

THE OPPORTUNITIES AND CHALLENGES OF PARTICIPATION IN TRANSITIONAL JUSTICE: EXAMPLES FROM NEPAL[†]

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Abstract: Transitional justice (TJ) has developed in relative isolation from development discourse. However, in recent years, a growing number of academics, practitioners and policy makers have advocated for the adaptation of participatory methods from development studies to TJ. This article critically analyses the opportunities and challenges of implementing participation in TJ. I argue that participation can provide avenues for the voices of victims and other stakeholders to be heard, albeit not without significant challenges. I also argue that there should be increased focus to carry out participatory attempts where victims and affected community members are partners and decision makers; this just might be a starting point to ensure that TJ is indeed victim-centric. Copyright © 2014 John Wiley & Sons, Ltd.

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Participatory approaches emphasise that people are central to development. Throughout the 1980s and 1990s, the concept of participation metamorphosed from ‘part of a counter-hegemonic approach to radical social transformation’ to part of development orthodoxy (Leal, 2007:539). At the crux of participation is a concern with power, voice and rights (Cornwall, 2003). Transitional justice¹ (TJ)—which encompasses the processes and institutions employed to address widespread human rights abuses after conflict—has developed in relative isolation from development discourse.² TJ has increasingly been

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¹There is a wide spectrum of definitions of transitional justice. See for example, Bell (2009), Teitel (2003:893), Mani (2002:17), Murithi (2009:140), ICTJ (2013), and UN Security Council (2004:4).

²In recent years academics, practitioners and policy makers have begun to explore the relationship between transitional justice and development. See, for example, Arbour (2007), de Greiff and Duthie (2009), Duthie (2008), Laplante (2007), Lenzen (2009), Mani (2007, 2008), Selim and Murithi (2011), and Waldorf (2012).

framed as a victim-centric process by TJ policy makers and practitioners (for debates, see, for example, Clark, 2011; Elster, 2004; Humphreys, 2003; Republic of South Africa, 2003; Robins, 2011a, 2011b; Sriram *et al.*, 2012; UN, 2010; UN General Assembly, 2011; UN Secretary General, 2011). This has particularly been the case for two TJ mechanisms: truth commissions and reparations. However, these claims have been contested. For example, although truth commissions have been triumphed as a means to provide recognition to victims and space to tell their stories without the strict legal requirements of criminal trials, the ways in which victims participate in these commissions are rigidly defined by other actors, not victims or their representatives (for debates, see, for example, Amnesty International, 2007; Mani, 2002; Dukalskis, 2011). What is more, the predominant thrust of evidence reveals that victims who were involved in truth commissions were rarely satisfied with the process and frequently had their expectations unmet (e.g. Hamber, 1998, 2000; Hamber *et al.*, 2000; Wilson, 2001; Stanley, 2004, 2009). Reparations have been heralded as direct, tangible, victim-centred TJ mechanisms; however, there are limited coherent policies and guidelines regarding what this entails in practice (for debates, see, for example, de Grieff, 2006; Magarrell, 2007; UN Women & UNDP, 2012). It is against this background that in recent years, a growing number of academics, practitioners and policy makers have advocated for the adaptation of participatory methods from development studies to TJ (e.g. Lundy & McGovern, 2008; McEvoy & McGregor, 2008; Robins, 2011a, 2011b). For those working in development, the incorporation of participatory approaches in TJ has the potential to contribute more broadly to the intersectionality and interconnectivity of TJ and development (see, for example, de Grieff & Duthie, 2009; Selim & Murithi, 2011) and to provide input and feedback into participatory theory and practice.

This article critically analyses participation in TJ. I argue that participation can provide avenues for the voices of victims and other stakeholders to be heard, albeit not without significant challenges.³ I also argue that ‘participatory attempts’ need to go beyond consultation and information sharing to give victims and affected community members a true opportunity to be partners and decision-makers (the upper levels of most participatory typologies).

I use Nepal for my case study. There was limited documentation about participatory activities in Nepal. Accordingly, I supplemented document analysis with semi-structured interviews with various stakeholders, which is part of a larger doctoral study on the TJ process in Nepal. Interviews were conducted in nine districts: Bara, Dang, Dadeldura, Kailali, Kathmandu, Ilam, Lalitpur, Morang and Rolpa; comprising all five development regions in Nepal. Respondents included victims, families of victims, NGO workers, political representatives, human rights advocates, the media, former combatants, academics and representatives from diplomatic missions, international organisations and the donor community.⁴

This article has four parts. Part one provides an outline of participation and development discourse. Part two provides an outline of participation in TJ. Against this background, part three analyses participation efforts in postconflict Nepal. Part four highlights the opportunities and challenges of incorporating participation in TJ in Nepal.

³There are numerous ways to capture victims’ needs (e.g. targeting representatives and gatekeepers and through social movements). However, the dominant approach is to seek victims’ voices through participation as generally practiced in development.

⁴Owing to ethical confidentiality considerations, details of the respondents’ positions and the specific interview location have been omitted.

PARTICIPATION AND DEVELOPMENT

Participation has gained a mantra-like quality in development discourse and practice. Generally, advocates argue that participation provides a means (the efficiency argument) and/or an end (the empowerment argument). A central component of this approach is that people who were once socially and economically marginalised in decision making (deemed ‘the powerless’ or ‘the lowers’) should be given the space to identify and express their needs and the best ways to address those needs (Chambers, 1994). In so doing, it is argued, when local people are involved in a participatory process, when they take charge, organise and take action then they are regarded not as subjects but enabled to become agents of change with the ability to transform power and social relations by their own praxis (the empowerment argument) (Rahman, 1993). The efficiency argument holds that participation is a tool that can be employed to achieve better project outcomes including increased effectiveness, sustainability and a reduction in time and money in the long term (e.g. Cornwall & Jewkes, 1995; Gaventa & Cornwall, 2006; Cleaver, 2001).

Participation has become mainstreamed in most major development agencies and in many smaller organisations, including NGOs. For example, for the UNDP, participation is a desired approach because of its impact on ownership and sustainability; also, it is deemed to be a right with consequences for the design and implementation of development activities (UNDP, 2002). The most well-known participation typology is Arnstein’s ladder of participation (Figure 1).

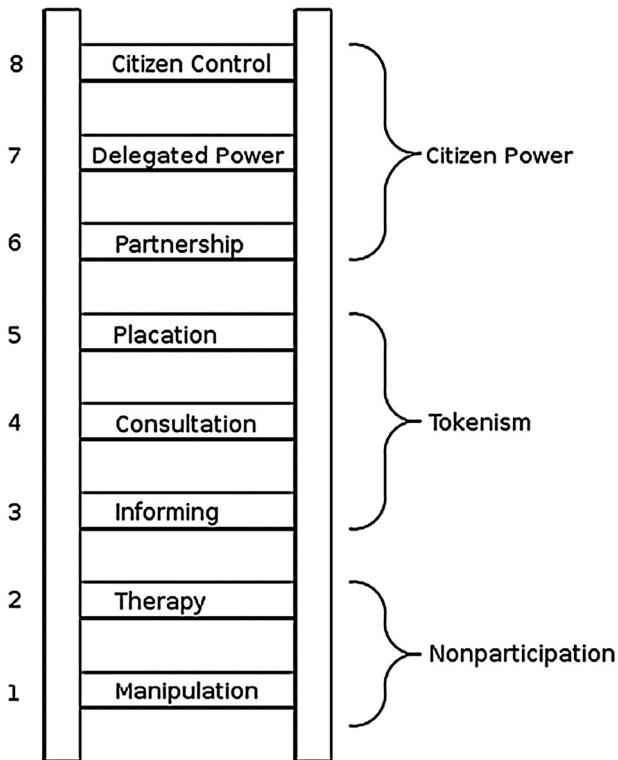


Figure 1. Eight rungs on the ladder of citizen participation

Each rung represents increased citizen power and control to plan and/or program. Arnstein differentiates between the ritual of participation and ‘real power’ that can affect the outcome arguing that ‘participation without redistribution of power is an empty and frustrating process for the powerless.’ (Arnstein, 1969:216). The model is designed from the perspective of the participants. Despite the model’s continued prevalence, it has been criticised for failing to encapsulate the complex continuum of activities and failing to distinguish between the quality and outcome within and between these levels. Other models have been created or adapted: with some focusing on the actors who employ participatory approaches (e.g. Pretty, 1995), specific types of participants (e.g. children) or contexts (e.g. ‘underdeveloped countries’) and the interests of actors involved (e.g. White, 1996, 2011); although sometimes these various participatory models have different end points (e.g. transformative participation, citizen control, collective action or self-mobilisation), a relatively common theme is that information sharing and consultation (usually in the lower or middle of most models) are tokenistic attempts at participation (this will be discussed further in the succeeding text).

With regard to TJ, I argue participation needs to move beyond the preoccupation with consultations and surveys to give victims and affected community members a true opportunity to be partners and decision makers (the upper levels of most participatory typologies). In doing so, there is potential for transformative change even if it cannot be predicted or predetermined.

Critiques of Participation

Participatory approaches have been heavily criticised. Critics diverge regarding what the flaws of participation are (in theory, in practice or both), and the implications this has as well as the extent to which they require revisions (e.g. Cooke & Kothari, 2001). Owing to limitations of space, this paper will focus on those pertaining to the operationalisation of participation while not discounting the ongoing need to critically assess the theory that informs this practice.

Today, although the rhetoric of participatory approaches has gained orthodox legitimacy, often it is only the *language* that has changed with few stakeholders changing what they *do* (Chambers, 1997). Claims of participation of all stakeholders and full participation in project descriptions and documents ‘all too often boil down to situations in which only the voices and version of the local few are realised and heard.’ (Cornwall, 2003:1325).

Power relations are at the crux of participatory approaches. Power is not merely conceived to be something that can be given by the ‘powerful’ to the ‘powerless’; rather, power is relational (Leal, 2007). This notion of power has impact on knowledge generation and sharing. Through participatory approaches, Chambers (1994) argues, the transfer of knowledge is not just *from researchers/practitioners* to the locals but also *from locals* to the researchers/practitioners and *between locals*. This overcomes what is deemed to be ‘legitimate’ knowledge being solely derived from privileged experts (the ‘uppers’ or ‘powerful’), which has the effect of obscuring and under-privileging other forms of knowing and voices of knowers (Gaventa & Cornwall, 2006). However, critics argue participation privileges ‘local’ or ‘indigenous’ knowledge, which can legitimatise a predetermined and externally derived development agenda, present external interests as local needs and deny the value of different forms of knowledge and expertise of various actors (e.g. Cooke & Kothari, 2001).

Creating new 'spaces' in the metaphorical sense and a culture for meaningful participation is also an act of power (Chambers, 2006; Cornwall, 2002). This raises the question of who creates the space, participates and benefits (Cornwall, 2003). Research and development work takes place in complex political and social environments and researchers and practitioners in effect take a political stance by choosing to work with and seeking to empower inaccessible, disenfranchised, unorganised groups in order to transform their lives. Although these temporary spaces may be created for a certain purpose, it may be conceived of and engaged with differently by those who create, subscribe to and engage with it. It is not only important to consider the power exercised by researchers, practitioners and facilitators (e.g. who are invited to speak and who are excluded), but also the power local people exercise (e.g. the extent to which people choose to participate and also who chooses not to participate, which also can be conceived of as acts and varying degrees of power). In fact, marginal people may choose to exercise their agency and raise their voices by other means and in other domains (Cornwall, 2003).

Although the allure of romanticising the local is hard to resist, these new spaces are not immune from existing power relations and can in fact reproduce and further entrench unequal power relations without actually leading to changes in policies or structures and may even perpetuate the problems being addressed (Cornwall, 2002). Some of the fiercest critics argue that in theory and practice, participation has the ability to *disempower, exclude and exploit* and to legitimise projects and reinforce an unequal status quo (e.g. Cooke & Kothari, 2001). The process can also provide a distorted view of people's aspirations and privilege voices of particular, but not necessarily representative, individuals or groups (Cornwall, 2003; Cornwall & Jewkes, 1995). Opening up spaces to give people room to exercise their voices does not automatically translate into empowerment and those voices being heard or having influence (Cornwall & Garrett, 2003). Also, participants may be explicit about what they need but the researchers/practitioners may carry out predetermined external agendas or measures that differ to those expressed or even choose to withhold support. The danger is that participants' hopes and expectations are raised as opportunities are presented to realise their rights and exercise their voices, but there is lack of commitment and implementation. Even if these issues are addressed, the difficulty remains of how to translate the diversity of voices into a means of influencing policy and on to relevant policy agendas.

Eventually, compromises get made to meet imperatives of 'doing' development; any attempts to involve people in the process of development should be extremely cognisant and critically reflexive about this. A lack of understanding and consideration of power relations in communities is a potential pitfall for participatory approaches, and strategies should take into account the effects of power to enable people to exercise their agency and voices. The experiences of participation in development are well documented in reports and journals providing a corpus of material to assist in meeting the challenges of participation in TJ. However, participation is practised by a range of actors and is employed in a variety of ways so a definitive revision of the concept remains elusive. Despite these criticisms of participation, it remains an attractive tool for development practitioners and is preferable to top-down approaches; this appeal has recently carried over to TJ to address trenchant criticisms of the dominant TJ agenda. Although TJ practitioners and policy makers can learn much from three decades of critiques and revisions in development, there is little to guarantee that TJ practitioners and policy makers will not face issues.

PARTICIPATORY APPROACHES IN TRANSITIONAL JUSTICE

A key critique of TJ is that it is an overly legalistic, 'one-size-fits-all' top-down imported blueprint that focuses on state-centric measures, processes and institutions rather than people, particularly victims. Put simply, TJ is externally formulated and implemented and that this deprives local communities of agency; it frames locals as either victims to be rescued or perpetrators to be prosecuted, rendering 'them incapable or morally unworthy of positive contributions to peace-building' (Madlingozi, 2010:212). To address these concerns, there has been growing momentum by practitioners, academics and policymakers to take heed of the literature, knowledge and experience derived from development and participatory theory and practice (Lundy & McGovern, 2008).

The UN has in part affirmed these views that call for greater participation in TJ processes but with particular emphasis on consultation. According to the UN Secretary-General, 'the most successful TJ experiences owe a large part of their success to the quality and quantity of public and victim consultation carried out.' (UN Secretary General, 2004:26). The Office of the High Commissioner for Human Rights (OHCHR), the UN's lead entity on TJ, contends that comprehensive processes of national consultations form a crucial part of TJ. National consultations are held to identify needs and entitlements of affected communities, ensure a strong sense of local ownership, promote respectful dialogue and stakeholder articulation in the TJ process, reignite peace processes, trigger debates in the community and help victims and other members of civil society to develop local ownership of the TJ programme. In relation to victim-centric design and implementation of TJ, the UN provides that

National consultations, conducted with the explicit inclusion of victims and other traditionally excluded groups, are particularly effective in allowing them to share their priorities for achieving sustainable peace and accountability through appropriate transitional justice mechanisms. (UN, 2010:6).

Although consultations do have benefits, I argue that participation should not stop at information sharing or consultation where there is the danger that victims and other stakeholders have merely 'participated in participation', a 'window-dressing ritual' rather than meaningful participation, which requires the opportunity for decision making and authentic partnerships (e.g. Arnstein, 2011; Saxena, 2011). Regardless of the quality and positive impact of these consultative processes, the decision-making power remains in the hands of other actors (not victims and affected community members), so that these actors can utilise the consultation as a means to legitimise already made decisions and have no obligation to consider or incorporate participants' voices and recommendations (as will be discussed in the succeeding text) (e.g. Cornwall, 2008:270).

Despite the rhetoric, to date, participatory approaches have been utilised to varying extents in TJ processes. Mechanisms that have been employed include consultations, surveys, participatory action research and collaborative oral history projects.⁵ Consultations have been a popular mechanism employed. In Sierra Leone, national human rights organisations conducted consultations prior to the finalisation of the Lomé peace agreement, which in turn provided victims and other actors with the ability to influence the trajectory of TJ. After the

⁵For a detailed discussion, see OHCHR (2009). For further information, see also Aptel and Ladisch (2011), Lundy and McGovern (2008); Lykes *et al.* (2003); ICTJ and UNICEF (2010); Iyodu (2011); OHCHR (2007) and Pillay and Goodfriend (2009).

consultations, non-governmental groups presented a common position for the need for a truth and reconciliation commission, which was subsequently included in the peace agreement. In Timor-Leste consultations led to an expansion in the Commission for Reception, Truth and Reconciliation's mandate to examine the issue of famine and for the inclusion of community-based justice and reconciliation procedures based on traditional practices. Consultations in other countries have identified forms of reparations (e.g. the provision of education for the children of victims in Peru and pensions rather than lump sum payments in Chile).

Marginalised and excluded groups such as children, women and refugees have also been consulted in TJ processes. The community dialogue meetings of women in Liberia demonstrate the advantages of participation. This had not been carried out as part of a TJ process in another country. The meetings were led by national civil society during the period when the Liberian Truth and Reconciliation Commission was entering the report-writing phase. The aims of this three-day participatory process included the following: to evaluate the commission from a gender perspective; to discuss key aspects of TJ⁶ to examine community and individual responsibility for healing and transformation; to provide recommendations from Liberian women to inform the commission's final report; and to form a monitoring group regarding the implementation of these recommendations. Breakout groups of participants included a facilitator, a counsellor and documenter who had been trained in a transformational learning approach. Participants reported a number of benefits of participating. These benefits included that participants appreciated the opportunity to share their stories in a compassionate environment and to build friendships with women from other parts of the country. They also appreciated that conversations were held in their indigenous language. It was noted that '[a]n unexpected outcome of the process was that women spontaneously started making individual commitments for what they would do when they went back to their communities as peacebuilders.' (Pillay & Goodfriend, 2009:14). Participants reported that they hoped that the event would not be a one-off event, stressed the need for follow up and sought assistance with their immediate needs. It was also reported that the flexible agenda encouraged women to intersperse storytelling and recommendations in their conversations and provided a replicable model for transformational community peacebuilding in other contexts (Pillay & Goodfriend, 2009:14).

Another popular participatory approach in TJ has been public opinion surveys. National Human Rights Commissions (e.g. Afghan Independent Human Rights Commission, 2005) have played a role, but often these surveys have been conducted by (I)NGOs (e.g. the International Center for Transitional Justice) or academic institutions (e.g. University of California Human Rights Center, 2004). OHCHR has also provided expertise and material support to governments, National Human Rights Commissions and civil society. For example, the Human Rights Center at the University of California Berkeley has carried out several qualitative and quantitative studies in a number of postconflict countries seeking to provide 'evidence-based transitional justice' (Vinck & Pham, 2007:231). The authors in one such study argue that the consultative process in TJ has a number of benefits as it can mobilise the civil society and the community, increase the impact of TJ mechanisms on sustainable human development, influence the political agenda, and foster a sense of ownership and participation (Vinck & Pham, 2008).

⁶It is noteworthy that these key aspects were taken to be the following 'seven pillars': truth-telling, reparations, memorialisation, institutional reform, prosecutions, amnesty and reconciliation.

The timing of participation is crucial. I argue that participation requires a sustained attempt to include local voices and to hear different views; something that cannot be achieved by simply involving local people at the implementation stage of TJ initiatives, which has often been the case. Rather, a fully participatory process takes part at *every stage* of the TJ process from asking whether communities want TJ, and if so, what and how (Lundy & McGovern, 2008). Many surveys were conducted *after* the initial decisions have been made rather than before initial design decisions. For example, in South Africa, a nationwide survey of 4000 South Africans was conducted to evaluate the TJ process after it was completed (Gibson & MacDonald, 2001), and research has revealed that victims have frequently been dissatisfied with the Truth and Reconciliation Commission (e.g. Centre for the Study of Violence and Reconciliation and the Khulumani Support Group, 1998; Hamber, 1998, 2000; Hamber *et al.*, 2000; Wilson, 2001). However, 'participation does not, and should not, end with the creation of the TJ mechanism. Ownership should be viewed as a continuum and activities promoting both participation and education should be conducted *throughout* [TJ mechanisms'] existence.' (Triponel & Pearson, 2010:144, emphasis added).

Apart from the issue of the timing of consultations and surveys, consideration should be given to their agendas and approaches. Often surveys have the questions designed by 'experts', with a limited range of options for respondents from which to choose, which can steer and lead to circumscribed responses. Another issue is that often consultation teams do not have an acute knowledge of the local context, including and beyond the conflict period (Selim, forthcoming). Although some of these limitations may be overcome, to date, there are few examples where there has been a comprehensive participatory approach in TJ. Too often, the practical complexities of scale, time frames, funding and security trump meaningful and authentic participation. Even if these constraints are overcome, participation may provide answers that do not accord with the dominant TJ discourse underpinned by human rights discourse (e.g. Robins, 2011b; Selim, forthcoming), which tends to utilise a pre-determined set of institutions, irrespective of the context and nature of the conflict.

Involvement in these consultations and surveys often raised participants' and respondents' expectations and hopes of what could be achieved by TJ. The UN provides that this challenge can be reduced if consultation teams invest time to provide a clear explanation of the purpose and possible outcomes of the project. But not only have expectations been raised, but also at times stakeholders views have not been expressed accurately.⁷ This disconnect could be mitigated if reports of consultations are translated and published in local languages and widely broadcasted and disseminated. But again, the issue of translating voices that are 'heard' into change is difficult and thwart with practical and political complexities.

The Nepal case study provides an opportunity to evaluate recent participatory attempts in a transitional country on which there has been limited analysis.

PARTICIPATION IN TRANSITIONAL JUSTICE IN NEPAL

In light of the examination of participation provided earlier, both in general and in relation to TJ, the following section provides a brief outline of the People's War in Nepal and examines how participation has been carried out in the TJ process in Nepal.

⁷For example, one national consultation process resulted in a clear call for the establishment of a 'truth, reconciliation and justice commission', while the consultation's report only made reference to a 'truth and reconciliation commission' (UN, 2008:26).

The People's War

On 4 February 1996, the Maoists proclaimed a 'People's War', which resulted in an estimated 16 000 deaths. The main objectives of the insurgency were to abolish the monarchy, establish a people's republic committed to the principles of gender and caste equality, set up a constituent assembly to draft a new constitution and to provide services for poor rural areas. The armed revolution became increasingly violent when the Maoist insurgents targeted government officials, police officers, army depots and banks; these incidents coincided with a marked increase in torture and enforced disappearances by the state.

The conflict impacted the majority of the country. Human rights violations during the conflict included torture, enforced disappearances, property confiscation and sexual assault. Marginalised caste and ethnic communities were disproportionately affected because these groups were more willing to support the Maoists and/or were targeted for Maoist recruitment, which led to widespread victimisation by security forces (ICTJ and Advocacy Forum, 2010). The conflict concluded with the signing of the Comprehensive Peace Agreement on 21 November 2006 between the Maoists and the Government of Nepal. By 2008, ground-breaking achievements had been gained with the official abolition of the monarchy, the elections for the Constituent Assembly and the declaration of Nepal as a federal democratic republic: major objectives of the Maoist insurgency. However, to date, there has been limited progress on the TJ front, including limited participation in the TJ process, despite massive investment in the process.

The Transitional Justice Process in Nepal

The Comprehensive Peace Agreement (CPA) covers a broad range of issues including provisions relating to the disappeared and the human rights violations during the conflict (Article 5.2.3, Article 5.2.4 and Article 7.1.3). In particular, the CPA prescribed that a Truth and Reconciliation Commission (TRC) to probe 'those involved in serious violation of human rights and crime against humanity in the course of the armed conflict and develop an atmosphere for reconciliation in the society' (Article 5.2.5). The Interim Constitution also outlined the specific state responsibilities in relation to the conflict (Part 4(p), (q), (r) and (s)). These TJ provisions included in the CPA and Interim Constitution were drafted with limited consultation with victims, civil society and other stakeholders (this will be discussed further in part four).

The Ministry of Peace and Reconstruction (MoPR) draft bills for the establishment of a TRC, and the Commission on Disappearances (COD) were made public in July 2007 and November 2008, respectively. The draft TRC and COD bills were heavily criticised by civil society, OHCHR and victims' groups for being drafted without consultation (ICJ, 2009). It was only *after* the bills were made public that consultations by MoPR were held with of some victims, victims' groups and civil society (details discussed in the succeeding text). Although there were some amendments made to the draft bills owing to the input from donors, human rights groups and civil society, a wider consultative process was not undertaken by MoPR.

In May 2012, the government submitted a motion to withdraw the two pending bills 'to be replaced by one consolidated bill to establish a single TJ mechanism with wide powers to grant amnesty' (TRIAL, 2012); this legislation was adopted as an ordinance but was subsequently held to be unconstitutional by the Supreme Court. Again, the international

community, international and national human rights organisations and victims' groups have raised vocal criticisms about this ordinance, which until its adoption had not been made public, again depriving victims and other stakeholders of the opportunity to participate.

There has been no vetting of abusive officials/personnel or any criminal prosecutions in relation to conflict-related crimes. Although in January 2013, Nepal Army Colonel Kumar Lama was held in the UK under the universal jurisdiction for charges of torture committed during the conflict. To date, there have not been any reparations provided, but in 2008, the government commenced an Interim Relief Program.⁸ A recent ICTJ report asserts that despite the Interim Relief Program's merits, the program has not fully responded to the needs of all victims (ICTJ, 2012b).

Thus, over 7 years since the signing of the CPA, it is apparent that little progress has been made on the TJ front. In fact, it has been alleged that the TRC and COD are perceived to be a means to *avoid* accountability and that the interim relief payments are being used to quell calls for prosecutions and establishment of the TRC and COD (see Selim, forthcoming).⁹ The limited degree of participation in the TJ process will be analysed in the next section.

PARTICIPATORY ATTEMPTS IN NEPAL

The following section provides an outline of the participatory attempts in the TJ process in Nepal. I have grouped these attempts into four categories based on the general theme of participation. I note that these attempts were conducted by various actors including TJ 'experts' (those who produce TJ discourse and knowledge); TJ brokers (those who set the TJ agenda on the ground); TJ implementers (those who implement TJ on the ground); and victims' groups, which in turn impacts the potential for these attempts to impact the official, national TJ process (see Selim, forthcoming). Where possible, I have sought to draw attention to: what are the stated reasons for employing participation (as it difficult if not impossible to determine the genuine reasons why); when does participation occur; who is participating and how. I will unpack who benefits from the participatory process and/or from its outcomes in part four.

General Transitional Justice Consultations including regarding the draft TRC and COD bills¹⁰

Following the CPA, the first attempt of participation I have been able to trace was conducted by the United States Institute of Peace to address a perceived need for more information on international experiences and practices of TJ. The United States Institute of Peace conducted a weeklong series of roundtable sessions including civil society organisations, victims' groups, government representatives, political parties and the media. These consultations took place in the same week that the MoPR released the draft bills, and were held in Kathmandu, as well as in three districts in the mid-western region (the most affected region during the conflict). The main objective of these consultations was to raise awareness among different stakeholders

⁸The Interim Relief Program provided monetary compensation, scholarships, reimbursement of medical expenses and skills development training.

⁹See, for example, International Center for Transitional Justice (2012b).

¹⁰There have been various consultations and workshops carried out (predominantly by human rights organisations), which cover issues such as conflict-related human rights violations, victims' issues and access to justice. See, for example, FORHID's Peace Building and Reconciliation project.

‘about what the key issues are for establishing a credible and effective transitional justice process and to encourage informed discussion on the issues.’ (USIP, 2007). This provided an opportunity to bring together a number of relevant actors in one space. Even at this early stage, participants reported that they were concerned about being sidelined during the TJ process in Nepal. Many participants felt alienated from the process and were unaware of the scheduled MoPR consultations in each of the five regions. I was informed that the feedback from these workshops was not provided to government officials or other personnel.¹¹

In 2007, ICTJ (an INGO) and Advocacy Forum (a national human rights NGO) undertook a quantitative and qualitative study entitled ‘*Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and the Transition in Nepal*’ (ICTJ and Advocacy Forum, 2008). This was the first study of its kind in Nepal and reveals the opportunities that participation provides to enable victims to voice their needs. The study was intended ‘to bring victims’ voices to the forefront of the national debate and to ensure that ‘transitional-justice mechanisms involve stakeholders, especially victims and their families.’ (ICTJ and Advocacy Forum, 2008:10-11). The objectives were to determine the opinions and expectations of the victims and their families on a range of TJ issues, such as truth-seeking, justice, reconciliation, accountability, reparations and human-rights violations. The survey was designed by TJ experts and TJ brokers (namely, human rights representatives) from Kathmandu and abroad. Over 800 Nepali victims were surveyed. In addition to the survey, 10 focus-group discussions were conducted thematically categorised into child soldiers, disappearances, internally displaced persons, and women victims of sexual violence. Separate discussions were held for marginalised communities, including women, *Janajatis* (indigenous groups), Dalits and Madhesis. Most of the victims surveyed stated that their most urgent concerns and needs were of an economic and social nature. Here, I wish to draw attention to the fact that these findings stand in contrast to the predominant push for legal accountability by Advocacy Forum and other human rights organisations, and many remain aloof to considerations of economic and social justice.¹² Victims’ prioritisation of social and economic issues challenges how TJ is understood and raises the question would a participatory approach that truly gives agency to such victims create mechanisms based on victims’ demands so that victims could be actors or agents of change and not just beneficiaries (Robins, 2011). There is still much debate about whether TJ or human rights actors are the most effective means of addressing structural problems such as poverty and inequality; however, recently, there have been growing attempts to demonstrate the potential synergies of TJ with development.¹³

In response to lobbying from civil society and victims groups, the newly established MoPR conducted consultations regarding the draft bills on the TRC and the COD. These were conducted in each of the five regions, with cluster meetings in Kathmandu (e.g. women, *Janajatis* and children) and also expert group meetings. These consultations took place after a historical legacy of exclusion of minorities and the disadvantaged, particularly those outside Kathmandu. I was informed that the objectives of these consultations were to promote awareness among victims on the content and status of the

¹¹Personal interview, Kathmandu, Nepal, 11 October 2012.

¹²See, for example, Cornwall and Nyamu-Musembi (2004).

¹³See, for example, Robins (2011a,b). Although social and economic justice issues that are traditionally outside the scope of TJ work, Murithi and I have argued elsewhere that, notwithstanding the challenges this poses in theory and in practice, TJ organisations and mechanisms should address these issues (Selim & Murithi, 2011; see also Arbour, 2007, de Greiff & Duthie, 2009; Duthie, 2008; Laplante, 2007; Lenzen, 2009; Mani, 2007, 2008).

draft bills, to allow victims the opportunity for their voices to be heard and their views considered in finalising the bills and to facilitate the production of a memo to Constituent Assembly members in the form of amendments to the bills.¹⁴ Each consultation took approximately two days and it is reported that a film on truth commissions around the world dubbed in Nepali was shown and a TJ handbook was provided to participants (courtesy of the United States Institute of Peace) before participants were invited to share their views.¹⁵

In total, over 150 victims from around 55 districts in each of the five regions participated (IOM, 2011a). For each of these consultations, victims were selected by the Chief District Officer (CDO), which was supposed to be in consultation with political parties and civil society within the district to determine who should be nominated per district, although this was not always the case.¹⁶ Most invitations were distributed the day before the consultation. Although it was an invite only event, the consultations were effectively open to those who did not receive invitations; interestingly, some victims who heard about the consultation by word of mouth attended, which perhaps indicates that victims sought an opportunity to be heard. The latest draft TRC bill (including recommendations from other regional consultations) was distributed to participants at the workshop, and not prior, which no doubt impacted upon their ability to provide comments and recommendations.

Ultimately, the workshops were conducted for victims to examine the two draft bills that were before the Legislative Parliament. I was informed that the introductions by MoPR representatives focused on the TRC bill and not on wider issues of TJ and the concept of truth commissions.¹⁷ It was asserted that Constituent Assembly members were present with the view that they would feed back the views into future discussions in parliament. According to OHCHR:

The participants were chosen to represent groups most affected by the conflict but which have been largely excluded from any consultation on how the state should properly address the consequences of the conflict, known as transitional justice ... Participants were given an opportunity to share their experiences, identify the cause and consequences of the conflict and to explore possible responses in the post-conflict period. As such, the organisations were given the tools to make a meaningful contribution to a national process on transitional justice and to have their voices heard prior to the establishment of any mechanisms [e.g. TRC or COD]. (OHCHR, 2008)

This consultation process took over one year, which an interviewee involved in the consultations said gave the politicians an excuse to delay further action (Selim, forthcoming).¹⁸ Transcripts of these consultations were transcribed by The Asia Foundation (an INGO) and handed over to MoPR; the MoPR did not circulate/share copies of these transcripts with other organisations involved in the consultations, including the National Human Rights Commission, OHCHR or victims' associations.¹⁹ The outcome of these consultations was that a number of the suggestions from the consultations were included in the draft bills, which shows the benefits of participatory attempts being incorporating into

¹⁴Personal communication, on 4 January 2013.

¹⁵The film was called 'Confronting the truth' and the publication was 'Transitional Justice: Information Handbook (September 2008).

¹⁶I was told that in one district, the day before one consultation, the CDO was told that his draft participant list was not broad-based and inclusive, which the CDO explained was because he did not know any victims of the state and did not have an overview of which organisations to invite. Personal communication, on 21 November 2012.

¹⁷Personal communication, on 21 November 2012.

¹⁸Personal interview, Kathmandu, Nepal, 16 October 2012.

¹⁹Personal communication, on 27 September 2012; Personal interview, Kathmandu, Nepal, 16 October 2012.

TJ. However, owing to the political nature of legislating for TJ provisions the bills also retained controversial provisions to which civil society, the international community and victims' groups were opposed.

Women's Experiences²⁰

In 2010, Advocacy Forum in collaboration with ICTJ published a pilot qualitative study entitled '*Across Gendered Lines: The Impact of Nepal's Conflict on Women*'. The objective of this study was to investigate the impact of the armed conflict on women in Nepal with a specific objective to help advocate for the inclusion of women's experiences, concerns and voices in the TJ process; this example is noteworthy as women are traditionally marginalised and excluded in Nepal. The project used various methods (e.g. in-depth interviews using questionnaires, focus group discussions and informal sessions) and included women affected by the conflict and from different communities. The report states that '[t]he process listened to the voices of women, and sought to document their experiences and opinions on how the conflict affected their lives, how they coped with the situation at the time and after the conflict ended and to identify their present needs and demands.' (ICTJ and Advocacy Forum 2010:11-12). Recommendations for the government included establishing mechanisms to ensure 'that victims of sexual crimes receive appropriate reparations and that women participate in the entire reparations process from the shaping of policies to implementation, monitoring and evaluation', 'that women's voices are heard and that women can participate in ongoing negotiations and policy debates' and for the media to advocate for women's participation in TRC and COD (ICTJ and Advocacy Forum, 2010:102-103 and 107).

Relief and Reparations

The Office of the High Commissioner for Human Rights and IOM conducted strategic meetings and consultations with the victims groups, civil society, human rights organisations and government agencies. The first round of activities were part of the MoPR TRC and COD consultations (see aforementioned text) where 'internationally established principles and best practices of reparations were shared and victims were invited to share their expectations of the reparations policy being developed.' (IOM, 2011a). In September 2011, OHCHR commenced regional consultations on the draft reparations policy with victims, civil society and district level government officials. The objectives of the consultations were: 'to seek input of conflict victims, government officials and civil society interlocutors on specific aspects of the draft reparations policy and to provide participants with conceptual clarity on different aspects of reparations measures and international best practices.' (IOM, 2011b). Victims were consulted about their expectations of an outreach strategy and implementation plan; a set of recommendations was provided to the government based on victims' feedback, entitled '*Outreach: Conflict Victim's Perceptions and Recommendations*'. A draft outline for the framework on the reparation policy was also drafted after these regional consultations.

²⁰Various organisations (such as Sankalpa Women's Alliance for Peace, Justice and Democracy; Advocacy Forum; ICTJ; UNFPA; and, UN Women) have conducted activities (mainly Training of Trainers programs and workshops) for women on transitional justice.

Also, an ICTJ's study assessed victim's experiences with the Interim Relief Program (ICTJ, 2012a). Arguably, through a close analysis of the implementation of the Interim Relief Program, and the process of listening to the victims, the findings of this report were intended to inform a future reparations policy. Government representatives (including from MoPR) and Local Peace Committees, political parties, civil society and victims' organisations were involved in individual interviews, focus group discussions and workshops. Approximately 1200 people either shared information in group discussions or were directly interviewed (including a total of 257 'conflict affected persons'). It was held that the voices of victims helped to identify the gaps and additional elements required to implement a reparations policy (MoPR, 2010).

Families of the Disappeared

Simon Robins adopted a participatory research approach for his study of family associations of disappeared victims. This approach was used as a means for mobilising victims of these associations to influence policy and to provide support for victims in their communities. The survey was designed by the researcher in conjunction with the family associations with whom he collaborated. The study found that victims' needs were primarily to know the truth about their relatives who had disappeared and for basic economic support; and, while the respondents were in favour of justice, this was of relatively lower priority (Robins, 2011a, 2011b).

Robins recently published another participatory action research project entitled '*From victims to actors: Mobilising victims to drive transitional justice process*' (Robins & Bhandari, 2012). This study was carried out in collaboration with the National Network of Families of the Missing and Disappeared, Nepal and three district associations of families of the disappeared in Nepal. The principle aim of the study was twofold: 'to understand the challenges of mobilisation and to concretely advance it; and, to challenge a transitional justice process that has been entirely Kathmandu based and has marginalised victims.' (Robins & Bhandari, 2012:2). Semi-structured interviews and focus groups discussions were conducted by members of victims' groups (called 'peer researchers'), who also designed the interview questions. The study found the participants' priorities were (in decreasing order) livelihood, truth about the missing person and retributive justice. Families also reported that family associations were a source of information and advice about the TJ process and services available. Through these participatory attempts, families of the disappeared have been brought together and mobilised to various extents.

Despite the range of issues and stakeholders covered, barring the work carried out with some families of the disappeared, it is unclear to what extent the rhetoric of participation has impacted the practice of TJ; questions must be asked about who benefited from these participatory attempts as both a means and an end. I acknowledge that participants in these various consultations and surveys may have experienced significant benefits from participating; however, I was unable to obtain further documentation or information regarding this. Follow up with participants regarding their experiences would assist to ensure that the opportunities and benefits of participation that they deem to matter are documented.

Actors who undertake and are involved in participatory attempts have different interests and power, and this impacts their ability to respond to victims' needs. I note that NGO surveys cannot have the same results as an official consultation for a participative design

of TJ mechanisms, in part because they are not designed with the same purpose in mind. However, the potential for participation is that survey findings can assist to modify organisations' approaches, lead to different strategies and establish/strengthen partnerships. Also, even when consultations processes were flawed, it does not necessarily mean that all actors ignored the consultations. Despite this, I argue that consultations have the potential to form one part of a participatory approach but do not in and of themselves ensure meaningful participation. In fact, consultations can have the opposite effect: they can provide an opportunity for facilitators and sponsors to avoid the responsibility of their projects and have the (intended and/or unintended) effect of legitimatising already made decisions. Throughout the TJ trajectory, victims and other community members have had limited scope to articulate what TJ is to them, including being able to challenge the need for the TRC. The way the MoPR national consultations were designed and implemented, for example, could have unduly influenced and circumscribed how participants constructed their needs and what they anticipated the sponsors of the consultations or other actors were in favour of delivering.²¹ A more flexible approach, perhaps of a similar vein to the approach taken in Liberia (see aforementioned text), might have enabled participants to freely express their views and to feel empowered. Here, Kothari's performance metaphor rings true that participants may learn the roles to be 'good' participants. Other points of interest include that the process of participant selection for the MoPR national consultations, which were far from inclusive, broadbased nor apolitical (Kothari, 2001).

THE OPPORTUNITIES AND CHALLENGES OF PARTICIPATION IN THE TRANSITIONAL JUSTICE PROCESS IN NEPAL

The following section critiques the participatory measures that have been undertaken in Nepal. I will discuss four primary problems with the way participation has taken place in TJ in Nepal: (i) the role of TJ experts and various national actors; (ii) hearing authentic victims' voices (iii) language: finding the 'right' words; and (iv) the impact of follow through and the politics of TJ.²² Despite these challenges and limitations, I argue that there is still potential for participatory approaches to be incorporated into TJ.

i. The role of TJ experts and various national actors

The first issue in relation to participation is the process and the means by which TJ was incorporated in the CPA. An ICTJ (2009) report alludes to impact of Hannes Siebert, a South African consultant contracted by USAID as part of the US's Nepal Transition to Peace Project, who was instrumental in the adoption of the South African Truth and Reconciliation Commission model and yet prior to his involvement there was limited discussion on the adoption of a truth commission in Nepal. Of crucial importance are the following discoveries:

A broader range of comparative experience on transitional justice and more wide-ranging consultation on the design of any mechanism might have overcome the dynamics by which the TRC emerged within a CPA narrowly based on the need to move forward in the peace process. Notably absent at this stage and in the discussions that preceded the

²¹See, for example, Mosse (2001).

²²Other issues I identified, such as timing and the nature of the participatory spaces, were omitted owing to limitations of space.

draft TRC bill ... was a national debate among the various stakeholders regarding the scope and relevance of a TRC for Nepal. (ICTJ, 2009:21).

Not only is the importation of foreign model problematic, but also a prime participatory opportunity to ask the threshold question about if TJ should be pursued, when and how was missed. Locking the pathway of TJ, particularly by a group of TJ experts and political elite, sends the message that 'we know best' and means that from the outset TJ is not driven by victims or 'the community'.²³ Again, the timing of participation is crucial; TJ provisions in peace agreements rarely have scope for victims', women's and other actors' voices to be incorporated so participatory approaches offer ways to ensure that these actors' voices are included in future consultations and negotiations (e.g. van Zyl, 2008).

Although timing is relevant, equally important is being cognisant of who has power in the Nepali context and how they use it (see Selim, forthcoming; Robins, 2012). Key questions that must be raised in relation to participation in TJ is who participates, 'who makes decisions, in whose interests and why' (Lundy & McGovern, 2008:280) and how authentic are these voices? To date, most of the human rights work is carried out by TJ brokers *speaking for and about victims*, which has the potential to further perpetuate victims' marginality and disempowerment rather than ensuring these victims act themselves (Robins, 2011a, Robins & Bhandari, 2012). Indeed, Madlingozi (2010:210-211) argues that 'the transitional justice entrepreneur gets to be the speaker or representative on behalf of victims, not because the latter was invited and gave her a mandate but because the entrepreneur sought the victim out, categorised her, defined her, theorised her, packaged her, and disseminated her on the world stage.' A leader of one victims' group for families of the disappeared, among others, has reiterated this point.²⁴ Participatory research and greater support of victims' groups have the potential to assist in alleviating some of these concerns.

A nuanced understanding of power helps to explain both the dominant TJ discourses that have emerged in Nepal and how various participatory attempts to date have failed to challenge them. Although it is beyond the scope this paper to explore this further, it is paramount that the reasons why actors and organisations choose to ignore the implications of their own consultations with victims, in terms of changing their priorities and advocacy is addressed. Including the question whether these attempts have merely been exercises to obscure the agency of these actors rather than to address victims' and affected communities' needs.²⁵ What is also required is a greater appreciation of how actors resist and contest TJ, which is a highly politicised process (see Selim, forthcoming).

ii. *Hearing authentic victims' voices*

It is clear that many actors, including victims, will engage in participation according to their own interests. The real issue is then one of representation: who represents the victims, when they are unable or unwilling to speak for themselves? It is here that victims' groups have much potential to offer.

In Nepal, some victims' groups represent victims of both sides (the Maoists rebels and the state), whereas others focus on certain types of victims (e.g. women or families of the disappeared). Some victims' groups have the institutional backing of specific organisations (e.g. ICRC, Amnesty Nepal and the Berghof Foundation). These organisations have

²³See, for example, Cleaver (2001).

²⁴See, for example, Bhandari (2012).

²⁵See, for example, Williams (2004).

helped to make these victims' groups more visible, given them greater recognition and provided varying degrees of financial and technical support.²⁶

Victims' associations are generally more accessible than having to identify victims unattached to organisations, and thus, over time, they have become a convenient avenue through which victims are invited to various meetings and workshops in Kathmandu and regional headquarters. Some members of these victims' groups I spoke to reported a sense of empowerment (an end of participation) as a result of being involved in these groups. A female victim explained to me how she had raised her voice, entered the workforce and took on the cause of other female victims and this helped her to work through her trauma.²⁷ This transformation, particularly the increase in people's confidence to make a difference, shows the opportunities that participatory approaches in TJ provide.

Robins (2011a:87) argues by conceiving

self-organised victims' groups as the route to representation in a transitional justice process redefines the meaning of participation ... Victims' groups can act to democratise the creation of transitional justice mechanisms, serving as drivers of a bottom up process, in principle with few limits to the degree of participation.

It is through these participatory pathways of knowledge production that what is conceived to be possible can be expanded in part addressing the current preoccupation of a toolkit compromised of state-centric TJ mechanisms.²⁸

Although victims' groups have much to offer, they are not without challenges and contradictions. One leading victims' group leader said their victims' association was formed because political actors had not addressed what they committed to in terms of TJ and if they had, then there would be no need to campaign like this, 'this sort of office [organisation] working for TJ'.²⁹ There is a danger that by inducing victims' groups to be formed, and not organically created, then groups that are the most organised and accessible will be privileged and heard at the expense of less accessible (or uninvolved) victims. The extent to which victims are aware of these groups and/or participate in them is also worth asking.³⁰ Although one human rights activist informed me that they encouraged uninvited victims (who were not part of victims' groups) to attend consultations as well.³¹ Again, this demonstrates the challenges of selecting various individuals or groups as representative of the voices of victims and the fear that some people's interests will not be considered if they are not physically present. With funding and institutional support provided to some of these victims groups, there is also the danger that victims' groups will be pitted against each other. It is also imperative that donor support of victims' associations does not sap the energy of their movement or lead to 'projectisation'.³²

These victims' groups are not immune from unequal power relations and may in fact become microsites of exclusion, particularly of the poor, women and other disadvantaged groups. It is unclear the extent to which these groups consult with their members and the scope of their representation that can be attributed to financial, communication and geographical constraints. Some self-designated victims' group leaders may not necessarily

²⁶Personal interview, Kathmandu, Nepal, 16 October 2012.

²⁷Personal interview, Kalaiya, Nepal, 16 March 2012.

²⁸See, for example, Gaventa and Cornwall (2006).

²⁹Personal interview, Kathmandu, Nepal, 5 April 2012.

³⁰See, for example, Robins and Bhandari (2012).

³¹Personal interview, Kathmandu, Nepal, 17 October 2012.

³²See, for example, Cornwall (2007).

(re)present the views of its members, those for whom they purport to be speaking on behalf of. Robins' recent study with family associations of the disappeared found that representation was an issue; with women, people from lower castes or other minorities poorly represented at leadership levels (Robins & Bhandari, 2012). Obstacles to inclusive participation of these minority groups are exacerbated as many of these groups have had fewer education and professional opportunities. One leader of a district TJ network told me on numerous occasions that as a male educated professional, he had to do the work for other members of the TJ network because they were illiterate and uneducated.³³ Over time, there is the danger that some leaders (and participants) will become more involved than others so that wider participation of other victims becomes nominal, worse still participation could potentially be co-opted from below as well as from above.³⁴ Despite these (potential) challenges, these victims' groups are one of the few avenues through which victims have been able to articulate their concerns.

Bringing together diverse individuals poses the issue that members will be viewed as a homogenised group, an issue that is frequently confronted in development. This is particularly the case when victims' groups are comprised of different types of victims so that there is the potential for different voices within these groups to become obscured, conflated and submerged within the generic category 'the victims', insensitive to issues of difference and context.³⁵ What happens if victims within these groups have divergent or conflicting voices, interests and expectations? Perhaps participants do not express other/additional interests because they have no confidence that they can be achieved.³⁶ There is a danger that different voices both within and between victims' groups are hushed to ensure that at least some voices are heard.

It is noteworthy that several victims' groups I met with spoke about the need to present a united front in order to have their voices heard by the government and donors. A human rights activist stated that the disunity among victims was one of the key challenges working in TJ, citing that victims of the state who were affiliated with the Maoist party, in the early stage postconflict, were highly discouraged from being part of victims' groups and getting involved in meetings where victims and victims' groups were invited.³⁷ This reluctance of victims of the state and the Maoists to be brought together in the same space was gradually overcome; I was told on a number of occasions, because both groups of victims were brought to see that they had the same pain and often had the same needs and wants.³⁸ Although the risk of homogenising by various actors needs to be recognised, this unity has the potential to be a starting point for grassroots reconciliation and other activities. This is perhaps of even greater significance for remote rural people, because even if a TRC is established, its reach beyond the capital and district headquarters to remote rural areas will probably be limited, highlighting the need for complementary (and perhaps alternate) national and local TJ processes.³⁹

Victims' needs, although at times are similar or overlapping, are not the same. A civil society member reported that there are internal divisions with victims' groups according

³³Personal interview, Nepal, 23 March 2012.

³⁴See, for example, White (2011).

³⁵See, for example, Chambers and Guijt (2011).

³⁶See, for example, Chambers and Guijt (2011).

³⁷Personal interview, Kathmandu, Nepal, 17 October 2012.

³⁸For example, personal interview, Kathmandu, Nepal, 7 March 2012; Personal interview, Kathmandu, Nepal, 17 October 2012.

³⁹See, for example, Robins and Bhandari (2012).

to class and access to power.⁴⁰ One interviewee cited that some families of soldiers in one victims' group priorities had changed because they were already compensated and other victims within the group became concerned that this would impact the priorities of the victims' group in general.⁴¹ Presupposing some kind of homogenous identity and victim solidarity has the potential to mask victims' agency and other lines of connectedness and difference and may fail to match with people's own connections, concerns and agendas. To overcome this potential pitfall, it is crucial that we are cognisant of the multiplicity of voices and identities. For while participatory approaches have much to offer, they 'will only make a difference if they're used with sensitivity to issues of difference.' (Cornwall, 2003:1338). Finding a way to incorporate these differences into policy, however, poses significant practical challenges for organisations that implement TJ.

The source of institutional and financial support provided to these victims' groups should also be considered as they can shape participatory outcomes and are an example of power relations. A civil society member was critical of these victims' groups being formed to be the avenue through which their supporting organisations' agenda can be pushed; for example, one interviewee explained that Conflict Victims' Society For Justice Nepal, supported by Advocacy Forum, favoured accountability measures (namely prosecutions) because this is what Advocacy Forum advocates for. Another interviewee reiterated this point saying that you can predict what a victims' group would ask for based on the position of the organisation that supports them.⁴² One organisation I spoke to that provides support to these victims' groups acknowledged that there was a tendency for this to happen but also noted that the organisation tries to support other victims' groups to the extent possible and that the affiliated victims' group does not always agree with the organisation.⁴³ A positive aspect is that there is an increasing trend for a number of victims' groups to be in direct communication with donors and the media and it will be interesting to see how the supporting NGOs and institutions react to this shift in power relations. Notwithstanding the challenges posed by representation of victims and the formation of victims' groups, in contexts where not everyone can participate and some form of representation seems inevitable, it is preferable that representation, though imperfect, comes from self-organisation.

iii. *Language: finding the 'right' words*

For many people in Nepal, TJ, and its accompanying language, is unfamiliar. In my interviews, recently trained trainers or civil society members were unsure of the meaning of TJ, often conflating it with general justice measures during the transitional period. In Nepal, terms such as 'reconciliation' and 'forgiveness' have been confused and at times appropriated for political agendas. One interviewee at an international organisation cited a time when 'reconciliation' was translated to 'friendship' and spoke about the idea of producing a Nepali TJ glossary.⁴⁴ Also, politicians frequently speak about the 'reconciliation' when it seems they are referring to 'settlement' or even 'amnesty' (Selim, forthcoming).

In a country where there are over 100 languages, the choice of language is also significant. Most meetings and surveys are conducted in Nepali or English, which limits (or even excludes) the extent to which people not fluent in these languages can participate.

⁴⁰Personal interview, Kathmandu, Nepal, 11 October 2012.

⁴¹Personal interview, Kathmandu, Nepal, 17 October 2012.

⁴²Personal interview, Kathmandu, Nepal, 16 October 2012.

⁴³Personal interview, Kathmandu, Nepal, 17 October 2012.

⁴⁴Personal interview, Kathmandu, Nepal, 5 March 2012.

For example, in the *Nepali Voices* study, the survey was only translated from English into Nepali and not into local languages. Participatory attempts can be circumscribed by the language used and who chooses and defines these key terms; however, this challenge can be minimised if there is greater attention provided to the meanings the participants prescribe (rather than the facilitators or the program designers and funders).

The ways in which knowledge is produced and shared is of key importance. For example, measuring the degree of participation of individuals at a consultation by the quantity or even perhaps the quality of verbal contributions may be contrary to local norms and practices.⁴⁵ Thus, key to any participatory attempts is the understanding of the local norms of decision making and representation. It is here where ethnographic research has much to offer to ensure that the context is taken more into account (Selim, forthcoming).

I do acknowledge that there are real challenges of expecting rural, remote and illiterate victims to be active participants in the creation and implementation of TJ process. Take, for example, the manner in which information is presented and organised, which can privilege certain individuals or groups and enable them to articulate their concerns; so again, this means that power is in the hands of the most articulate and politically adept.⁴⁶ There may be practical and technical difficulties for participants (e.g. amending draft legislation). I was informed that in many of the MoPR consultations, participants were not provided with the legislation ahead of the consultations that they were then asked to comment on.⁴⁷ Thus, while some practical problems (e.g. in terms of timing and logistics) can be overcome for some individuals (e.g. providing the relevant documentation in advance), capacity, technical and political issues remain. These issues do not render employing participatory attempts futile but require due consideration with regard to each context.

iv. *The impact of follow through and the politics of TJ*

The TJ process in Nepal demonstrates that irrespective of the participatory attempts often top-down, predetermined political and other priorities prevailed. The consultations conducted present an issue because consultation that is not combined with other modes of participation is according to Arnstein (1969) 'a sham since it offers no assurance that citizen concerns and ideas will be taken in to account.' What extent, if any, did participants have real power to shape decisions? What was the real and perceived likelihood of, or commitment to, implement participants' recommendations? To what extent were participants informed of the legislative and other constraints that would impact the extent to which these recommendations could be heeded?

Key here are the stated and unstated motives and interests of various actors and government agencies to be part of these participatory attempts. Mosse (2001) rightly points out that participation does not mean there are no longer any institutional or bureaucratic goals, goals that may not correspond with those of participants. Ultimately, participation will always be constrained, yet TJ literature and practice guides seem blind or naïve to the political and institutional realities of TJ (Selim, forthcoming). This does not negate the potential of participatory approaches but does highlight the need for greater appreciation of the political nature of TJ and postconflict realities.

In Nepal, victims' issues were not given primacy in the policy agenda and ultimately, decisions were made by a very small group of top male leaders of the major political parties. Consideration of the legacies of the nature of interactions, the levels of trust and the degree of

⁴⁵See, for example, Cleaver (2001).

⁴⁶See, for example, Hailey (2001).

⁴⁷Personal communication, on 4 January 2013.

capacity between individuals, the state and other actors and agencies, *before* these participatory attempts commence, was neglected.⁴⁸ Questions need to be asked about the context and culture: what is the historical, political and social context with which these participants are entering this participatory space and what are the positions and power ascribed by virtue of individuals' birth, kinship, education and networks?⁴⁹ As I argue elsewhere, TJ does not operate in a vacuum but in the context of other and usually competing national and local political processes (e.g. constitutional drafting and army integration) as well as global norms.

Participation is certainly a political issue, yet there seems to be a 'naïve' presumption that participation processes will feed into policies and programming of organisations⁵⁰; as I have demonstrated, this is not always the case. As early as 2008 (only a few years after the CPA was signed), victims were frustrated and disillusioned reporting having told their stories on many occasions but promises made were broken.⁵¹ When people are asked to participate, this expands the realm of possibilities and also raises participants' expectations and hopes. When organisations proceed with their own (usually pre-determined) agenda and are not clear about what they can and cannot do, this sends a signal to participants that their priorities do not count.⁵² Moreover, the trajectory of amendments to draft bills indicates that even with modest participation, it is political will that ultimately determines the extent to which the voices are heard, included and heeded in state-centric top-down TJ processes, further emphasising the need for bottom-up TJ processes. This is particularly evident with regard to calls from consultations (and beyond) against amnesties set in contrast to repeated attempts by the government to include blanket amnesty clauses. This demonstrates the serious, perhaps even at times irreconcilable, tensions between the voices of victims, TJ experts, TJ implementers and TJ brokers (for debates see Selim, forthcoming; Leebaw, 2011; Fletcher *et al.*, 2009; Wilson, 2001).

Alongside these sizeable political considerations, practical constraints also impact the nature of the participation. These can include issues of funding and resource scarcity. For example, in the MoPR consultations, there were recommendations for *all* cases of human rights violations to be investigated, even if no complaints were received, but this would arguably extend the TRC's beyond economic and functional means.⁵³

Thus, the trajectory of TJ, including participatory attempts employed, has been impacted because the significance of politics and the political function of TJ has been downplayed or disregarded (see Selim, forthcoming; Rawski & Sharma, 2012).⁵⁴ Despite these challenges, participation provides a way to aid TJ to be informed and influenced by victims' voices and their concerns. Participation also has the potential to provide opportunities for victims to become agents with the ability induce and spur transformative change.

CONCLUSION

Participatory approaches can be used to steer and to challenge state-driven top-down approaches to TJ.⁵⁵ Although consultations and surveys can play a role in a broad range

⁴⁸See also Mohan (2001) and Lawoti (2009).

⁴⁹See Lawoti (2007) and for example, Hailey (2001).

⁵⁰See, for example, White (2011).

⁵¹Personal interview, Kathmandu, Nepal, 11 October 2012.

⁵²See, for example, Cornwall (2008).

⁵³Personal communication, on 4 January 2013.

⁵⁴For other country examples see Rubli 2011 and 2013 and Gowing 2013.

⁵⁵For example, a survey can help inform the authorities about the general perceptions of victims; consultations can provide more direct input on the design.

participatory approach in TJ, they do not ensure effective participation in and of themselves. Participation needs to move beyond the preoccupation with consultations and surveys to give victims and affected community members a true opportunity to be partners and decision-makers (the upper levels of most participatory typologies). These approaches and an increased focus by donors, human rights agencies, victims associations and other groups to support and enable the mobilisation of victims to become agents of change, combined with an understanding of the political nature of TJ, just might be a starting point to ensure that TJ is indeed victim-centric. This is challenging to be sure, but with a shift in focus of the expectations of participation it may be far more possible than at present.

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