' (Eastern Indonesian interview for the *Peacebuilding Compared* project).

The key feature is an empowerment role for village assemblies in deciding how to spend an annual village development budget. The village assembly aspect is perhaps the hope for a simple form of horizontal accountability to prevent corruption, waste and NGO-isation. Though development professionalism is of course needed up to a point to connect remote villages to suppliers of water pump technology if a water pump is what they prioritise, to build capacity in some basics of tendering, and to enforce rules on participation of women and lower-caste people in the decision making as a condition of funding.

If the village assembly votes for transitional justice or restorative justice as one of their budget priorities, then they may need support from some transitional justice or restorative justice professionalism. There is some appeal in the idea that transitional and restorative justice should only be allowed to flourish in village societies when village assemblies decide to allocate to it some of a village development budget that is under their control. This would be a good check against restorative justice going the way of 'rule of law programming' in UN and development budgets generally, where so much of the cash goes into the pockets of foreign lawyers who rarely venture out from secure compounds in capital cities. A transitional justice that failed to help transform the lives of victims and failed to rebuild justice in harmonious communities would stand little chance of winning village assembly votes against water pumps and bridges (see generally Bhandari 2014). An attractive feature of such Community Empowerment Programs in principle is that they are demand driven from the villages, not demand driven by NGOs in capital cities. More importantly, they are not supply driven by what donors, development professionals and transitional justice professionals in the west think it is important to supply.

Sadly, most of the 'community empowerment' work that we see on the ground that is funded by countries such as Australia is supply driven. This is as true of programs in remote Aboriginal communities in Australia as it is true in West Papua. It is great to support a program that supplies water pumps or solar power generators for remote villages. But it is better to supply them only when a village assembly ratifies a demand for them from a village development budget over which the village has ultimate control. The village might decide the water from our river is fine, but our priority is first to rebuild the trust in our community that was destroyed by the war. A reconciliation process for our village is the crucial thing for us because until we heal our wounds we will be incapable of working together for any kind of development and social justice. If we do prioritise reconciliation through transitional justice, we will discuss who is going to repair it, and how, if it falls apart in five years time, long after the western donors have lost interest. Likewise if we prioritise a water pump or a solar panel for our precious budget, we are going to discuss who is going to repair it when it breaks down.

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 (Braithwaite *et al.* 2012: 119–127; 240–251), but other hopeful least likely cases (Eckstein 1975) for testing its implicit democratic theory such as Aceh in Indonesia during and after its civil war and tsunami (Braithwaite *et al.* 2010a: 380–425), 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 (Majeed 2013) program, and even some hope in the least likely place of all for a democracy innovation to work, the Democratic Republic of Congo. There may be less corruption in these programs than in corporatised programs that get 'sliced' in the cities, but there is still corruption, still capture by local 'big men'.

Part of Mahatma Gandhi's 'village republicanism' vision for Panchayats as a deliberative corrective to metropolitan representative democracy 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 (Khan and Sharma 1982; Latha and Thilagaraj 2013), 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), hybridised 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 crucial. 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 *Muslahathi* (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 (2014) concluded that they are succeeding in interrupting many cycles of revenge killing, particularly through their handling of murder cases.

The last section of this chapter was about all societies pondering the insight that they are overly ossified into a top-down Westphalian tripartite separation of powers. Therefore they might consider the 'new governance' vision of Sun Yat Sen's more complex separation of powers. And they might consider locating truth and reconciliation commissions within a fourth branch of governance. Because that is just another top-down solution driven from the metropole, this section has sought to complement that idea with a new governance vision

demand driven from villages rather than supply driven from governance templates supplied from metropolises.

### **Scaling up restorative justice**

Does the path of a permanent reconciliation architecture with guaranteed independence within the separation of powers have a solution to the challenge of 90+ per cent of victims of atrocity not testifying before transitional justice hearings? Could it enable transformation of structural injustices that induced conflict and suffering? There is room for great strides in answer to these questions, because such small strides have been taken. One diagnosis of why they have been so small is that modern management techniques have never been applied to transitional justice. This was also the point about long-term commitment to iterated cycles of fail fast, learn fast, adapt fast. The computer industry had many decades of producing dud computers, or computers that were of little use to us ordinary citizens, before the contemporary era where most of us carry a computer in our purse or pocket most of the time.

A permanent commission could be mandated to achieve long-run continuous improvement in access to transitional justice. This would mean consultations with transitional justice stakeholders to set performance indicators. The commission could be required by law to maintain records on how many victims had received different kinds of justice, how satisfied they were with the justice they received, with the quality of listening to their grievances, with whether they had an opportunity to say all the things they wanted to say and ask for all the things they wanted to request, whether their rights were respected in the process, whether they were treated with dignity, whether post-traumatic stress disorder services and other forms of counselling were provided as needed, and so on.

Such data should be independently collected because CEOs of Permanent Truth and Reconciliation Commissions should be evaluated partly according to how successful the society is in improving justice indicators during their watch. Many other indicators could be identified by stakeholders as measurements the commission must collect, such as refugees and IDPs resettled, mines cleared, schools rebuilt, child soldiers completing their education and getting jobs, ethnic and religious discrimination surveys, equality measures of various kinds, restorative justice circles completed and followed up to the satisfaction of participants, criminal prosecutions completed, named victims memorialised through ceremonies to unveil memorials, peer review evaluations from transitional justice practitioners from elsewhere on the strategic and reconciliatory qualities of the prosecutions, restorative justice circles, reparations, and other initiatives. Put another way, this is a proposal to scale up restorative justice and other forms of transitional justice, both in terms of the proportion of survivors benefitting from it and in terms of quality, by mandating a permanent truth and reconciliation commission (or a permanent peace committee architecture) to invest in management and cultural change to continuously improve transitional justice. Critically, the last section argued that a good test of continuous improvement is how transitional justice is

evaluated by hybrid village democracy. In village societies, if villages are empowered with budgets to choose transitional justice and none of them do, then transitional justice has failed to scale up. The question must then be asked if it deserved to fail.

In the first few years of operation, one could expect a permanent commission to fail slowly, learn slowly and adapt slowly. This is just to say that it would need to learn how to manage itself, how to open itself to feedback from stakeholders and peer reviewers. Such a reasonable expectation about how a management system might mature gradually to cultivate learning through monitoring (Dorf and Sabel 1998) goes to why it seems so naïve to believe that a transitional justice institution that wraps up in three years could achieve great things. Hope for transformation in three years is worse than a triumph of hope over experience (managerial experience). It is ritualism of victim rights (Charlesworth and Larking 2014). It is about the politics of being seen to be ‘doing something’ about victim rights, without a sustained strategy for succeeding at justice that matters with all or most victims, over time.

## Notes

- 1 It also suffered from the usual allegations that some working for it may have been former rights abusers themselves (see Stanley 2009).
- 2 In my *Peacebuilding Compared* fieldwork in Nepal, one prominent advocate for victims of war crimes felt so honoured that a new tap in his village had been named in honour of his disappeared father.

## References

- Bhandari, R. (2014) ‘Class and Justice’, *Kathmandu Post*, 30 July, 2014. [www.ekantipur.com/the-kathmandu-post/2014/07/29/oped/class-and-justice/265548.html](http://www.ekantipur.com/the-kathmandu-post/2014/07/29/oped/class-and-justice/265548.html).
- Braithwaite, J. (2014) ‘Traditional justice’, in J. Llewellyn and D. Philpott (eds) *Restorative Justice, Reconciliation and Peacebuilding*, New York: Oxford University Press.
- Braithwaite, J. and Gohar, A. (2014) ‘Restorative Justice, Policing and Insurgency: Learning from Pakistan’, *Law & Society Review*, 48(3): 531–561.
- Braithwaite, J., Charlesworth, H. and Soares, A. (2012) *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste*, Canberra: ANU Press.
- Braithwaite, J., Cookson, M., Braithwaite, V. and Dunn, L. (2010a) *Anomie and Violence: Non-truth and reconciliation in Indonesian peacebuilding*, Canberra: ANU Press.
- Braithwaite, J., Dinnen, S., Allen, M., Braithwaite, V. and Charlesworth, H. (2010b) *Pillars and Shadows: Statebuilding as peacebuilding in Solomon Islands*, Canberra: ANU Press.
- Causevic, S. and Lynch, P. (2011) ‘Phoenix Tourism: Post-conflict tourism role’, *Annals of Tourism Research*, 38(3): 780–800.
- Charlesworth, H. and Larking, E. (2014) *Human Rights and the Universal Periodic Review: Rituals and ritualism*, Cambridge: Cambridge University Press.
- Clamp, K. (2014) *Restorative Justice in Transition*, London: Routledge.
- Collier, P. (2009) *Wars, Guns and Votes: Democracy in dangerous places*, New York: Harper.



- Dorf, M. and Sabel, C. (1998) 'A Constitution of Democratic Experimentalism', *Columbia Law Review*, 98: 267–473.
- Eckstein, H. (1975) 'Case Study and Theory in Political Science', in F. Greenstein and N. Polsby (eds) *Handbook of Political Science*, Volume 7, Reading, MA: Addison-Wesley..
- Majeed, R. (2013) *Building Trust in Government: Afghanistan's National Solidarity Program, 2002–2013*, Princeton, NJ: Princeton University.
- Keane, J. (2009) *The Life and Death of Democracy*, New York: Simon and Schuster.
- Kent, L. (2004) *Unfulfilled Expectations: Community views on CAVR's Community Reconciliation Process*, Dili: Judicial System Monitoring Program.
- Khan, M. Z. and Sharma, K. (1982) *Profile of a Nyana Panchayat*, Delhi: National.
- Latha, S. and Thilagaraj, R. (2013) 'Restorative Justice in India', *Asian Journal of Criminology*, 8: 309–19.
- Lennon, J. T. and Foley, M. (2002) *Dark Tourism: The attraction of death and disaster*, London: Continuum.
- Mahatma Gandhi National Rural Employment Guarantee Act (2005) 2014 Report to the People. [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).
- Montesquieu, Baron Charles de Secondat (1977) *The Spirit of the Laws*, D. W. Carrithers (abr. and ed.), Berkeley, CA: University of California Press.
- Nagarajan, H., Raghendra, J. and Pradhan, K. (2013) *The Role of Bribes in Rural Governance: The case of India*, ASARC Working Paper 2013/03, Canberra: Crawford School, Australian National University.
- Nickson, R. (2013) *Great Expectations: Managing realities of transitional justice*. Ph.D. thesis, The Australian National University.
- Nickson, R. and Braithwaite, J. (2013) 'Deeper, Broader, Longer Transitional Justice', *European Journal of Criminology*, 11(4), 445–463.
- Parker, C. (2002) *The Open Corporation*, Cambridge: Cambridge University Press.
- Pettit, P. (1997) *Republicanism*, Oxford: Oxford University Press.
- Sapsomboon, S. and Khundee, S. (2007) 'Referendum law or penalty law?', *The Nation* (Thailand), July 7, 2007.
- Shankar, S. (2010) *Can Social Audits Count?* ASARC Working Paper 2010/09. Canberra: Crawford School, Australian National University.
- Shearing, C. and Froestad, J. (2007) 'Beyond restorative justice – Zwelethemba, a future-focused model using local capacity conflict resolution', in R. Mackay, M. Bosnjak, J. Deklerck, C. Pelikan, B. Van Stokkom and M. Wright (eds) *Images of Restorative Justice Theory*, Frankfurt: Verlag fur Polizeiwissenschaft.
- Sorensen, E. (2006) 'Metagovernance: The changing role of politicians in processes of democratic governance', *American Review of Public Administration*, 36(1): 98–114.
- Stanley, E. (2009) *Torture, Truth and Justice: The case of Timor-Leste*, London: Routledge.
- The Times of India (2013) 'CAG finds holes in enforcing MNREGA'. *The Times of India*. <http://timesofindia.indiatimes.com/city/bengaluru/CAG-finds-holes-in-enforcing-MNREGA/articleshow/21498524.cms>.