The *Xingshi Hejie*: Criminal Conciliation in Mainland China and in Taiwan

Abstract

The paper examines the conciliatory institutions operating in Criminal Law of People’s Republic of China and of Taiwan.

Criminal Reconciliation is defined in Chinese language *Xingshi Hejie*, 刑事和解, and represents a very significant institution in the two legal systems considered.

The text examines the offenses targeted by the Criminal Conciliation and the conciliatory procedure, and then present some concrete examples of implementation of this restorative justice practice in the reality of Mainland China and of Taiwan.

Given the paucity of sources on the subject, it was put in place a field research, which led to the realization of six interviews in June-July 2010 in Taipei, at the National Taipei University, and in Nanjing at Nanjing University. The interviews made it possible to investigate in particular the issues of the role of tradition in the discipline of modern *Xingshi Hejie*, and the reasons that lead victim and offender to choose this conciliatory procedure.

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The *Xingshi Hejie*:

Criminal Conciliation in Mainland China and in Taiwan

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Introductory Profiles

Introduction

When we say Xingshi Hejie (刑事和解), which could be translated as “victim-offender reconciliation” (VOR), we are talking about a conciliatory practice that was only recently implemented in China’s criminal legal system although, despite its recent appearance, it has very ancient roots.

It is founded, basically, on a choice that the person accused of minor criminal offenses makes to enable a conciliatory procedure, with the consent of the judge and the prosecutor, in order to obtain a less severe punishment at the end of the judicial process. It is a procedure that allows the victim to receive and promotes the offender’s repentance, in fact very often the rules of Xingshi Hejie emphasize the formal apology from the offender to the victim and society, or his acts expressing repentance and contrition.

These features of Xingshi Hejie led to its insertion in what are called practices of restorative justice, which consist of encouraging the offender, to repent for his criminal actions, which in turn leads to a meeting. Including VOR in the list of restorative justice practices is essential to understand how deeply rooted in Chinese history and philosophy these practices are, and therefore how far back in time beginnings of criminal reconciliation in China go. John Braithwaite, one of the greatest theorists of restorative justice, recognizes the

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1 Xingshi Hejie is a word composed of characters 刑 (xìng: punishment, torture, corporal punishment, commonly used to denote the criminal law branch of law), 刑 (shì: literally “deal” with xìng means “criminal”), and 和 (he: means harmonious, gentle, but also peace and is used as a conjunction as its sense of union; finally 解 (jie: means to explain, interpret, solve, together with he takes on the meaning of “resolve with harmony”) and, then, reconcile, mediate.
famous Chinese philosopher Confucius as probably the most influential thinker in the field, and reports in support of its argument, a significant sentence of his Dialogues:

"One of Confucius's best-known views is that "if the people be led by laws, and uniformity sought to be given punishments by them, they will try to avoid the punishment, but have no sense of shame" (Confucius 1974, p. 16). In opposition to his contemporaries, he was against capital punishment (pp. 92-93, 98). Reciprocity, mutuality, and harmony were central to his ways of seeing."

Purpose of the research

This research is interested in Xingshi Hejie as it is enforced in legal systems of Mainland China and Taiwan. Consideration of the practice in both the People's Republic and Taiwan is justified by the fact that it allows observation of the same legal tradition in two realities that have taken very different political and social roads over the past century, thus permitting a more detailed examination of the influence of Confucian tradition in current criminal reconciliation practices.

Research profiles

The real influence of traditional Chinese legal institutions on current restorative justice practices is much debated. Field research therefore can be particularly valuable helping us to understand how much the modern Xingshi Hejie owes to the tradition, particularly Confucian ethics and principles. Other issues field research can help us analyze include the reasons that the parties choose a settlement procedure, and the advantages that Chinese litigants perceive from this mechanism.

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7 This is a quote from Confucius' dialogues, in particular, this is article 3 of the second book, original text: 子曰：「道之以政，齊之以刑，民免而無恥；道之以德，齊之以禮，有恥且格。」 An alternative translation is: "The Master said, Govern the people by regulations, keep order among them by chastisements, and they will flee from you; and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord". English-Chinese edition: 论语 Confucius, (2008) The Analects. New York: Oxford University Press.
Given the complexity of the questions it is better to put in place a research design that left a lot of freedom to the interlocutor, to let his/her original ideas emerge. So I oriented myself toward research through qualitative, unstructured and addressed to a privileged observer.\textsuperscript{10}

The research was put in place, thanks to the efforts of Professor Ignazio Castellucci, professor of Chinese Law at the University of Trento, in June and July 2010 at the National Taiwan University, Taipei\textsuperscript{11}, with the kind cooperation of Professor Susyan Jou, and led to interviews to three NTPU Professor, an Examination Yuan Member and a Taipei Criminal Court Judge. While in Nanjing, in the People’s Republic, the research has been put in place at the Nanjing University\textsuperscript{12} and led to one interview to a Nanjing University Professor, thanks to the kind help of Professor Di Xiaohua, who advised me on many useful texts about \textit{Xingshi Hejie}.

I would like to take this opportunity to thank them all for their exquisite courtesy and availability, and to express my gratitude to the University of Trento (Italy) for the financial support granted to this research.

\textbf{The Xingshi Hejie}

\textit{In the People's Republic of China}

In People’s Republic of China the legal background in the field of victim-offender reconciliation is rather vague and generic, with few laws that take into consideration the \textit{Xingshi Hejie} at the national level.

Article 172 C.C.P. states that VOR is applicable only if an agreement between the parties has been reached and the victim has evidence to prove that the crime is a "minor criminal case", Article 130 and 142 of the Code of Criminal Procedure state that a prosecutor

\textsuperscript{10} With regard to research profiles this text adheres to the classification of the instruments of social research here adopted: Corbetta, P. (1999). \textit{Metodologia e tecniche della ricerca sociale}. Bologna, Italy: Il Mulino.

in the stage of preliminary investigation may decide not to proceed further in prosecuting if the "criminal suspect's criminal responsibility should not have been investigated" (Article 130 C.C.P.) and if "an act is obviously minor, causing no serious harm, and is therefore not deemed a crime", or if "the crime is to be handled only upon complaint according to the Criminal Law, but there has been no complaint or the complaint has been withdrawn" and "if other laws provide an exemption from investigation of criminal responsibility" (Article 142 C.C.P.). Article 130 and 142 are important if the conciliatory settlement has been reached under Article 172 C.C.P., as they constitute the tool that allows the prosecutor to avoid proceeding further in criminal prosecution; also their being unspecific let the prosecutor to be more flexible in exercising this power, not only about cases prosecuted upon complaint covered by Article 172.

If instead we face a crime where the prosecution takes place automatically, \textit{ex-officio}, and the prosecution has already been carried out, to let the conciliatory settlement enter the process we must refer to Article 37 of the Chinese Criminal Law.\textsuperscript{13} This Article is included in the section on different types of punishment provided for in the People's Republic, and is in a significant place at the end of the section, after a series of schematic rules for all other retributive penalties,\textsuperscript{14} and confirms the possibility of the Court to not impose criminal measures against the offender.

The Article says: "\textit{If the Circumstances of a person's crime are minor and do not require criminal punishment, he may be exempted from it; however, he may, depending on the different circumstances of the case, be reprimanded or ordered to make a statement of}

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\begin{itemize}
\item[\textsuperscript{13}] Here we refer to the new Criminal Law of 1997.
\item[\textsuperscript{14}] Chinese Criminal Law, chap. III: Punishments; section I: Types of punishments; artt.32-37.
\end{itemize}
repentance, offer an apology or pay compensation for losses, or be subjected to administrative penalty by the competent department\textsuperscript{15}.

Article 37 of China's Criminal Code is therefore pivotal for the Xingshi Hejie in People's Republic of China, since it is not limited to offenses prosecuted upon complaint and, even though the law does not speak explicitly of an agreement, it places a range of possible punishments for the offender that certainly fits well (and have in fact well adapted) to the conciliatory procedure. This article reflects the importance given to repentance, to apology, and to compensation, and then also reflects the influence of Confucian tradition, and the ultimate goal of achieving harmony in society. But we can also see a certain vagueness in the rule: the only requirement to engage in this type of punishment seems to be that the offense has to be minor; even if we could clearly state when a crime is to be considered such, we don't have any other requirement except the fact that crime should not require a punishment, certainly a factor difficult to interpret.

Everyday experience tells us that this vagueness has played an important role in ensuring the application of an institution such as that of criminal mediation, which doesn't tolerate a compelling body of regulation. This conciliation system provides a more immediate and real satisfaction of victims' interests, and from the standpoint of the public interest involved seems to be able to produce lower rates of recidivism. To give an idea of how Xingshi Hejie is actually applied in the People’s Republic, it is useful to examine some significant local regulations, which may also give an idea of the complexity and variety of conciliatory procedures in the PRC:

I. The Office of Justice of the Yangpu District (one of the 19 districts that form the city of Shanghai), the Public Security Bureau of the city and the Procuratorate, have issued

several documents\textsuperscript{16} in order to entrust to local People's Mediation Committees several minor criminal cases, especially regarding minor injuries. According to these document, with regard to minor injuries at every stage of ordinary criminal proceedings, the public institution having charge of the procedure (these are: the organs of public security in the initial stages, the Procuratorate and the court below) may decide to entrust the PMC of the conciliation procedure. In addition there is a mechanism by which, if the parties have reached an agreement in civil lawsuit related to the criminal process about compensation for damages resulting from the offense, the institution that is in charge of the procedure can consider not to report the case to the Attorney and to stop considering it a crime (if the department is an organ of public security), or (if the body in question is the procurator), not to prosecute, or (in the case instead it is the court) not to punish the offender.

II. The city of \textit{Nantong (南通)}, Jiangsu, has developed a rather interesting and original conciliation program, not only functional in criminal mediation, but also in civil disputes and above all in administrative ones.\textsuperscript{17} The project is called \textit{Dà Tiaojie, 大调解}, literally "Great Mediation", it also involves, as the procedure in Shanghai, the People's Mediation Committees, but is characterized by the fact that it not involves only these committees, but also other political representatives and directors, as officers from Public Security Organs, judicial organs and offices that bring together the complaints of citizens; the same PMCs are also involved at more administrative levels: district, city, sub-district. The District Procuratorate of Chongchuan\textsuperscript{18} issued a document called "Provisional Measures on Bringing Civil Compensation Disputes Caused by Minor Offenses into "Great Mediation" Mechanism", which underlines that the reconciliation program is focused on the civil


\textsuperscript{17} In this respect: Interview 6, Professor at Nanjing University.
litigation incidental to the main criminal case, but influences directly the criminal proceedings. In fact, however, is the prosecutor who decides, whether the victim and offender are favorable, to mandate the procedure in the Da Tiaojie institute.

III. In Xinbei (Xīnběi Qu, 新北区), District of Changzhou (常州), another city in Jiangsu, it has been issued in 2007 a set of rules for the mediation in criminal matters, based on the principles of restorative justice, and after this innovation the University of Nanjing, who also participated in the drafting of legislation as a consultant, sent a research team which examined the satisfaction of victims and perpetrators after the mediation procedure. The set of rules referred to was adopted by the People's Procuratorate in April 2007 and is defined: "Rules on the Victim-Offender Reconciliation of Minor Criminal Cases in People's Procuratorate of Xinbei District". The application of conciliation in criminal matters before the adoption of these standards in the district was characterized by economic perspective, the institution was considered as a method to obtain more rapid and consistent compensation for damage suffered by the victim. So the reconciliation was poorly informed by the principles of restorative justice, principles which are instead central in the 2007 legislation. In particular the new legislation highlights the forgiveness of the victim and the apology from the offender; and even more it brings to the middle of the conciliation the same victim and offender, thanks to procedures that help the victim to overcome the shock of the crime, and procedures that aim to the reintegration of the offender, and also that maintain the willing nature of the procedure and the freedom of choice for victim and offender.

In Taiwan

18 One of the districts that divide the province of Nantong.
19 The text of the report of the research, of which a summary is provided here, was delivered to me by Professor Di, who I thank very much for this, and has not yet been published. References in the text are: Di Xiaohua, Li Xiang, He Lu, Gao Hui, (2010). Report on the Victim-Offender Reconciliation of Minor Criminal Case in People's Procuratorate of Xinbei District (常州市新北区人民检察院课题*轻微刑事案件和解机制研究). Unpublished manuscript, Nanjing University, Nanjing, PRC.
Formosa is a young democracy, with a strong push for innovation provided by a vibrant doctrine. If you deal with the subject of Xingshi Hejie in Taiwan, you find yourself in front of an institute at times similar to that in Mainland China, but fell in a very different context. As in Mainland China, the legal background for the criminal reconciliation is rather vague, it is based on Articles 57\(^{20}\) and 59\(^{21}\) of the Criminal Law of Taiwan\(^{22}\), these two articles list a number of extenuating circumstances which the Court must keep in mind when issuing its sentence, one of the circumstances listed in Article 57 includes the fact that the offender has shown remorse for his criminal conduct, while Article 59, more vague, states that if the judge finds that the offender shall be forgiven for his conduct, he or she can impose a lighter sentence. The Taiwanese Judge who I interviewed explained how, by practice, the Courts, if a conciliation agreement has occurred between the parties, usually refer to these two articles to justify a less severe punishment or the fact for the culprit to be completely exempted from punishment.\(^{23}\)

From the point of view of criminal procedure, important rules can be found in the Code of Criminal Procedure in the section devoted to the phase called as "Investigation" (the first phase of criminal proceeding) governed by Articles 228-263.\(^{24}\) In particular, Article 253 of the Code of Criminal Procedure states: "If a public prosecutor considers it appropriate not to prosecute a case specified in Article 376 after having taken into consideration the provisions of Article 57 of the Criminal Code, he may make a ruling not to prosecute."\(^{25}\) This item allows the prosecutor not to prosecute if the case falls under the scope of Article 376 of the Code of Criminal Procedure, which gives a legal definition of what a "minor criminal

\(^{20}\) Article 57 refers to a series of circumstances which the court must take into account when deciding on sentencing; among them number ten: 十, 犯罪后之态度, requires to take into account the attitude of the offender after having committed the crime; it can be translated as,"if the offender shows remorse" (Interview 5, Judge Taipei Criminal Court).

\(^{21}\) Also article 59 refers to circumstances under which the court must take into account when issuing his sentence, is that if the judge finds the offender otherwise forgivable, can impose a more lenient punishment, "if the judge Thinks That the offender is forgivable HIM or he can sentence her to a lenient punishment "(Judge Taipei Criminal Court, interview 5).

\(^{22}\) The Criminal Law was adopted in Taiwan March 10, 1928 and consists of 387 articles.

\(^{23}\) Interview 5, Judge Taipei Criminal Court.

\(^{24}\) The Code of Criminal Procedure was adopted in Taiwan July 24, 1928.
case" is: unlike in Mainland China, Taiwan has in fact a law that lists which are the so-called minor criminal offenses\textsuperscript{26}. The second condition for which the prosecutor may decide not to prosecute is the reference to Article 57 of the Criminal Code, so it must be taken into account, among other things, the repentance of the perpetrator.

It can be seen therefore that the combined operation by Articles 57 and 59 of the Criminal Code about the trial stage, and by Article 253 for the previous phase before the criminal prosecution, provides the Court and the Prosecutor a tool that let them consider, within criminal proceedings, the successful experiment of conciliation between victim and offender. Unlike the procedure laid down in Mainland China, in Taiwan there are special "Conciliation Board" that are entrusted of VOR procedures by the same parties individually, or by the prosecutor or the judge (depending on the stage of criminal proceeding), or even by the police for less serious cases, always with the agreement of the parties involved.\textsuperscript{27}

In Taiwan it has been developed a very comprehensive and specific program with regard to juvenile justice, and in particular, for what concerns us here, reconciliation is always central in these programs. The introduction of a comprehensive program that included reconciliation within the juvenile criminal law occurred in 1997, on the 2\textsuperscript{nd} of October of that year was in fact enacted a "Revision of Juvenile Criminal Law", whose rules have been enforced in 1999. This law is aimed at obtaining an agreement between victim and offender, rather than a criminal conviction, but it looks also with favor to the rehabilitation of the offender, it is in fact structured to guarantee a "second chance" to minors convicted of minor crimes and tries to achieve this by involving a wider range of actors in the process of conciliation, so, in addition to the victim and offender's parents, it includes teachers and employers of the parties, together with social workers who will be entrusted of the care of the

\textsuperscript{26} According to Article 376 are "minor criminal cases" the crimes for which there is a maximum sentence of 3 years imprisonment prescribed by law, along with other marginal cases such as minor cases of theft, embezzlement and fraud.
\textsuperscript{27} Interview 3, NTPU Professor.
offender after the dispute and, where appropriate, also of the victim.\textsuperscript{28} The main feature of these procedures is that they can be handled in court, with the judge acting as mediator; the judge, however, must receive special training in order to exercise this role, a training less juridical and more sociological, in fact with that training it is tried to stop the role of the magistrate and to carry out the one of the mediator as completely as possible; so, for example, the procedure takes place in special courtrooms where the judge "gets down" to the level of the litigants, developing what is called a "round table system".\textsuperscript{29} This "round table system" is activated if the criminal case dealt with falls within the "1\textsuperscript{st} loop" or "protective loop", which includes all offenses for which the minimum sentence prescribed by law not exceed 5 years of imprisonment. A process carried out in the "protective loop" may lead to a simple confirmation of the agreement reached between accused and accuser, or the integration thereof by the court with a sentence to a period of community service, or to an additional compensation for damages, or even to a period of hospitalization. In addition to the large volume of cases that falls within the "1\textsuperscript{st} loop", the other cases, those with a minimum penalty of more than five years of imprisonment, may be carried out in accordance with the procedure of "protective loop" on the basis of a discrentive decision of the Court.\textsuperscript{30}

It may be useful to provide some examples of criminal cases and criminal policies in Taiwan concerning reconciliation, restorative justice and the Taiwanese spirit and culture about these institutions.

One of the National Taipei University Professor during her interview\textsuperscript{31} spoke of a significant event that took place in 2010 and had a wide coverage by the media: it was an accident caused by a British businessman, who drove with an alcohol content over the threshold permitted by law and had invested a guy who was on the side of the road, causing

\textsuperscript{28} Interview 5, NTPU Professor.
\textsuperscript{29} Interview 2, NTPU Professor.
\textsuperscript{30} Interview 2, NTPU Professor.
\textsuperscript{31} Interview 5, NTPU Professor.
his death. In such a situation in Taiwan it is expected that the culprit presents himself at the home of the victim's family and offers his apologies, and then it is possible to start talking about the compensation. The British businessman instead chose to simply follow the law, refusing to set a procedure for conciliation with the victim to reach an agreement on compensation. Then the judge pronounced a sentence where, in addition to the punishment in accordance with the ordinary procedure, condemned the businessman to pay the costs. Then, in addition to the non-reduction of sentence that would have come from the use of the conciliation procedure, the Englishman was also the subject of a negative media campaign, with newspapers in Taiwan never tired of emphasizing how heartless was a person who had behaved this way. This case is important because it brings us back to Chinese tradition, yet so deeply rooted in Taiwan, as in Mainland China, for which "go to the courts" is not morally correct or however it is absolutely not morally sufficient in order to atone for one's sins in front of the community.

As for the policies relating to restorative justice in Taiwan, one of them is very interesting and useful to realize the originality of the approach in the training of Taiwanese judges who shall set the conciliation procedures in juvenile justice, very important area for Taiwanese politics and doctrine. It is a measure put in place in June 2010: the distribution to criminal prosecutors who deal with juvenile justice of 2000 copies of a Japanese comic book, titled "Love", which, based on a real story, tells of the reconciliation between a mother who has just lost his son after a murder and the family of the murderer, a sixteen year old student. This measure is part of a broader program to promote restorative justice, and the choice of a Japanese comic book is based on the fact that Japanese pop culture exerts a strong influence in Taiwan; the stated purpose of the invitation to read is the hope that prosecutors

32 Interview 5, NTPU Professor.
33 Interview 2, NTPU professor. Who is one of the leading academics pushing for an implementation of mechanisms of restorative justice in the juvenile criminal justice in Taiwan.
34 The measure was announced June 9, 2010.
will develop a more compassionate attitude and try to facilitate the comparison between the parties in the process.\textsuperscript{35, 36}

\textbf{Research Profiles}

\textit{Premise}

The research that I conducted at the National Taipei University\textsuperscript{37}, 立台北大学 and the Nanjing University\textsuperscript{38}, 南京大学 was carried out by means of "unstructured" interviews addressed to "privileged observers"\textsuperscript{39}, the unstructured interview is aimed at the spontaneous developing by the interlocutor of his/her own suggestions and ideas, and is little influenced by the interviewer, who is concerned only to present the theme and provide food for thought.\textsuperscript{40} This research method is aimed at recognizing the basic traits of the institution investigated but also to let come out original ideas of respondents; in our case the most interesting ideas are grouped under two main themes: The Influence of Tradition and The Reasons for the choice of VOR.

Here is a scheme of the interviewees positions and academic ranks:

| Interviewee 1 | Member of Examination Yuan | Taipei NTPU 14.06.10 |
| Interviewee 2 | Professor at Law school NTPU | Taipei NTPU 15.06.10 |
| Interviewee 3 | Professor at Criminology Dpt. NTPU | Taipei NTPU 17.06.10 |
| Interviewee 4 | Professor Graduate Sc. Criminology NTPU | Taipei NTPU 17.06.10 |
| Interviewee 5 | Judge Taipei District Court (Criminal Court) | Taipei NTPU 18.06.10 |
| Interviewee 6 | Professor Law Sc. Nanjing University | Nanjing NU 04.07.10 |

\textit{The Influence of Tradition}

\textsuperscript{35} This statement was made by Gloria Fei, head of the Department of Rehabilitation and Social Protection, Ministry of Justice of the Republic of China.

\textsuperscript{36} Source: AFP, (5 Jan 2010). Taiwan hopes Japanese comics can teach prosecutors. (http://www.google.com/hostednews/afp/article/ALeqM5jikKBHwzmfv5EcCOnbU0__KmJWkcPg) Retrieved September 01, 2011.


\textsuperscript{39} According to the classification of the search tools provided by Augusto Pino in his: La ricerca Giuridica (CEDAM 1996)

\textsuperscript{40} P. Corbetta – Metodologia e tecniche della ricerca sociale – Il Mulino 1999; A. Pino – La ricerca giuridica – CEDAM 1996
The influence of the Chinese legal tradition on modern Xingshi Hejie is carefully considered in many studies on conciliatory practices in the Mainland China, and about Taiwan the interviews I conducted in Taipei shows that also in that country there is high interest in the matter. Some scholars, in interviews I have done, pointed, variously reasoned, the important influence of tradition on the institution of criminal reconciliation and on the figure of the Chinese litigant; in Taipei in particular the Examination Yuan Member I interviewed points out that in his country "I'll Sue You" is not a common phrase, as it is considered bad luck to take legal proceedings, and that in his view is a legacy of the Confucian tradition, still strong in Formosa. This phrase recalls the Confucian principle of wu song 无讼, or "do not go to the courts", that is central in the ideology expressed in the Dialogues of the Master. One of the NTPU Professors I interviewed on the other hand refers to how much are still important in contemporary China the principles of peace and harmony of the Confucian tradition, which leads to take into wide account the conciliatory procedures. Another NTPU Professor interviewed instead stresses the importance of a tradition precedent to Confucianism, which would have been later source of inspiration for the same Confucius. This is the transformation of the ritual of the court, the Li 礼, which occurred during the Zhou period, and led to the creation of a "culture of shame" where the value of forgiveness could find a place. The Judge I interviewed stresses the fact that the Confucian Chinese culture influences the disposition toward peaceful and constructive conversation, the reconciliation as a means of dispute resolution, which then creates a "positive environment"
for forgiveness, reconciliation and restorative justice. Last (but not least) Taiwanese scholar to be taken into account is a professor of criminal law at National Taipei University\(^\textsuperscript{46}\) who distances himself from the statements of other interviewees in that he considers the Confucian tradition as of little relevance in contemporary Chinese society, both in Mainland China and Taiwan, and complains that Western scholars often overestimate the influence of Confucianism and its social influence in everyday life of Chinese people. In his opinion, the philosophy of Confucius is largely a *governance* tool, and is therefore targeted at legislators and governors, in order to enable the realization of that good moral government proposed by the Confucian philosophy. In common life, however, are more influential for example the philosophy of life proposed by Taoism\(^\textsuperscript{47}\), or by other religions and philosophies significant in Chinese culture. At this point, the Professor acknowledges the existence in the history of Imperial China of a tendency to resolve disputes informally, but does not believe there is any Confucian influence in this trend. He also believes that resolving disputes informally is not to be considered a form of restorative justice; restorative justice, to earn its name, must appear in legal form, i.e. it must be justified in law and public power.

As for the interview that took place in the People's Republic of China, the interviewed\(^\textsuperscript{48}\) believes that the Confucian tradition is important for the modern VOR, he states in particular that thanks to the original and ancient Chinese tradition, the very term restorative justice assumes a different meaning in China than it has in the West, in China it does in fact indicate not just a reconciliation between victim and offender, it is something more, it sub tend to a culture of dialogue, to a basic principle: to address and resolve problems through dialogue and agreement.

\(^{44}\) *Interview 5, NTPU Professor.*  
\(^{45}\) *Interview 4, Judge Taipei Criminal Court.*  
\(^{46}\) *Interview 2, NTPU Professor.*  
\(^{47}\) Taoism, religion and philosophy which has first shown during the Zhou Era, proposes renouncing to the ambition, and the "practice of not acting" (wei wuwei).  
\(^{48}\) *Interview 6, Nanjing University Professor.*
We are facing a surely complex framework, with views ranging from considering the influence of Confucian tradition essential to being regarded as completely irrelevant. This research however leads us to confirm that, regardless of the position taken in relation to the role of tradition, it is not possible to speak of restorative justice and of *Xingshi Hejie* in China and Taiwan without confronting this issue, without taking on a position about the importance of tradition and Confucianism in shaping the modern conciliatory institutions effective in these systems.

In the vast majority of the studies examined the Confucian tradition is acknowledged of a positive influence on Chinese culture and society, a culture of forgiveness, a society that holds in high regard the values of harmony and also wary of the justice exercised in the courts.49

In addition to creating this positive environment for the development of restorative justice institutions, many other authors bestow Confucian tradition to play a role not only of positive social and environmental factor, but also to be an inspirational model for the modern institutions of restorative justice.50

Stating hypotheses about the importance of tradition, should be borne in mind, however (as noted in interviews n. 251 and n. 352), how the Confucian philosophy is an extremely complex phenomenon, and how from the short teachings and aphorisms of Confucius can be drawn different conclusions about many features of Confucian philosophy, however, seems to say, as also notes an NTPU Professor in his interview:

51 Interview 2, NTPU Professor.
52 Interview 3, NTPU Professor.
"Confucianism has different views, but the common idea is that of its principle of harmony, peacefulness, so if you have conflict with other people Confucianism asks people to reconcile."53

The Reasons for the choice of VOR

"... It is not only 'I give you two million dollars’, in real restorative justice these could be only two million pieces of paper, because what really matters is the fact that the one who pays has taken responsibility for his own actions."54

It is very important to define what are the reasons why victim and offender choose the conciliatory procedure instead of the ordinary criminal process in Mainland China and in Taiwan; in particular whether the reasons are only economic for the victim, and of convenience for the offender (who tries to get a lighter punishment), or if indeed there is something more in the Chinese Xingshi Hejie, something that comes from the importance given by the Chinese society to the social and moral forgiveness of the victim and to the assumption of responsibility by the offender. The existence of this "something more" is really important since it can make this practice a model to be considered carefully by scholars outside of China.

Looking first at the research I have developed in Nanjing and Taipei, the respondents generally agreed that the conciliation procedure is chosen for economic reasons by the victim, this is indeed a very effective tool for both a more rapid and a more consistent compensation than the one that would be obtained through civil proceedings for damages, and also the payment is actually paid in much greater extent when you set a restorative procedure. As for the reasons of convenience to entice the offender to opt for the conciliation these are given by the exemption or the substantial discount on the sentence that comes from reaching an agreement with the victim and the offender; an additional advantage derives from the

53 Interview 3, NTPU Professor.
immediate closedown of the procedure otherwise detrimental to his/her social image. But many scholars\textsuperscript{55} recognizes the Chinese "culture of forgiveness" as a major motivation to prefer a conciliatory procedure rather than an ordinary one, and even in interviews that I conducted I found many statements to that effect.

The image that we draw from this research is that of different weights given to the formal apology in the Chinese than in the Western world; in the Chinese world apology is an act very representative, which has an high social value, and so is the following forgiveness of the subject to which the excuses are addressed. Those are acts of complete acceptance of what was stated by the other party, recognition and repentance.

The apology and the struggle for forgiveness are also seen as strenuous activities for a person convicted of a crime, more strenuous than to submit to the sentence; the confrontation with the victim is a further steps in the criminal proceedings, and this is the element of restorative justice more important in the \textit{Xingshi Hejie}:

"You see the cultural difference? To go to court and submit to punishment is not enough here, you have to pay responsibility, with this compensation after an agreement with the victim (..), this compensation is taking responsibility. In Western Countries probably you do not need to apologize, you just go to the court and it is enough."\textsuperscript{56}

In interviews I've done it is highlighted the social and moral importance of this dyad apology-forgiveness: the reasons to choose \textit{Xingshi Hejie} should not be sought only in affordability; the "culture of forgiveness" should in fact be granted an appropriate space in the examination of an institution such as the VOR, having to even admit a problem that stems from this culture: a culture that gives a such a high social value and moral support to apology.

\textsuperscript{54} Interview 2, NTPU Professor.
\textsuperscript{56} Interview 4, NTPU Professor.
and forgiveness, along with the presence of close-knit community, often brings with it the
danger of a too strong social pressure on the parties to peacefully solve the dispute, that
pressure can force the parties to accept an unwelcome agreement only to avoid the social
disapproval which would result from its refusal. This point, however, open up new questions,
one of which, very exciting, is whether the continued progress of Chinese society and the
progressive loss of the old traditional values of the new generations will drain of meaning this
procedure, making it equal to many of its like in the West.
References


AFP, (5 Jan 2010). Taiwan hopes Japanese comics can teach prosecutors. (http://www.google.com/hostednews/afp/article/ALeqM5jiK8H1wmfv5EcC0nbU0_-KmJWKcPg) Retrieved September 01, 2011.
Interviewee 1
Examination Yuan (former Criminology professor at Central Police University of Taipei)

1- Restorative Justice and Conciliation

In Taiwan we have a tradition, but now it is changing, if You ask about restorative justice I will discuss first about the victim, and among these about the victim of sexual assault, I think it has been, probably, twenty years ago that one female legislator: Pān Weīgāng 潘维维(..) enacted a lot of laws in order to protect victims of crimes, I think that to protect victims is the first step to develop restorative justice, If you are asking me about the history of restorative justice in Taiwan I will answer you that it has started with these laws (..).

Until now we have three kinds of law to protect the victims (female):
- the first one we call the “dv” domestic violence, that was the first law (of this kind) enacted in Asia, so, as I have just said we have a tradition about restorative justice, and that is the significant evidence.
- secondly we have the law to punish the sexual harassment (..) that is to deal with violence against the woman in community.
However this laws are not real restorative justice, it is only a statement of law.
- then we have the law to protect the victim, it is the so called: “protection of the victims of criminal cases” law, unfortunately we protect most of the (victims of) criminal actions except female victims of rape, because one legislator was envious of the success of the female legislator (Pan Weigang), because they have a competition and did not enact (her) law to protect the victim of rape only two years ago we enact a law that included the protection of the victims of rape (..)

Because we have such kind of project, now we are dealing about the confrontation between victim and offender, I saw the project (that) is going to be enacted (..) it is based on the establishment of a social network.

If we are to discuss on who has contributed most about restorative justice in the last years in Taiwan I will say you Interviewee n.3, who launched the studies in here about the restorative justice, and Interviewee n.4, who is doing a lot of studies on restorative justice.

I was just talking with the Ministry of Justice three week ago (..) which branch of the criminal justice system we need to improve, it is the relationship of the system with the victims, for example they were discussing on how to make the police treat more kindly the
victims, to treat the victim tender, and to give them advice about restorative justice institutes.
The philosophy of restorative justice should start from the police.
Then go to the prosecutor: prosecutor is very powerful in restorative justice matters, but in Taiwan the biggest problem in my opinion is the personnel training; most of the persons involved in restorative justice institutes are person who have studied law, they have legal background.
Legal background is good for us to facilitate restorative justice programs, from legal aspects, however to do restorative justice it is not just a part of legal system, (...) it is the person who get involved (..) If you are asking me what is the meaning of restorative justice in Asia, it is the tradition, the Confucian tradition.(..)
About criminal conciliation ten years ago there was a lack of legislation; but now there is a System of confrontation victim-offender (..)
Prosecutor still keep control, the problem is the legal background of all the personnel involved.

2- **What do you think about the compatibility between the restorative justice and the basic principles of criminal law (especially about the due process of law)?**

We have to think at a “Pan Chinese culture”, this culture suggest to solve conflict not only by law; so we have a lot of space for compromise. In our Chinese tradition you look at the elder of the village, city to solve the conflict, that people ask for confrontation.
Actually if we want to study the origins of restorative justice it is from the very very primitive Chinese society to resolve conflict through mediation, so it is the same (heritage) in Taiwan.
I say that we have a strong foundation about restorative justice in our country. Interviewee n.3 has done much research about aboriginal people here in Taiwan, they have the same system, to solve disputes between them.(..)
In dealing with restorative justice most that we can do is to promote research about it, promote study that then can be enacted as laws; for example Interviewee n.4 is the consultant for the Taipei City Government in juvenile and restorative justice matters.(..)
I think that in Taiwan society we don't think that necessarily to solve a dispute you have to go to court, for the Confucian tradition, and also we have a lot of students that study restorative justice matters.
3- What does it mean to you the Confucian influence on modern restorative justice?

“I'll sue you” is not a common sentence in an argue in Taiwan, Confucius says that to stop the dispute is the first duty of the judge, in Confucian culture go to court is misfortune, (...) we see the lawyer as a person that with sophisticated words creates sues.

Taiwan has had also German influence first, and then the one of the United States in legal matters, so it has a mixed influence, both continental and non continental, but tradition on restorative justice has survived.

4- What do you think about the future of restorative justice?

I'm very optimistic about Taiwan's situation to facilitate restorative justice because there is a stable legislator, which is the one who launched restorative justice, and also because people which had introduced restorative justice in Taiwan had modified it according to Taiwanese culture, because first the idea of modern restorative justice came in Taiwan from students that have studied in the United States, and also because people like that.

We can say that there is also an economical factor, it is important to notice that you need to be rich to do restorative justice, Taiwan can implement such mechanism only now, since there is enough money to do it, otherwise it is too expensive.

Because we need to give money to the victim (state compensation system), we need to train judges, prosecutors, police.

I would say that in the future about restorative justice is very good perspective for us.

5- Do you think the Taiwanese legal system is effective?

It is hard to answer because the effectiveness and the length of a process depends on the cases, it depends on the single treatment, there are long processes, but also short ones.

I say in general it is true, it takes a lot of time to make an entire process; it is a dilemma because you can have a short process but dispense no real justice.

There has been a case decided after thirty years, but it is an extreme exception, usually a full process lasts three or four years.
Interviewee 2

Professor at Law school, National Taipei University (criminal law)

Interview in Chinese translated by Interviewee 4 (Professor, Graduate School of Criminology, National Taipei University Adjunct Professor, Department of Educational Psychology and Counselling, National Taiwan Normal University Chief Editor, Journal of Crime and Criminal Justice International Executive Counselor-Elect, Chinese Association of Criminology)

1- Restorative justice and Conciliation

He says foreigners, especially western scholars always misunderstand our culture, thinking we strongly believe in Confucius, but in his opinion he has a complete objection to this thought, because Confucianism is a way to discipline our people, to make them obey, a way of politics; but in terms of our everyday life which are the most influential factors, they are like Taoism, or like believing in ancestor spirits, that kind of things probably control our everyday life. And then the other evidence he think there is about the misunderstanding of Confucianism is that if you look at Hong Kong, China, or Taiwan and you ask about what Confucianism is or how Confucianism influences their legal system they always have a different answers.

That is in his opinion the evidence that Confucianism has a really little impact on our legal system.(..)

In his opinion if we look back at the history of China we can find out that people tend to solve informally disputes among them, but in his opinion this is no restorative justice, because restorative justice has to be based on law, if we are to call it this way. You need modern legal system to have restorative justice, otherwise you are just like family, community, that tries to solve disputes in a very informal way, without legal sanction.

In his opinion even now restorative justice does not exist.

He refers at the condition in China, like in the city they have rule of law, but in the countryside there is no law, no legal system so they have to rely on a system like “restorative justice”, a system to solve conflicts, that’s how this sort of “restorative justice” settlement enters in the country.

Because the countryside is like “outlaw”, and so depends on informal settlement, because rule of law cannot get into the system in countryside of mainland China because it is too big nation, and has too many differences.
He says that also in Europe, before the eighteenth, nineteenth century there was a similar system, before the advent of rule of law, this is a matter of how you control your people, law is a sort of whip to discipline the people, and education is another mechanism to discipline people, like sugar, so then you have whip and sugar.

So how did the modern restorative justice come in?

If you have a modern legal system, the traditional “restorative justice” will be excluded by the legal system, because it is too informal and it represents a challenge to rule of law. Formal law must keep control, so it cannot admit that someone has its own way to deal with disputes.

So if you have modern legal system it means that automatically you try to exclude traditional “restorative justice”.

But so why nowadays we still talk about restorative justice? It is because rule of law leaves gaps in modern societies, because everyone is different, and it tries to rule all under one legal system.

There modern restorative justice has its function, to connect gaps between legal systems or in the society.

In other words he says that the modern legal systems expect everyone to be equal, in front of the law, but the legal system also realizes that everyone is different, no one is “equal” in front of the law, so the law recognizes its limits, it recognizes the “failure of the modern legal system, and so restorative justice come in, to facilitate, so law sold its authority, if you can reach an agreement it is fine, but if you cannot then you came to the court, and the legal system comes in.

So in his view restorative justice is like an opposite of modern legal system.

Modern legal system’s aim is justice, but when this private settlement between the victim and the offender comes in, then you have to give it a name, it has been chosen “restorative justice”, but “justice” is wrong, it is “restorative justice”, not “legal justice”, but despite this it remains a wrong name.(..)

2- What do You think about the future of restorative justice?

Taiwan

During the Japanese colonization of Taiwan there was a medic, Jiāteng Xīnping 家藤新平, a Japanese medical doctor that was head of administration office, and the one who implemented in Taiwan modern police with authority to control, so only the police could
use authority to control Taiwanese population, by then there was a special regulation, called “regulation of police order” (1928) that was a sort of criminal legal system, it gives the police the right to sanction minor crimes.

So that is how we form our modern country, so for Taiwanese people this police is representative of the rule of law, so in Taiwan we strongly believe in rule of law, at that time it was a police system but now it is a legal one; a court system, in a court system the court has strong authority over people; so restorative justice, modern restorative justice, does not have a place in this system where all the people believe in this court system.

But there are two conditions that can help restorative justice’s raise:

1- Individualism, since everyone has a different mind we argue about why the court has to give less or more money.

2- The other one is that when a country is too big, the rule of law is weak and then you have the restorative justice.

So Taiwan does not have the second condition, because it is has only twenty million inhabitants, so the legal system can rule the whole island without need of restorative justice.

And also individualism is not very strong in our country yet.

But, in the future, he thinks restorative justice should be used to push the legal system, to change.

He thinks that restorative justice should also challenge the modern legal system, to show that there is another way to deal with conflict.

But which one “restorative justice” system?

There are two options:

1- or we rely on the traditional restorative justice system, where there are the victim, and the offender, and the judge over them

2- or we can try this new way: we have the victim and offender, that can talk together and express their remorse, forgiveness, and then a representative of the community, that is independent from the legal system, he could be appointed by the government for the legitimacy but should be independent from government and cannot be part of the government, they cannot also be part of the political forces, otherwise they would lose their position of representative of the community (it is different from the Italian peace justice because peace judge is not a common representative, it is still appointed by the government, so it is not independent from the government system; so he says that the peace justice is just a judge without his robe; the representative of community instead,
should be there not to judge people, he is sitting there and listen to people, he represents the community and must also understand why this criminal act has happened, because probably there is also something wrong in the society if some criminal matters has happened; so community has to recognize its own mistakes.

So the parts have to apologize first, but the community representative does not judge, you’re not a criminal in this process) It is not a model similar to jury system, or the Japanese layman judge; in those systems regular citizens can judge people, the system is often founded on the majority principle, and this is a violence.

It is a system that does not changes the person who judges, but the fact that he has to judge.

He thinks that in this way we should be able, at last, to get rid of the legal system, and to replace it with something better, like a restorative justice based system.

“-So the modern restorative justice cannot live together with the legal system, unless there are gaps and individualism, but can replace the legal system?”

Yes, you are right, and also he think that the term justice is misused, “restorative something” but definitely not justice.

The definition of justice involves the appointment of someone higher than the victim and the offender, the judge, he comes in and tell us who is right and who is wrong. This is justice, but he says that we don’t need this third person over the parts, it is enough if we have three persons that sits and discuss on which is the best solution for the people involved and the community.

There is no justice between us

It is all about agreement.

3- Is this model exportable abroad?

He does not believe that “culture” could be a wall to export abroad the model of restorative “justice”, because what really matters is not culture but the way of life, the lifestyle of the society.

So the one which doesn’t like to have a culture of forgiveness is the State, it doesn’t do anything to make people accept the value of forgiveness, and go over the compensation idea, it is not only ‘I give you two million dollars’, in real restorative justice these could be only two million pieces of paper, because what really matters is the fact that the one who pays has taken responsibility for his own actions.
So if the State encourages people toward the value of forgiveness or stop to put his hands in matters of minor criminal cases and enforce this compensation idea, he thinks that a culture of forgiveness could be created. When people experiments forgiveness, then perceive that forgiveness is better than having two millions piece of paper. If the State doesn’t get in the way this encourages people. Each State decides if forgiveness is fruitful or not. He says that his ideas come from Nietzsche and Hobbes, the death of god and the leviathan.

4- Juvenile delinquency
This is the most painful question you could ask him, because he really cares about the matter of juvenile delinquency, and in 1997 he persuaded our Ministry of Justice to implement a new system for juvenile justice, that was based on new education for judges, not legal one but about consultancy, he had 200 judges to be trained this way. So the judges learnt to sit down with the victim and the offender in the juvenile courts, and also with parents and teachers, to try to work out the case and find the possible settlements to deal with the juvenile criminal behavior. He called it “round table system”, because until that moment the judge, also in juvenile delinquency cases was over the parts, and after the implementation of this new system the judges has came down and sit with victim, offender, and also parents and teachers. Its purpose is to low judge down to the table with the parts. He has now not superior position, by his new peer position he can better search for apology, for a settlement. However he still represents the State so can receive the apologies of the juvenile offender also.

But this round table system is really hard, it is a time consuming job for the judges, and it costs a lot of social resources. Also the writing of the verdict is more difficult, they have to report the whole process that had lead to the agreement. So lot of judges had welcomed this new system, but later on other judges has criticized the fact that it is a time consuming job. So he is very disappointed about the system that he has created, also for the lack of counseling education for the new judges that come in the system. But his hope is that if this system doesn’t work in the courts it still can work in the schools.
If students do some mistakes teachers don’t have to punish them, but sit down and talk about the matter, with victim and parents, but we need social resources to implement also this mechanism.

In his opinion this method should be applied also in medical profession: the medic should sit with the patient and discuss which is the best treatment, instead of giving him orders.
Interviewee 3
*Criminology Department, National Taipei University*

*Doctorate in Criminal Justice from School of Criminal Justice, State University of New York, Albany, USA. Conductor of two national victimization surveys in Taiwan and one three-year follow-up study of juvenile delinquency. Working on a project on restorative Justice in Taiwanese Aboriginal communities.*

**1- Restorative Justice and Conciliation**

Police has not a very important role, since Police take offender to mediation board, to the community leaders, and in this way the victim can be compensate very quickly.

So the motivation that pushes the victim to choose mediation is the quick compensation.

Usually for example if you have a car accident, and you hurt somebody, or even kill somebody, you can go to the conciliation board for mediation, and you can get the money very quickly.

It does not mean that the offender isn’t prosecuted at all, especially in case of a car accident with someone killed probably the offender would be prosecuted also if he has reached an agreement with the victim’s family, but usually there will be a lenient punishment.

-“And what about the importance of forgiveness?”

Yes, for example if you have a fight, in a bar or with your neighbors and somebody is hurt you can go to compensation board, reconciliation board and there to have compensation and conciliation completed it is not enough the economical compensation, but also the apologies of the offender.

And then the agreement can be sent to the court for confirmation.

We have a reconciliation board almost in every community, it is organized and held by community leaders, and you can call them anytime, not only to solve and deal with civil disputes, but also with minor criminal cases.

Only for certain cases of misdemeanor you can use mediation board, not serious criminal cases.

The law fixes what is a minor criminal case; for example assault, or petty theft, before the amendment of the law also domestic violence was included, but not anymore.

Anyway usually it is small crimes, misdemeanor. So there is a legal definition of what is a minor criminal case.
2- What do You think about the Confucian influence on modern restorative justice?
Confucianism has different views, but the common idea is that of its principle of harmony, peacefulness, so if you have conflict with other people Confucianism asks people to reconcile.
So in traditional China there is a mediations system with a long history.
When you have conflict, when you have an argue, when you have a minor criminal case, misdemeanor, you go to neighborhood judges.
Neighborhood judges are important because in China we have a big community organization. We can go to the leader of our community for mediation. So this system is possible since in China there are strict communities.
Instead for serious criminal cases you go to county governor for investigation and judgment.

3- Juvenile Delinquency
It is also possible to use mediation, but usually in the court, the judge can held an informal proceeding, and act as a mediator, if the offender promise to apologize or offer compensation usually the proceeding will end with very little or none punishment, for example only a good probation.
It is effective also a program in the schools, usually in the schools the teachers held mediation conference, where the teachers ask to victim, offender, and their families to talk, and come to an agreement, with the apologies of the offender.

4- What do you think about the compatibility between the restorative justice and the basic principles of criminal law (especially about the due process of law)?
Oh, yes, here (in the mediation board) we have an informal process, but it is made for the protection of the rights of the victim, and these are important too; so it is possible to derogate some principles to protect others.
However the agreement must be sent to the judge for a review, and he sees if it is good, fair, for victim and offender.
And if the judge finds out that the agreement is not fair he can rework it.

5- What do You think about the future of restorative justice?
I see a bright future for restorative justice in Taiwan.
Department of Justice has adopted programs to broaden restorative justice in Taiwan, so not only to emphasize victim status in the proceeding, but also they ask prosecutors and prison workers to take restorative justice training. And also the Department of Justice has settled some experiments about restorative justice, in five prosecutor’s offices.

6- Do you think the Taiwanese legal system is effective?
First of all most of the cases that go through restorative justice are trivial ones. And also the majority of the criminal cases presents a crime picture which is trivial, the trivial criminal cases are about the seventy percent of the total criminal cases. And so most of these cases do not attract people’s attention. So restorative justice process can serve as a filter for less serious crimes; and also victim can get compensation quickly. But: you pay the money, and with this, you take also responsibility. If you go to the court, and then to prison, you are punished but don’t take responsibility for what you have done. So some people say that restorative justice is nothing else than a lenient punishment, but I don’t think so, because you have to compensate, take responsibility, and apologizes, and this is harder than a couple of months in prison. Anyway there is also a Victim protection law, that assures compensation also from government, for serious crime victims; especially victims of sexual assault or rape can apply for this government compensation fund.

7- Conciliation after imprisonment
If there is a regular process usually the compensation for the victim is really more difficult to obtain and also takes really much more time. After a regular process has been held, in Taiwan, according to the present regulation, usually there is no conciliation or restorative justice, because the restorative justice one and the regular one are two different and alternative proceedings; surely the offender can apologize to the victim after his punishment, and in Taiwan there are private associations that can arrange a meeting with the victim, but there is not a Law about this at the present time. Instead there is community service, if you have no money for paying a fine.
8- Other Restorative Justice Institutes in Taiwan
In Taipei is effective one mechanism: the prosecutor can suspend prosecution if the offender for example has job, it’s his first crime, he pays money to victim, he apologizes. for example also in case of drunk driving, usually the prosecutor will suspend prosecution if there is no precedent criminal record for the offender.
Drunk driving could be a crime without victim, but public property is still a victim, or private property, for example if you crash into a private building.

9- Aboriginal Restorative Justice in Taiwan
My interest is to know if and how they use restorative justice in aboriginal community here in Taiwan; and I found out that for example more than one hundred years, and still fifty years ago restorative justice was used by aboriginal also in dealing with serious crimes, also homicide and sexual assault.
They have now dual system, legal law, the ordinary criminal justice system, and this informal system of restorative justice.
The chief get together all stakeholders, the victim, the offender, their family.
Also now it is possible to use this system in homicide cases, in parallel with the legal system.

10- VOR in more serious criminal cases
In Taiwan we are thinking about abolishing the death penalty, and to elevate instead the state of the victim; I think that it should be good to elevate the state of the victim, if victim wants to get restorative justice meeting it should be given to he/her, also if it is the case of a serious crime, if there is the taking of responsibility. So it should be a choice of the victim, if he or she wants compensation, or apology.
Anyway at the present time I don’t think that restorative justice should be applied to serious crime here in Taiwan. We still have a long way to go.
Interviewee 4

Professor, Graduate School of Criminology, National Taipei University Adjunct Professor, Department of Educational Psychology and Counseling, National Taiwan Normal University Chief Editor, Journal of Crime and Criminal Justice International Executive Counselor-Elect, Chinese Association of Criminology

1- Restorative Justice and Conciliation

If we want to date back the origin of restorative justice we probably have to search in the Zhou period, when the generalization of the rules of Li contributed to increase the importance of shame among the nobles, and therefore the creation of a “culture of shame”, where the value of forgiveness could find a place.

2- Juvenile Delinquency

I will start from the police system, in the police here we have like a special division, with officers specialized in dealing with juvenile cases, if the case is a very minor one, like - the kid steal five dollars in goods from a store
- and the owner of the store does not want to pursue the legal suit
- and the offender’s parents are willing to pay back the damages or losses
- and the offender apologizes to the victim

If this conditions are present police usually does not file the case.

Also in the school we are trying to implement this idea, in school for minor criminal cases the teachers sometimes try to don’t contact the police; they take victim and offender together with their parents and sit down and talk and try also to convince the victim and the offender to don’t go to the lawsuit, and maybe settle the dispute.

In this school conciliation system sometimes the police can get involved, and sometimes it is the police itself that encourages the victim and offender to settle with an agreement their dispute, without going to the court.

It is a common idea among the Taiwanese police that if it is possible the young offenders should not go to court, and it is more strong among the special division with officers specialized in dealing with juvenile cases.

About ten years ago we have had an important reform of juvenile criminal law, it is the 1997 law juvenile system “revision of juvenile criminal law” 2nd October, that has been implemented in 1999.
According to this reform it has been introduced a system based on two loops, any crime that has a minimum legal punishment of more than five years imprisonment is considered a serious crime, is in the 2nd loop (it includes for example rape, murder..), instead every crime that has a minimum legal punishment less than five years is considered a minor criminal case, and is in the 1st loop, that is called the one of “protective cases” (it includes for example damaging, dealing drug..), if a case is filed under the protective loop it could lead to a punishment like community service, repay of the damages, shelter instead of prison.

And also in the protective loop the judge can try to find an agreement between victim and offender, can try to obtain the apologies of the offender.

So the 1st loop is intended to give the young offenders a second chance.

In the 2nd loop instead it is necessary to go to the court, have a process, but during the process the judge can, if the offender shows remorse, regret for what he has done, apologizes for example, give the young offender another chance, if he considers the offender’s remorse true, and in this way the judge can send the case to the 1st loop; and to sentence them to the shelter instead of the prison.

The “revision of juvenile criminal law” of 1997 has also a third part, that is about the prisons for juvenile offenders, since 1999 in Taiwan there are no more prisons for young offenders, before 1999 there were three “training schools”, I mean “reformatories” for rehabilitation and discipline for young offenders convicted for minor criminal cases, and one prison for juvenile offenders; now there are no prisons and two of the former training schools have become “reformatory school”, it is not a reformatory facility, it is a school, with ordinary curricular activities.

They have ordinary teachers, it is intended to be similar to an ordinary school as much as possible, we can say that the only difference is that there are guards.

There’s also the possibility of take counseling in these reformatory school; where the young offenders have ordinary curricular activities and also vocational activities, that are training activities to find a job after the punishment.

After 1997 the judge also have been retrained, to try to give them a more social background, instead of a legal one. This training has the objective of make judges more sympathetic to the offenders.

While implementing this reform, anyway, the people was not thinking about restorative justice, they just think that it is important to be kind with young offenders, it is important to give them another chance.
They deserve this second chance, also because they usually are not fully responsible of what they have done, there usually is probably a responsibility also of the parents, or of the society that is around them, or also of the school, because they are too young to fully understand the offences.

Six months ago the Minister of Justice thinks that here in Taiwan we should strengthen this system for juvenile offenders, and also to focus on conciliation, both in the court and outside it.

And also here in Taiwan it is common to do some investigation about the environment around the juvenile offender, like his or her family, school, neighborhood.. and during this investigations the police usually works with social workers, to investigate the case, but also to find out what should be the best correction for the kid, and when they collect all the information they bring that to court; then in the court the judge can arrange a meeting between victim, offender, and this social workers.

In Taipei there is also an experiment, where the social workers, if they find out remorse in the offender, they can come to the court and give their suggestions and opinions to the judge.

But this experiment of introducing social workers in the court has some negative aspects because it leads to a more time consuming process for the judge.

3- Criminology

I think that it depends on the type of crime we are talking about.

In restorative justice is central the apology, but also if you apologize you still have to pay the compensation, so there are this two elements; so:

- If we have violent or serious crimes it is difficult for the offender to apologize, and also difficult for victim to give forgiveness, I’ve listened to interviews in prison to offenders that had committed very serious crimes, and one of the questions that I’ve asked them was if they were willing to apologize to the victims, most of them said no, and I asked why, they answer me that they felt bad for what they had done, but toward their own family, not toward the victim or his/her family. The most of them thought that they have been depicted in an evil way, because they had done something bad, a serious crime, but in the rest of their lives they had been just like normal people, and in public they had been presented just like monsters.

So their only remorse was for their own family, because their family still supported them also after the crime, and when they were in prison. With also Interviewee n.2 we were
talking about this triangle of victim-offender mediation, with the victim, the offender and the judge, but I think that in more serious and violent crimes this triangle cannot be, because victim and offender have nothing to share, no common ground. And the problem is that also the third part of the triangle, the judge, that it is not the right part, because with the judge there is a too strong practical reason to apologize in serious criminal cases, so the third part should be someone else. Also the victim usually with the judge pretends a severe punishment and is not willing to forgive. I think that in this case it is really difficult to put in practice the idea of Interviewee n.2 of the representative of the community as a mediator; because it is difficult to identify a relevant community in this case; we should find a common ground between the victim and the offender; we see that the family of the offender is something that the offender cares about; so it is important that the offender’s family takes part in the reconciliation process. And to consent to the offender family also to apologize to the victim. So we should get over the idea of the triangle for mediation, there can be something else if it is found that it is useful. To obtain the forgiveness, or at least to cease the hatred. So my point of view about restorative justice in serious and violent crime cases is that it is really difficult and complex to put in effect a restorative justice mechanism.

- In crimes that concern propriety instead it is probably more a matter of the price of compensation.

Anyway also if victim and offender cannot find an agreement, or meet, there is still a way to obtain restorative justice; the State can provide restorative justice mechanism. In particular I’m thinking about two mechanism, the first one consists in the provision of an independent system of compensation for the victims, a State compensation system. And the State should have another independent system, with the purpose of the rehabilitation of the offender; and these two systems can be completely separated. If you try to bring rehabilitation and compensation together without the willingness of the victim and offender it is against the human nature.

I also think that restorative justice should be put in practice immediately after the crime, especially when we are dealing with serious crimes, if a process goes on, and then after many years the judge tells to the victim that one person is guilty it doesn’t change much, because many years have passed, without any justice until that moment, and the judge can also say after many years that the convicted person is not the real offender, and that it is all to be done again; so restorative justice practices should be effective as soon as
possible to grant support to the victim, because the victim shall not be alone in those moments.

In John Braithwaite ideal he does not go out from the criminal justice system, but he sees punishment as last resource, you still have to go to court; there is still a strong justice goal. In Chinese culture, there is an high ideal of harmony, everyone tries to persuade, sometimes to force you to settle the case, to apologize and to accept apologizes; in Chinese culture the goal is to settle the case, not exactly to bring out true repentance.

The common goal in the Braithwaite idea and in the Chinese culture instead is shaming. So, in Taiwan also, sometimes offenders are forced to apologize, but I’ve interviewed offenders in prison and sometimes they say that yes, they have done something wrong, but also the victim has done something wrong before their offence, but they have not evidence to prove these things. (..)

So in John Braithwaite idea there is a pyramid, like this:

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Prison
Severe Punishment
Legal System
Restorative Justice
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So in this pyramid restorative justice is the base, but still prison is kept in the system, it is necessary if people doesn’t reach an agreement.

But in Chinese idea restorative justice is the goal, it is the first goal, because the objective is to settle the case so the group also forces you to reach this goal, this is an effect of the Chinese collectivism, as Interviewee n.2 says Taiwan has little individualism, it is different from western societies, there is still a strong collectivism.

A recent interesting case here in Taiwan was about a car accident; usually here when you have a car accident and you kill someone in the accident, you are expected to go to the family of the victim, to the house of the family, and apologizes, show remorse for what they had done, and then they can talk about compensation.
In this recent case was involved an English businessman, he had made a car accident while drunk driving, and had killed a boy, a newspaper-boy, and he refused to go to the victim's family and apologizes, he said that he wanted to go to court and let the judge decide about his case, he didn't fell like an apology was necessary.

So the Taiwanese media start to attack this Englishman, saying that he was “coldblooded”, arrogant, and despite he has paid a compensation to the victim's family, upon an order of the judge, since he still did not apologize the attack from the media and the victim's family continued.

Because he had shown no remorse.

You see the cultural difference? To go to court and submit to punishment is not enough here, you have to pay responsibility, with this compensation after an agreement with the victim's family; this compensation is taking responsibility.

In Italy probably you don’t need to apologize, you just go to the court and it is enough.
Interviewee 5
Taipei District Court (criminal court)

Interview in Chinese translated by Interviewee 4 (Professor, Graduate School of Criminology, National Taipei University Adjunct Professor, Department of Educational Psychology and Counseling, National Taiwan Normal University Chief Editor, Journal of Crime and Criminal Justice International Executive Counselor-Elect, Chinese Association of Criminology)

1- What He Can See from His Position: The Implementation, The Success of The Practice of VOR

He says that there is not much implementation in criminal court, more much in juvenile court; because in juvenile courts there is the concept: to teach kids, these courts have a more educational purpose.

The juvenile judges try to teach kids how to take responsibility, and deal with their conflicts, for example to apologize to the victim, to compensate.

Another important principle in juvenile courts is to try to avoid punishment, because punishment is violent, it is not the way to solve conflict, so sometimes the judges of juvenile courts try to demonstrate to the kids how to solve conflict in a peaceful way.

So in his opinion the implementation of conciliation mechanisms is mainly in juvenile courts.

He says that the implementation of restorative justice methodologies has started since 1999, since Professor Lee’s reform.

Instead ordinary criminal courts are still focused on cross-examination, on how to define facts, rather than conciliate.

But in ordinary courts there is something similar to conciliation, in criminal courts when the judge finds that the offender is guilty, they try to mediate between the offender and the victim, and try to make the offender apologizes and compensate, then he might consider to mitigate sentence, but the judge is not aware of this, he is not trained for this, in the ordinary criminal court, also there is little literature and researches on the matter; it is just something done naturally by the judge.

The former Minister of Justice, Wang Qingfeng 王清峰, has tried to implement restorative justice ideas and training in ordinary criminal courts, but in his court it is not yet arrived.

2- Differences of Gender, Age, Area in Restorative Justice Implementation, Some Data
- AREA
He says that restorative justice’s practices in juvenile courts are more effective in the urban areas, rather than in rural ones.
One of the main reasons is that parents in the city are willing to sit down and talk each other, in the countryside instead people is more ready to argue, yell, shout; so the first reason of the success of conciliation in cities is the higher educational background of people in urban zones.
The second reason is that in the cities we have more social resources, like more social workers, they are important because they can bring the victim and the offender to meet each other and reach an agreement; he made an example, of a sexual assault case, where both the victim and offender were lead by social works to talk each other and the victim and offender at the end come to an agreement and apologizes to each other.
The percentage of success of this practice in juvenile courts, in urban areas, at the beginning was around fifty percent of the cases, then it has increased, instead in the countryside it depends most on who is the judge that deals with the case, if he or she is more or less prepared about conciliation matters.
- AGE
He says that the parents are more willing to conciliate when kids are younger, it is like they have passed through less heart breaks, usually when the kids are younger they have committed less offences, so their parents still believe that the offence can be their only wrongdoing.
- GENDER
About the gender there is a difference, if the kid is a male then parents are more willing to reconcile, because the boy later on should carry on the family, so they don’t want that he has a criminal record.
Instead if it is a girl, usually if the matter goes to court it means that she has done a lot of bad things, so the parents are less willing to reach an agreement.

3- Punishment
The judge takes consideration of the fact if the victim and offender have reached an agreement, sometimes with the judge can let the offender go if he has apologized and paid compensation to the victim, otherwise he can give lenient punishment.
In juvenile cases, in protective loop (1st loop), he could let the kids go if an agreement is reached, and also if the agreement is not reached he can give lenient punishment if for
example the offender has done everything he could to reach that agreement but the victim still doesn't accept it; there is not a law about this thing, but it is in the discretion of the judge.

4- Tradition

He sees the positive side of the Chinese tradition on restorative justice, because we have the culture of seat down peacefully and talk each other.

In his opinion this culture has a positive impact in the implementation of restorative justice. In his work he sees a lot of victim, and their parents willing to forgive, so with this culture you can create a positive environment, where you seat down peacefully and have a dialogue, especially in young courts, instead it is more difficult in ordinary cases.

He can provide some other examples in regular criminal courts, in a case of tax evasion, usually it is a first offense, if the offender makes a charity donation, the judge can mitigate the punishment, because, when you can see the offender face, if he feels guilty and shameful, the judge has the possibility to trust the repentance of the offender and give him at the end more lenient punishment.

Because we have this culture that if you do something wrong you have to balance, and you have the chance to balance what you have done also if you have done a serious offence, it is also for you, to feel better.

5- Law about restorative justice and VOR

In our Criminal Code we have Articles number 57 and 59 they are articles about sentencing regulation:

- Article 57 has 10 commas, one of them is “if the offender shows remorse” the judge can sentence him or her to a lenient punishment, using this article the common jurisprudence in Taiwan can give a punishment also an half less than the legal minimum punishment in case of minor criminal cases.

- Article 59 says that if the judge thinks that the offender is forgivable he can sentence him or her to a lenient punishment, this is a more vague rule, but Taiwanese judges can also sentence an offender of another half less than the legal minimum punishment, so if both article 57 and 59 are used by the judge, the offender can also avoid entirely the punishment in case of minor criminal cases.
Usually a judge uses Article 57 to give a lenient punishment, and then, if he or she thinks that the offender deserve a more lenient punishment he uses also Article 59. So usually Article 59 is not used alone.

6- What do You think about the future of restorative justice?
He says that he tried to experiment to use more the restorative justice mechanisms, and that the first incentive for a judge like him to continue in using restorative justice institutes is when the conciliation is successful and he can see that victim and offender reach a peaceful agreement and that this agreement can also change them.
But the main problem in conciliation is that it is a time consuming job for a judge, especially for ordinary criminal courts.
But as a judge he think that it is good to reach a peaceful solution for a dispute, also the judge feels good after an agreement is reached.

7- What do you think about the compatibility between the restorative justice and the basic principles of criminal law (especially about the due process of law)?
He says that conciliation practice is compatible with the basic principles of the criminal law and of the due process because in the criminal law there is plea-bargaining, and also a provision that allows the prosecutor to postpone the prosecution, and these practices are fine with the due process rules.
So if the prosecutor can postpone prosecution and carry on plea bargaining without infringe the basic principles of criminal law it is perfectly agreeable that a conciliation procedure is not against the same principles.
And also during the pre-trial period the judge can bring in victim and offender together and try to convince them to solve their problems without going to court.
Anyway it is a choice of the judge to do this pre-trial conciliation attempt or not, because this is also a time-consuming job; and also it is necessary to have the consent of victim and offender to carry on this conciliation.
And also some of the judges are sick of this pre-trial conciliation because they say that they are annoyed by all this arguing and crying of the victim and offender and their families.

8- What do You think about the Confucian influence on modern restorative justice?
He says that Confucianism is part of their life, one of the sentences of the Analects of Confucius sounds like this: “If people treat you badly, you need to treat them nicely and forgive them”, this is a famous quotation, so you don’t need to get a revenge, you should just forgive, but not only forgive, you should also treat nicely the ones that treat you badly. It is an important part of the social environment here in Taiwan.

9- There are other Restorative Justice Institutes Effective in Taiwan, beyond Conciliation

He says that in his opinion there are other ways to do restorative justice. He can provide an example from one of his cases: it was a case of incest, a brother had sexual assaulted the sister. During the process he sent both brother and sister to take counseling; and he saw that the brother was changed a lot after the counseling, but the more he went deep into the case, the more he realized that the real problem were the parents of the two; they had grown their child with sexual, gender stereotypes, like the boy had no limits, a complete freedom, he could do anything he wanted; so he sent the parents to take counseling courses, especially the father was very resistant in his ideas; but after the counseling courses he found out that they had made progress in realizing their faults; then again he finds out that the grandmother of the boy, the mother of the father, had the same problem, so he sent the grandmother also to take counseling courses; after that, after some time, grandmother, parents had changed a lot. And also the brother had changed a lot, he apologized; and the victim, the sister, forgave him and asked the social workers if she could come back home. He doesn’t know if it is really restorative justice, but he feels that this is another way to obtain the same objects of restorative justice institutes.
Interviewee 6

Professor in the Law School of Nanjing University, Head of the Nanjing University Institute for Crime Prevention and Control, and deputy director of the Legal Psychological Council of the Chinese Psychological Society. He has also been engaged as expert consultant by many judicial departments.

He has undertaken for twenty years the integrated study of criminology, criminal psychology, penology, criminal procedure, juvenile courts and criminal law. He has published more than 10 books (both alone and co-authored) and more than 70 papers. For the last 5 years, he has focused on drawing lessons from restorative justice principles in China’s judicial reform.

Working through the Nanjing University Institute for Crime Prevention and Control, He organized the first International Seminar of Restorative Justice Principles in China, a special training course on restorative justice and established the first restorative justice base in procuratorial (prosecutorial) office. At his suggestion, the Nanjing procuratorate recognized restorative justice principles as an important idea for dealing with minor criminal cases and delinquency. Currently, restorative justice principles are gaining more and more attention in China.

Important Ideas

Restorative justice and Chinese traditional reconciliation both seek to repair social relationships, but differ in ways of realizing this goal. Restorative justice emphasizes that victims should resolve conflicts by communication.

Chinese traditional reconciliation, on the other hand, prefers to achieve reconciliation using bridge builders’ resources and technology.

Although the restorative justice principles have some relationship with the customs of western native peoples, it isn’t a simple copy. It is a new justice principle which adapts the development progress of western society. Any modern society must draw on the experience of restorative justice according to one’s own actual conditions.

As a country in the process of establishing rule of law, China can benefit from restorative justice. Firstly, it can help change traditional expectations for severe punishment. Secondly, it points toward formation of a new system to take into account the interests of the government, society and the person.

Thirdly, it gives an impetus to the unity of both legal purpose and social purpose in justice.

1- The Influences of Ancient Chinese Tradition on Modern VOR

Modern victim-offender mediation is really different from ancient Chinese mediation; and also there are important differences between Chinese restorative justice and Western restorative justice concept, indeed Western restorative justice means only victim-offender mediation, instead in China it does not mean only this.

When we have mediation we have two people that have a dialogue, a discussion upon a dispute, upon how to deal with their dispute; in this conciliation process there is little space for the power.

Instead in the ancient Chinese mediation there were more power involved in the process.
So in China if there is a dispute, a conflict between two people, they use reconciliation to solve their dispute, and, if one of the people involved in the dispute sues the other, we have real mediation, because real mediation is in the court, according to Chinese tradition. So real Chinese mediation is in a court, with an active role of the judge, this fact means that this is a less restorative process than the one that involves only the two parties, that autonomously solve their conflict.

Anyway in both these procedures there is a common ground, that is the principle of dealing with problems with dialogue.

We have then two possible schemes:

- A-B (informal conciliation, without power)
- A-B-C (mediation, real Chinese ancient mediation, with power)

In the latter scheme C, that is the judge, or the community chief, or a leader, has more power, and with his power he can force people to accept the decision, so we have a more effective mediation, but a less free one, there is the risk of lack of willingness in the agreement.

I think that the intimate nature of mediation is voluntary.

2- Nantong Example

In Nantong in the last years has been implemented a new system of mediation, that is called “big mediation”, this is a system that uses the latter scheme of mediation: the one A-B-C; in this case C is the government, and can involves different government departments, this is the reason for which it is called big mediation; it is a form of administrative mediation, but presents this problem of the power; especially in the case where B is also the government (for example in case of an expropriation process).

In Nantong mediation institute the mediators come from the government, and usually more government departments are involved, so there are different mediators that take part in the proceeding.

3- Legal Aspects

According to Chinese Criminal Law and Criminal Procedure Law there are only three kind of criminal mediation. In practice prosecutors and courts seldom used mediation in the beginning, so Chinese government decided to train prosecutors and judges in order to change their mind, so they first introduced restorative justice in the judicial ideas.
Because the translation from ancient Chinese mediation to a modern way of it necessarily passes through the introduction of restorative justice.

The reasons of the introduction of restorative justice programs are the same that had lead to the launch of *Yanda* 严打 campaigns, that is the increase of crime rate in the last years in China.

But since Chinese Government first launched *Yanda* 严打 campaigns and then restorative justice programs, Chinese people at that time was used to a punitive, strongly effective criminal law, and so Chinese Government had to change also people’s mind toward restorative justice.

They had to change the ideas of Chinese people about the fact that there were other ways to deal with crimes.

It was in that situation that restorative justice was introduced in China, many books were translated, and many researches were started on the matter, it was the year 2002, so it is a really recent introduction.

Between 2002 and 2005 restorative justice was introduced in China, that was the first step; the second step was the beginning of the practice, with the cooperation of the courts and prosecutors.

Usually it is the prosecutor that takes mediation on; according to Chinese law prosecutor has the power to don’t initiate public prosecution; in this way he can give impulse to restorative justice.

In China prosecutors use restorative justice in criminal matters only when dealing with minor criminal cases, and in juvenile courts.

But, what is a criminal case? In Chinese law there is not a legal definition of what is a minor criminal case, so it is left to judicial interpretation the decision of whatever is a minor criminal case and whatever is not.

I had a research on ten restorative justice cases, and I saw that restorative justice is used mostly in juvenile criminal cases, with a proceeding called “round-table proceeding”, this system involves the victim, the offender, their parents, the teachers and can also involve more people, like other students or community workers.

During these years some cases of traffic accidents have been solved with mediation and dialogue; in China the use of mediation is in fact very spread, but when dealing with criminal cases its use is limited, growing, but limited.
One of the causes is probably that some minor offences are not crimes in China, for example drunk driving is not a crime unless if it leads to an accident with people severely injured.

It is important to remember that in China disobey the law and crime are two really different concepts, so one people can put in act a behavior of disobey the law, but without committing a crime.

So civil and administrative disputes can be held with the mediation system, and also between the parties, only crime has to be held first by the police and then by the prosecutor, so it involves necessarily power.

Anyway the rise of crime rates has been an heavy task for the police and the courts, so they use restorative justice, diversion.

So in the past every criminal case had to pass through the prosecutor office and to be sent to the court for trial; after the introduction of restorative justice some not serious crimes can be held outside the court.

In China mediation system does not replace the process, it is only a supplement, something that goes parallel to the process and can have an influence over the sentencing, but it is a discretionary decision of the judge and the prosecutor.

4- Motivation for the Parties to Choose VOR

Mediation is a convenient mechanism both for offender and victim, it could made them got their interests, such as the compensation.

Anyway the compensation can lead to a lenient punishment, but it is not sure, other elements are important, such as apology, remorse, since it is a decision of the judge and the prosecutor.

If the crime is a serious one, mediation could lead to a lenient punishment, but it affects in a little way; if instead the crime is a minor one the mediation and compensation can make the offender avoid punishment.

People choose mediation because it leads to compensation and lenient punishment, but also because it leads to apology and forgiveness, that is really important in Chinese culture. The only problem is that in criminal matters there is power involved, and so the parties can be forced to accept the agreement, if the judge gets in the matter.